THE STATE v. JOHN HAUFIKU

CASE NO. CA 36/99

1998/08/11

Maritz, J et Mainga, A.J.

CRIMMINAL PROCEDURE

Appeal – claimed disparity of sentences – approach on appeal.

Sentence - Knowingly tendering forged bank notes – serious nature of the offence discussed – imprisonment appropriate in circumstances

THE HIGH COURT OF NAMIBIA

JOHN HAUFIKU **Appellant**

and

THE STATE **Respondent**

CORAM: MARITZ, J. et MAINGA, A.J.

Heard on: 1999-08-09
Delivered on: 1999-08-11

JUDGMENT

MARITZ, J.: The appellant was convicted in the magistrate's court, Swakopmund of unlawfully tendering forged banknotes as payment to three different vendors well knowing that they had been forged: on two occasions he tendered forged R200.00 notes in contravention of section 2(c) of the Prevention of Counterfeiting of Currency Act, 1965 (counts one and two) and on one occasion he tendered a forged N$100.00 note in contravention of section 27(1)(b) of the Bank of Namibia Act, 1990 (count three). On counts one and two, which were taken together for purposes of sentence, he was sentenced to three years imprisonment. On count three, he was fined N$10 000.00 or sentenced to five years imprisonment. It

was furthermore directed that the sentences of imprisonment should be served concurrently.

The appellant, claiming that his sentence was discriminatory and unfair, applied that his sentence be reviewed on appeal. To that end he obtained a judges' certificate under section 306 of the Criminal Procedure Act, 1977.

The appellant relies for his contentions of discriminatory and unfair treatment on a comparison between his sentence and that of five years imprisonment (of which two years were conditionally suspended) imposed in the Magistrate's Court, Tsumeb upon one J.H. Potgieter. According to the appellant Mr Potgieter was apprehended in the process of printing forged N$100 notes. According to the appellant he had about 661 forged notes already in his possession as well as enough quality paper to produce a further 3 million notes.

Although, as a general rule, disparity of sentences should be avoided whenever possible, the peculiarity of each case, the diverging interests of the particular society within which the offence has been committed and the individuality of each offender do not allow for a mathematical uniformity of sentences by the application of some magic formula. The weight to be given to sentences for comparative offences has, in my view, been paced in to correct

perspective by Botha, JA in **S v Reddy**, 1975 (3) SA 757 (AD) at 759 H:

> "*It would not... be improper for a judicial officer to have regard, in addition to all the other relevant circumstances in the case, to the sentence imposed upon another accused in respect of the same offence, or to sentences generally imposed in respect of offences similar to the offences dealt with by him, or in respect of offences of a kindred nature, but to follow such sentences for the sake of uniformity without proper regard to the relevant circumstances in the case, may not only constitute an irregularity but may result in ineffective or inappropriate sentences.*"

Sentencing is pre-eminently a matter in the discretion of the judicial officer presiding at the trial of the accused. Such a sentence will not be interfered with on appeal only by reason of the fact that it is not in conformity with the sentences imposed by other courts for similar offences unless, of course, the disparity is so striking that it warrants the conclusion that the presiding officer has exercised his or her discretion in an arbitrary manner (See: **S v Jackson**, 1976 (1) SA 437 (A) at 439A – B) – and even if the latter is found to be the case, the court of appeal will not correct the sentence appealed against by equating the sentence with others, but rather by imposing a sentence which is appropriate in the circumstances of the case under consideration (**S v Giannoulis,** 1975 (4) SA 867 (A) at 871A - 873H).

There is a compelling need to protect currencies, commerce and the community against criminals who unlawfully enrich themselves at the expense of others and the economy by issuing or tendering forged bank notes. The person who was fraudulently induced to deliver goods or render services, without receiving true value in the exchange, feels the most immediate effect when counterfeits are being used in a transaction. He is that much the poorer. On that level the effect of such an act does not appear to me to be dissimilar to that of theft by fraudulent misrepresentation.

On a different level though, the result of such conduct impacts on the economy, both on the micro and macro sense of the word. Businesses will eventually be constrained to take protective measures against unacceptable losses caused by the acceptance of counterfeits. Such measures may not only manifest itself in the refusal or reluctance to accept larger denominations of the currency, but also in the acquisition of expensive equipment and the introduction of inconvenient procedures to detect forged notes. On a macro level, the Bank of Namibia will have to take expensive measures to ensure that the public can trust the authenticity of the notes in circulation by introducing new or enhancing existing security features or, under certain circumstances, go to the expense of issuing new notes of a particular denomination to replace the ones already in circulation.

It is not difficult to appreciate that, when counterfeiting takes on larger dimensions, this will result in an erosion of the public's confidence in our currency. In such circumstances the public may be tempted to rely increasingly on an alternative currency in their transactions with a resultant decrease in the demand for our domestic currency; a loss of revenue to the Government and complications in controlling money supply and interest rates in the national economy.

Hence the measures introduced by the Legislature by section 27 of the Bank of Namibia Act, 1990 to protect the public and the integrity of our own currency. The need to also protect the public against the unlawful use of forged foreign currencies and, I suspect, reasons of comity and commerce on an international level, necessitated the promulgation of similar proscriptions in section 2 of the Prevention of Counterfeiting of Currency Act, 1965.

Thus, the Legislature understandably authorised the imposition of heavy penalties for the contravention of those sections: A person who contravenes section 27 of the Bank of Namibia Act, 1990 is liable on conviction to a fine not exceeding N$100 000 or to imprisonment not exceeding 15 years (or both). The Prevention of Counterfeiting of Currency Act, 1965 provides for a similar term of imprisonment in the event of a conviction following on a

contravention of section 2(c) thereof – it does not even allow for the imposition of a fine.

To her credit, Ms Hamutenja, who appeared *amicus curiae* on behalf of the appellant, did not content that the offences of which the appellant had been convicted were not serious. She did not labour the appellant's submission regarding the claimed disparity of sentences but nevertheless submitted that part of his sentence should have been suspended.

Ms. Dunn, appearing on behalf of the respondent, argued that the magistrate did not misdirect herself on the facts or on the law; did not commit an irregularity and did not impose a sentence that is disturbingly inappropriate in the circumstances – and I have to agree.

The accused has a previous conviction for an offence involving dishonesty. He picked his victims and sought to commit the offences under circumstances that would reduce the possibility of immediate detection. He committed the offences on a number of occasions. When confronted he faked ignorance and surprise only to appease his victims and create an opportunity for escape. He did not take the court into his confidence, showed no remorse and did not compensate his victims for their losses.

The magistrate considered his personal circumstances and the fact that he had been awaiting trial in prison for a period of 7 months. In relation to counts one and two she considered their proximity in time and took them together for purposes of sentencing. She gave due weight to the more immediate concerns relating to the counterfeiting of our own currency by imposing a heavier sentence for the contravention of section 27 of the Bank of Namibia Act, 1990, yet, appreciating the similarity between the Legislative objective of that Act and that of the Prevention of Counterfeiting of Currency Act, 1965, directed that the sentences should run concurrently. The sentence of effective imprisonment imposed by her is, as far as I was able to ascertain, in line with sentences imposed for similar offences elsewhere (Compare e.g. **S v Modisakeng**, 1998(1) SACR 278 (T) and **S v Van Der Westhuizen**, 1995(1) SACR 601 (A)).

In the result the appeal is dismissed.

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Maritz, J.

I agree.

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Mainga, A.J.