

REPUBLIC OF NAMIBIA



CASE NO.: CR 183/07

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

1. **DAVID SOSO Useb**
2. **HENDRICK HAIB**
3. **HERMANUS GAOSEB**
4. **JOHANNES NDATONGHOSHI**
5. **PETRUS NARUBEB**

(HIGH COURT REVIEW CASE NO.: 1716/07)

***CORAM:* VAN NIEKERK, J *et* SILUNGWE, A J**

Delivered on: 2008-01-21

REVIEW JUDGMENT:

VAN NIEKERK, J:

[1] The five accused were all convicted by the magistrate, Tsumeb, on a count of escaping from lawful custody and sentenced to one year imprisonment each. Accused no. 1, 2 and 3 are 18 years old. Accused no. 4 is 34 years old and accused no. 5 is 19 years old.

[2] I directed the following query to the trial magistrate, namely:

"Is the sentence of 12 months imprisonment not too harsh for such young offenders as accused no. 1, 2, 3 and 5?"

[3] The learned magistrate replied as follows:

"The Honourable Reviewing Judge's query on sentence in respect of accused 1, 2, 3 and 5 is to whether the sentence is not too harsh for such young offenders.

In principle, I do agree with the Honourable Reviewing Judge, but these young offenders were in custody for very serious offences related to Housebreaking with intent to steal and theft in respect of accused 1, 3 and also accused 5 but two counts of the same offence as accused 1, 3 and accused 2 has a pending case of rape and assault with intent to cause grievous bodily harm i.e. the victim was badly assaulted.

Moreover, accused 1, 2, 3 were re-arrested in Otavi and accused 5 were re-arrested in the area of Tsitsabis. Their intention indicated that they wanted to abscond the administration of Justice. In addition accused 1 had already convicted and sentenced to three years imprisonment.

Finally, if the sentence on the said offenders is too harsh, I am indebted to you your Honourable Reviewing Judge for the sentence to be reduced up to (6) six months imprisonment each."

[4] The information contained in the magistrate's reasons do not form part of the record. I assume that the magistrate obtained this information after sentencing the accused in order to motivate his reasons. According to the record, the accused were all first offenders. There is not much difference between the personal circumstances placed on record by each of them in mitigation of sentence. The only striking factor is the age difference between accused no. 1, 2, 3 and 5, on the one hand, and accused no. 4 on the other hand. Normally this factor would be something to consider when deciding what an appropriate sentence should be. I cannot find any reason in the record, and the learned magistrate has not referred me to any, why the accused should be treated the same in spite of the difference in age.

[5] In the *State versus Toini Erickson* (unreported Case No. CR 18/2007 delivered 09/02/2007), this Court (per Silungwe, AJ) again emphasised the need to treat youthfulness as a mitigating factor and said:

"[6] In general, young offenders should not fall victims of an indiscriminate (that is, a sweeping) exercise of the court's discretion in regard to punishment. The reason for this is that a teenager, such as the accused in the present case should, *prima facie*, be regarded as immature. See: *S v Ngoma* 1984 (3) SA 666 (A) at 674F. Indeed, irresponsibility is more often a characteristic of the youth than it is of adults. This is so because a youthful person often lacks maturity, insight, discernment, and experience and, therefore, acts in a foolish manner more readily than a mature person. See: *S v Willemse* 1988 (3) SA 836 (A) at 838D; and *S v Solani En Andere* 1987 (4) SA 203 at 206H.

[7] In view of the foregoing, extra care is needed in determining a suitable sentence for a young (or juvenile) offender where the possibility of reform is great and the result of an indiscriminate exercise of the court's discretion is potentially irreparable.

[8] After confirming the care that is needed in determining a sentence for a young offender, the Appellate Division had this to say in *S v Jansen and Another*

1975 (1) SA 425 (A) at 427H-428A (per Botha, JA, with Rabie, JA, and Corbett, JA (as then was) concurring):

"In determining an appropriate sentence to be imposed upon an accused person in any particular case, it is the duty of the Court to have regard, not only to the nature of the crime committed and the interest of society, but also to the personality, age and circumstances of the offender. (S v Zinn, 1969 (2) SA 537 (A.D) at 540).

In the case of a juvenile offender, it is above all necessary for the Court to determine what appropriate form of punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile. The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society."

The remarks in the quotation equally apply to a young offender. In other words, if the young offender can be dealt with in a manner which will present a reasonable chance for his rehabilitation, such action will, in the long run, be in the interests of society. Thus, in sentencing a young offender, a fine balance is needed for the simple reason that the interests of society cannot be served by disregarding the interests of the young offender."

[6] As in the *Erickson* matter, it is clear that *in casu* the learned magistrate erred by disregarding the youthfulness of accused no. 1, 2, 3 and 5. The sentence of one year imprisonment can therefore not be allowed to stand. The learned magistrate suggested that this Court should reduce the sentence to 6 months imprisonment if it should interfere. I agree that this would be appropriate.

[6] In the result the following order is made:

1. The convictions in respect of all the accused are confirmed.
2. The sentence in respect of accused no. 4 is confirmed.

3. The sentences imposed on accused nos. 1, 2, 3 and 5 are reduced from 1 year imprisonment to 6 (six) months imprisonment each.

VAN NIEKERK, J

I agree

SILUNGWE, A J