CASE NO. CA 52 /93

IN THE HIGH COURT OF NAMIBIA

In the matter between

EDETROUD FRANCINA B6CK

versus THE

STATE

CORAM: STRYDOM, J.P. et MULLER, A.J.

Heard on: 1994/03/28

Delivered on:

1994/03/28

JUDGMENT

STRYDOM, J.P.: The appellant was convicted on 13 counts of theft involving an amount of N$17 165,08. The theft of the money was committed during the period 24 November 1992 to 12 February 1993. The money was stolen from Standard Bank Limited that was at the time the employer of the appellant. The appeal is against the sentence only.

In mitigation the appellant requested the Court to impose a fine. She stated that she had made arrangements to repay the bank. In this regard it was confirmed by the Prosecutor that about half the stolen money has been repaid by the appellant. The appellant further informed the Court that she was presently e'mployed by the Ministry of Education as a teacher with a monthly salary of N$1 300. She is the mother of a two year old child who is in her care. She further stated that she stole the money because she was heavily in debt and had to pay attorneys N$650 per month out of her salary of N$1 400. The total debt amounted to approximately N$8 000. The appellant was also a first offender and was at the time 22 years old.

The grounds of appeal read as follows:

"The sentence of the Honourable Magistrate was in the circumstances inappropriate and outrageous in that the Honourable Magistrate:

(1) **Did not duly take into consideration the fact that the appellant pleaded guilty and was a first offender.**

(2) **Did not duly take into consideration the fact that the appellant had already repay a considerable amount to the complainant.**

(3) **Did not duly take into consideration that fact that the appellant also arranged to repay the rest of the money to the complainant while she is employed and in a position to do so.**

(4) Did not take the charges together for the purposes of sentence."

Mr Swanepoel, who appeared on behalf of the appellant, submitted that the Court a quo misdirected itself on the facts in regard to the time span during which the crimes were committed, the motive for stealing the money and the amount already repaid to the bank. Furthermore he submitted that the Court misdirected itself by overemphasizing the deterrent aspect of the sentence at the cost of the personal circumstances of the appellant.

Miss Lategan on behalf of the State submitted that the sentence imposed by the Magistrate was in all the circumstances proper and appropriate.

In his reasons for judgment the Magistrate dealt with all these circumstances put before him. I agree with the Magistrate that there are circumstances present which call for a deterrent sentence. First and foremost is the fact that the appellant was in a position of trust vis-a-vis her employer and that she abused her position by stealing from her employer. This Court has on more than one occasion expressed itself in this regard. The prevalence of offences of this nature is common knowledge. In circumstances such as these the deterrent aspect of sentencing must come strongly to the fore. More so also to deter others in similar positions from stealing from their employers. The whole economic structure may be endangered if employers can't trust their employees not to help themselves to money which does not belong to them. To give more weight to the deterrent aspect would not be wrong. See S v van Wyk 1992(1) SACR 147 NSc. It was also regarded by the Magistrate as an aggravating circumstance that once the appellant sets

herself on the road to dishonesty, greed soon took over and her excuse that she stole from need, which is not justifiable but is at least perhaps understandable, became only a myth. In this regard it is also relevant that the appellant committed these crimes over a period of time. She therefore had ample opportunity to reconsider what she was doing but nevertheless persisted in her wrongful conduct.

In this regard Mr Swanepoel has submitted that it is clear from the charge sheet that the appellant was arrested on 7 June 1993. As the last theft was committed on the 12th February 1993, this would indicate that the appellant stopped by herself from committing further crimes. This does not necessarily follow. It may be that she was suspended from work pending an investigation. If this is however accepted the fact remains that these crimes were committed over a period of some two and a half months and that she took considerably more money than what was necessary to get out of her financial difficulties. In this respect Mr Swanepoel submitted that the Court must accept that the amount of N$8 000 stated by the appellant as being her total debt only included the capital amount and did not take care of attorney's costs which can easily be double the capital amount. I do not accept this submission. The appellant when asked specifically stated that her total debt was N$8 000 which she had to repay at the rate of N$650 per month. There is no evidence whatsoever indicating that the amount was higher and in my opinion the Magistrate was fully justified to come to the conclusion that the appellant, by stealing some N$17 000, intended also to enrich herself at the expense of the bank.

