W.H. COETZEE -vs- THE STATE 1994/05/1

Strydom, j.p. et Frank,

CRIMINAL PROCEDURE:

Sentence - Factors applicable - Way in which defence was conducted not a factor to be taken into consideration when determining appropriate sentence.

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CASE NO.CA 13/94

IN THE HIGH COURT OF NAMIBIA

W.H.COETZEE APPELLANT

versus

THE STATE RESPONDENT

CORAM: **STRYDOM, J.P.** et **FRANK, J.**

Heard on: 1994/05/16

Delivered on: 1994/05/16

JUDGMENT

STRYDOM, J.P.: The appellant was convicted in the Magistrate's Court, Gobabis, of the crime of theft and sentenced to three (3) years imprisonment. He applied for and was granted a judge's certificate in respect of the sentence imposed.

The appellant, when he appeared in the Court below, pleaded not guilty.

The Complainant testified that the accused on the day in question was working for him in his yard. At a stage the daughter of the complainant missed a wallet containing credit cards and some R3 00 cash. The Complainant stopped the taxi with which the appellant was on his way to Epaku and after a body

search the money and cards were found in the pocket of the Appellant.

During cross-examination of the Complainant the Appellant admitted the theft. It further transpired that the Appellant gave his co-operation and everything that was stolen was recovered. He also apologized to the Complainant and asked his forgiveness. When the Appellant testified he admitted the theft. His evidence however, that he told the taxi driver to take him back to the Complainant so that he could return the stolen goods cannot be accepted. In mitigation the Appellant told the Court that he is married with three children. He did not have any regular work and that he attended school up to standard 8. The Appellant has four previous convictions which are not related to theft or any crime involving dishonesty. These are two previous convictions for possession of dagga, one for assault and one for driving a motor vehicle with an excessive quantity of alcohol in his blood namely a contravention of Section 140(2)(a) of Ordinance 30 of 1967. In none of these instance was the Appellant sent to prison. He was either given a suspended sentence or a fine or, in respect of the assault charge, he was cautioned and discharged. The last offence committed by the Appellant was in the beginning of 1989.

The Magistrate availed himself of the opportunity to give reasons and stated that he inter alia considered the following factors:

" (a) The personal circumstances of the accused and his family.

(2) The amount stolen.

(3) The frequent occurrence of crimes of this nature in Gobabis."

As regards the demeanour of the Appellant the Court found that he did not show remorse and that he wasted the time of the Court by not pleading guilty and wanted to mislead the Court. Although the previous convictions are not related to theft they showed that the appellant had previous clashes with the law and that he did not want to reform. The Magistrate further mentioned that he had often warned that harsher sentences would be meted out to people committing theft.

Mr Mouton, who drew up the heads of argument and who was supposed to appear amicus curiae and is now replaced by Mr Heathcote, on behalf of the Appellant, submitted that the Magistrate misdirected himself in various respects and only paid lip service to the personal circumstances of the Appellant. In any event, so counsel submitted, the Magistrate did not exercise his discretion judicially as the sentence is in all the circumstances too heavy.

Mr Small, on behalf of the State, conceded that the sentence is not a proper one and that the Court should in the circumstances interfere therewith.

The Court is indebted to both counsel for their assistance in this matter.

The crime of theft is a serious one and where prevalent the Court is entitled to take sterner measures even to the extent of imposing exemplary sentences. This does however not mean that a Court is entitled to ignore the personal circumstances of a

particular accused and the other factors relevant to sentencing. See S v Khulu 1975(2) SA 518 (N). It is also correct that the Court can have regard to previous convictions which are not related to the offence for which the accused must be sentenced, but such convictions will carry much less weight than a related previous conviction.

In the present instance the Appellant was a first offender in regard to a crime of which dishonesty was an element. The value of the goods stolen was relatively low and everything was recovered. To impose in these circumstances the maximum sentence which the Magistrate can, under his jurisdiction, impose, is by itself proof that the discretion exercised by the Court a quo was not judicially exercised. Even if the prevalence of the crime of theft in this area is taken into consideration the sentence is in my opinion so disturbingly inappropriate

> "that it can be said that the judicial discretion had not been properly exercised warranting appellate interference".

See S v Rabie 1975(4) SA 855 (A) at 864.

I agree with Counsel for the Appellant that the Magistrate over-emphasized the deterrent effect of sentence at the cost of the personal circumstances and other mitigating factors in favour of the Appellant. Both counsel were also agreed that the Court a quo misdirected itself by considering as relevant to sentence that the Appellant -

> "wasted the time of the Court by pleading not guilty while he knew that he had committed the alleged offence. He wanted to mislead the Court."

In this regard Mr Small referred the Court to Article 12(1) (a) of the Constitution. It is perhaps necessary to repeat what was stated in R v Klein 1942 TPD 263 at 266 in this regard, namely:

> "The manner in which the defence is conducted, even if it is immoderate and mistaken and is culpable in that improper motives and purgery are alleged however much one may disprove of it has nothing to do with the crime or the circumstances in which the crime has been committed and is in no way to be considered in arriving at the penalty".

See also S v K 1975(3) SA 446 at 451 D - H.

The fact that an accused pleaded guilty may, in certain circumstances be a mitigating factor. The fact that an accused did not plead guilty is not an aggravating circumstance to be taken into account in the determining of an appropriate sentence. Although the accused in this instance pleaded not guilty he admitted having taken the stolen articles with his very first question put in cross-examination. He even illicited the fact that he apologized and asked for forgiveness. The lie he told, namely, that he

still wanted to return the money and cards, is so transparent that not even a child would have been taken in by it.

In all the circumstances this Court is entitled to interfere with the sentence imposed by the Magistrate. Taking into consideration all the circumstances and accepting that the crime of theft is prevalent in the Gobabis area I am of the opinion that a sentence of one (1) year imprisonment would be appropriate.

In the result the appeal succeeds and the sentence of three (3) years imprisonment is set aside and substituted with a sentence of one (1) year imprisonment.

STRYDOM, JUDGE PRESIDENT

FRANK, JUDGE

The sentence is back-dated to the 3rd May 1993.