

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA, MAIN DIVISION**

**JUDGMENT**

**CR No: 09/2016**

In the matter between

**THE STATE**

and

**ESEGIEL VOS**

**ACCUSED NO 3**

**PETRUS PAAI**

**ACCUSED NO 4**

**JONAS SKRYWER**

**ACCUSED NO 5**

**THEOFELUS HAUSEB**

**ACCUSED NO 6**

**BERNADUS GARISEB**

**ACCUSED NO 7**

**HIGH COURT MD REVIEW CASE NO 1759/2016**

*Neutral citation: State v Vos (CR 09/2016) [2017] NAHCMD 15 (30 January 2017)*

**CORAM: LIEBENBERG J et SHIVUTE J**

**DELIVERED: 30 January 2017**

**Flynote:** Criminal procedure – Sentence – Factors to be taken into account – General principles applicable – Individualisation – Principle of individualisation must be balanced against uniformity with previous cases – Public must be able to rely on courts to impose sentences in accordance with general principles.

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### **ORDER**

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1. The convictions of accused no's 3, 4, 5, 6 and 7 are confirmed.
2. The sentence imposed on accused no's 3, 4, 5 and 6 are set aside and is substituted with the following: Each accused sentenced to two (2) years' imprisonment.
3. The sentence is antedated to 24.11.2016.
4. The sentence of accused no 7 is confirmed.

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### **JUDGMENT**

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LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused were arraigned in the magistrate's court for the district of Gobabis on a charge of unlawful escaping under common law and, having pleaded guilty, were convicted as charged. The convictions are in order and will be confirmed. Accused no's 3, 4 and 6 were each sentenced to three years' imprisonment while accused no's 5 and 7 were each sentenced to four years' imprisonment.

[2] On review I directed a query to the presiding magistrate in which it was pointed out that the sentences imposed significantly exceeds sentences imposed in other jurisdictions for the same offence, and enquired which circumstances the court relied on in sentencing. Furthermore, why a distinction was made between accused no 5 and accused no's 3, 4 and 6 in sentencing, as they were all first offenders. Furthermore, what prompted the court to impose on accused no 5 the same sentence as accused no 7 who had a previous conviction for a similar offence.

[3] The magistrate in her replying statement did not particularly furnish reasons for the sentences imposed and merely conceded that by comparison to sentences imposed by other courts in similar cases, the sentences imposed in this instance appears to be 'harsh and dehumanizing'. Though I would not go so far as to describe them as 'dehumanizing' or degrading, it is evident that the sentences imposed in this instance significantly exceed the punishment imposed in other jurisdictions for similar offences. To this end the concession is properly made.

[4] In this case there is no marked difference between accused no's 3 – 6 as far as it concerns their personal circumstances and, whereas they were convicted of the same offence, one would expected them to have received the same sentence. For no apparent reason the court singled out accused no 5 to be given a harsher sentence than his co-accused and, although I suspect this came about because it was said that he assisted in

unlocking the cell door to free the others, the magistrate did not confirm this to be the case. In the absence of any other reason, there is no justification to treat accused no 5 any differently at sentencing. He cannot be on the same footing as accused no 7 who has one previous conviction for escaping. The sentence of four (4) years' imprisonment imposed on accused no 7 is in my view proper and will be confirmed. However, that of accused no 5 does not conform to more or less similar cases and must be set aside.

[5] In imposing sentence the court must be mindful of the often competing principle of individualisation opposed to the principle of uniformity. As regards the first mentioned, the relevant facts and circumstances of the accused in one case may be distinguished from the crime and personal circumstances of another accused convicted of committing a similar offence. The principle of uniformity again concerns the court's approach where the same offence has been committed and the circumstances of the offender are more or less similar to other cases. In such instance the court should as far as possible endeavour to impose sentence in such way that the public can have confidence therein. The court is therefore required to balance the principle of individualisation against the guidelines regarding the imposition of uniform sentence in similar cases.

[6] When applying the aforesaid principles to the present facts, I am satisfied that the trial court had no regard to the principle of uniformity in sentencing. The concession made by the learned magistrate is therefore proper. It has become the norm for a lower court to impose a sentence of two years' imprisonment on a first offender and, pending on the circumstances of the case, to suspend part thereof when deemed necessary. In the absence of circumstances to the contrary, I am unable to find any reason why a harsher sentence should be imposed in this instance than what would have otherwise been considered appropriate. Neither is there justification to suspend part of the sentence for no good reason.

[7] In the result, it is ordered:

1. The convictions of accused no's 3, 4, 5, 6 and 7 are confirmed.
2. The sentence imposed on accused no's 3, 4, 5 and 6 are set aside and is substituted with the following: Each accused sentenced to two (2) years' imprisonment.
3. The sentence is antedated to 24.11.2016.
4. The sentence of accused no 7 is confirmed.

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**J C LIEBENBERG**

**JUDGE**

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**N N SHIVUTE**

**JUDGE**