Although the Magistrate misdirected himself in regard to the length of the period over which the crimes were committed I do not think that the misdirection is of such a nature that this Court will, on the strength thereof, interfere with the sentence. This goes also for the finding that she has repaid about half the money stolen by her.

Mr Swanepoel has referred the Court to the case of S v van Vuuren 1992(1) SACR p. 127 where a woman stole some R73 000 from the bank where she was employed. On appeal her sentence of five years imprisonment was suspended in toto on condition inter alia that she performs community services of 300 hours. There are some aspects which correspond with that of the appellant's case presently under consideration but there are also significant differences. Apart from the personal circumstances which differ markedly, the Court also found that van Vuuren's financial difficulties did continue and that all or any of the money stolen by her was not used to feather her own nest. It also seems that the element of whether the offence was prevalent did not play any part in the judgment of the Court.

For the reasons set out previously I am not persuaded that the Court a quo was wrong in imposing a prison sentence, however, I am of the opinion that the cumulative effect of 26 months effective imprisonment is in all the circumstances not an appropriate sentence. The appellant, a 22 year old woman, with a child of two years, is a first offender. Although she initially pleaded not guilty, she, on the resumption of the trial, pleaded guilty to all the charges. This at least showed contrition and remorse on her part. Cases of theft and fraud are sometimes

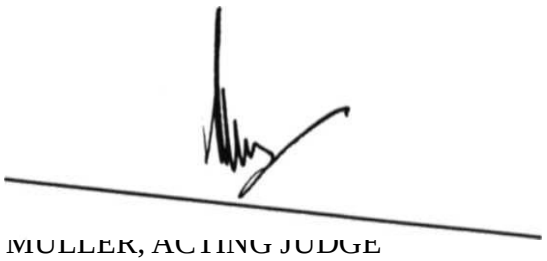
difficult to prove. Where the accused pleaded guilty, this is a factor which reflects favourably on the chances of rehabilitation of such an accused and is therefore an important factor when the Court must determine an appropriate sentence. At the time when the matter came up for hearing, the accused had already repaid at least half the amount of the money she had stolen, and she further informed the Court that she had made arrangements to pay the still outstanding balance. The partial or full compensation of the loss suffered by the Complainant is always a relevant factor in regard to sentencing. See S v Charlie 1976(2) SA 596 (A) and S v van Vuuren 1992(1) SACR 127 (A). Although the Magistrate referred to these factors in his reasons for sentence, it seems to me, taking into consideration the sentences imposed, that the Magistrate overemphasized the seriousness of the offence and gave very little weight to the mitigating factors as set out above. Cumulatively the term of effective imprisonment imposed is 26 months. Taking into consideration the personal circumstances of the appellant together with the other mitigating factors and when these are properly balanced with the aggravating circumstances and other factors relevant to sentence, then the period of imprisonment is in my opinion not appropriate.

In the circumstances this Court is at large and is entitled to interfere with the sentence imposed by the Magistrate. As previously stated this Court is satisfied that in all the circumstances it will be appropriate to impose a period of imprisonment. I am however of

the opinion that a period of one month effective imprisonment in respect of each count will in the circumstances be a sufficient deterrent for the appellant and others but will also take due regard of the personal circumstances of the appellant as well as the other mitigating factors.

In the result the following orders are made:

> **The appeal against the sentences imposed by the Magistrate is upheld to the extent that the sentences of four months imprisonment of which two months imprisonment was suspended on certain conditions, is hereby set aside and the following is substituted therefore:**
>
> **The appellant is on each of the 13 counts sentenced to three (3) months imprisonment of which two (2) months imprisonment is suspended for four (4) years on condition that the accused is not convicted of theft committed during the period of suspension."**



MULLER, ACTING JUDGE