

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REASONS

“ANNEXURE 11”

Case Title: <i>Neshingo Hosea v The State</i>	Case No: HC-NLD-CRI-APP-CAL-2020/00040
	Division of Court: Northern Local Division
Heard before: Honourable Mr. Justice January J <i>et</i> Honourable Ms. Justice Diergaardt AJ	Heard on: 11 August 2020 Delivered on: 11 August 2020 Date of release: 13 August 2020
Neutral citation: <i>Hosea v S</i> (HC-NLD-CRI-APP-CAL-2020/00040) [2020] NAHCNLD 105 (13 August 2020)	
The order: <ol style="list-style-type: none">1. The appeal is upheld;2. The sentence of 18 months imprisonment is set aside;3. Whereas the Appellant has already served 9 months imprisonment, he is warned and cautioned in terms of section 297(1) (c) of the Criminal Procedure Act 51 of 1977;4. The officer in charge of Divundu Correctional Facility is directed to immediately effect the release of the appellant.	
Reasons for the order:	
JANUARY J (DIERGAARDT AJ concurring): This court heard this appeal on 11 August 2020, gave an ex tempore judgement and indicated that the reasons will follow. These are the reasons	

- [1] The appellant was charged with contravening section 82(2) (a) of Act 22 of 1999- Driving with excessive blood alcohol level. He tendered a guilty plea and was thereafter questioned in terms of section 112(b) of the Criminal Procedure Act, Act 51 of 1977 (CPA). He was convicted and sentenced to 18 months imprisonment without an option of a fine on 18 October 2019. He appeared in person in the court a quo.
- [2] The appellant filed his notice of appeal out of time and simultaneously filed an application of condonation for the late filing of the appeal. He still represents himself and the respondent is represented by Ms Nghiyoonanye. After due consideration of the matter at hand the court proceeded to hear the appeal.
- [3] The appeal lies against the sentence only. The respondent did not oppose the application and conceded that the sentence was harsh and inappropriate under the circumstances.
- [4] The charge alleged that upon or about the 26 day of October 2018 and on a public road, namely Ondangwa-Oshikango main road or near Onhuno in the district of Eenhana the said accused did wrongfully and unlawfully drive a motor vehicle with registration number N 14661 SH, a white Hino truck, while the concentration of alcohol in his blood was not less than 0,079 gram per 100 millilitres, to wit 0.34 grams per 100 millilitres.
- [5] Section 106(2) of the Road Traffic and Transport Act 22 of 1999 provides that a person convicted of section 82(2)(a)- Driving with an excessive blood alcohol level shall be liable to a fine not exceeding N\$ 20 000 or to imprisonment for a period not exceeding five years or both such a fine and such imprisonment.
- [6] I take cognisance of the fact that the presiding officer went at length to assist the appellant in mitigation and gave detailed reasons for the sentence imposed. I am also alive to the fact that the trial court has a discretion to sentence. This discretion should not be easily interfered with. This court is however entitled to interfere where the discretion was not properly or judicially exercised. I find that the presiding officer, although applying the correct principles, failed to appreciate the objective purpose of sentencing and thus misdirected himself.

[7] Imprisonment as a form of punishment should not be imposed if it can be avoided. In this particular case, the law provided for an option of a fine. I am not convinced that the purpose of punishment could not have been achieved without a custodial sentence. Although competent, a custodial sentence should always be justified, not only by the commission of the offence but by such other factors that would render it the most appropriate sentence in a particular case.

[8] The appellant is a first offender. He pleaded guilty as a sign of remorse. He is a family man with 13 children most of whom attend school. He has high blood pressure and is on HIV treatment. He is unemployed and survives by communal farming. The vehicle he was driving was not involved in any accident as he was only stopped at a roadblock.

[9] I agree with the concession that the sentence is inappropriate and that a fine would have been appropriate. In my considered view, the magistrate overemphasized the seriousness of the offence. The objectives of sentencing could still have been achieved within the ambits of the penalty clause without imposing a custodial sentence. The appellant however has already served slightly over 9 months imprisonment.

[10] In the result it is ordered that:

1. The appeal is upheld.
2. The sentence of 18 months imprisonment is set aside.
3. Whereas the Appellant has already served 9 months imprisonment, he is warned and cautioned in terms of section 297(1) (c) of the Criminal Procedure Act 51 of 1977.
4. The officer in charge of Divundu Correctional Facility is directed to immediately effect the release of the appellant.

Judge(s) signature	Comments:
January J	NONE

Diergaardt AJ	NONE
Counsel:	
Appellant	Respondent
In person Of Divundu Correctional Facility	Ms Nghiyoonyane Of Office of the Prosecutor-General