"SPECIAL INTEREST"

CASE NO.: CA 177/2007

SUMMARY

JASON RENE JOLY *versus* **THE STATE**

DAMASEB, JP ***et*** **PARKER, J**

30/01/2008

SENTENCE:

The weight a trial court attaches to factors in mitigation or aggravation of sentence, is a matter in the discretion of the trial court taking into account all the circumstances of the case. This Court can only interfere if satisfied that the trial court in imposing sentence failed to properly assess the value of relevant mitigating factors or took into account irrelevant considerations or completely disregarded relevant mitigating factors.

CASE NO. CA 177/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JASON RENE JOLY **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **DAMASEB JP** *et* **PARKER J**

Heard on: 30 January 2008
Released on: 05 February 2008

REASONS

DAMASEB JP: [1] After hearing oral argument in this matter we made an order in the following terms: *"The sentence is set aside. The appellant is sentenced to 3 years and 6 months imprisonment; and the sentence is antedated to 4 September 2006."*

We stated then that our reasons would follow. These are the reasons.

[2] This is an appeal against sentence only. The appellant, a British national who is domiciled in Uganda, was found guilty of fraud involving an amount of N$16 743.64 which was never recovered. He pleaded guilty to the offence when the charge was put to him which alleged that he exchanged stolen travellers' cheques to the value of N$16 743.64. He admitted to two previous convictions; one on the 17th of January 2006 at Tsumeb involving N$16 850.29 for which he received 3 years imprisonment of which 1 year was suspended on conditions; the other one was on the 8th of March 2005 at Walvisbay involving fraud of travellers' cheques amounting to N$23 458.39 for which he was sentenced to 36 months imprisonment of which 12 months imprisonment was suspended on conditions. The magistrate took these convictions into account for the purpose of sentencing.

[3] The appellant was arrested on 1 December 2004 in connection with this case. He was sentenced on 4 September 2006 i.e. 1 year and 9 months later. He did not testify in mitigation of sentence and his legal representative made submissions from the bar on his behalf to the effect that the appellant was a 26 year single male and breadwinner of the family; with a 59-year old mother suffering from cancer, and a younger brother who was still at school. It was submitted that the appellant committed the fraud to pay back a loan shark and is remorseful for what he did. These allegations were not

tested on cross-examination because he did not testify in mitigation of sentence.

[4] The magistrate's remarks preceding sentence are very brief and I will quote them in full:

> "In giving sentence. A Court **must always consider the personal circumstances of the Accused**, which was duly laid before the Court, by your Counsel. The Court must look at the type of offence, which is fraud in this case, which in this country, is considered a very serious offence. I can refer, though I do not have the notification of the cases, to Deon Angula and a case that even I did, whether Accused Moses Kadira, he only stole from his employer, three thousand Namibian Dollars (N$3 000.00), and he was sentence to an effective two years imprisonment term. But as I've said, **I've taken into consideration your personal circumstances**, the interest of society in these matters. But **what makes your case a bit more aggravating, is that you came to Namibian, and defrauded people from Namibia**. You defrauded bank institutions and this also always relies or comes back to the customer. The amount is sizable, **the reasons you had given, namely your brother and your mother's condition, I understand it**, and I appreciate it, but the offence of fraud, is a crime of dishonesty. And Courts in general and that is with reference to, the State, Deon Hangula versus the State, must consider a custodial sentence. **I must also take notice of your previous convictions**, though it may be harsh to say that you were on a crime spree, I will say maybe not, but it seemed like it, since you have the same type of offences. Both were in Walvisbay and in Tsumeb, and in Grootfontein, **it's the same type of offences**, you were doing is purposely. So, after having considered and really thought about the sentence, I hereby sentence you to FIVE YEARS (5) imprisonment." (sic) [my emphasis]

[5] The appeal grounds complain that the fact that the accused pleaded guilty was not taken into account and that the previous convictions were over-emphasized; and that the court *a quo* failed to

take into account the time the appellant had already spent in prison while awaiting trial. It is also complained that the magistrate took into account as an aggravating factor the fact that the appellant is a foreigner. In oral argument Mr Namandje, for the appellant, submitted that the crimes treated as previous convictions for the purpose of sentencing should not really have been so treated because, although they constitute convictions preceding the present offence, they took place at about the same time as the present offence and that it was by quirk of circumstance that those two cases were finalised before the present. This submission is not seriously disputed by counsel for the State whose only retort seems to me that even if the two prior convictions are not "previous convictions" as the term is understood by the Courts as an aggravating factor, they are evidence of the propensity of the appellant to commit this sort of crime and the need, therefore, to visit him with condign punishment. Mr Namandje also submitted that the learned magistrate only paid lip-service to taking into account the personal circumstances of the appellant, as he in any event went ahead and imposed a sentence of 5 years which is the upper limit of that court's sentencing jurisdiction.

[6] The weight a trial court attaches to factors in mitigation or aggravation of sentence, is a matter in the discretion of the trial court taking into account all the circumstances of the case. This Court can only interfere if satisfied that the trial court in imposing sentence failed to properly assess the value of relevant mitigating factors or

took into account irrelevant considerations or completely disregarded relevant mitigating factors. As I said in the case of *The State v Jonas David*, High Court Review Case No. 31/2007 delivered on 25 January 2007 (Silungwe AJ concurring), at paragraph 3:

> "The magistrate ought in the interest of justice to have had regard to these weighty mitigating factors; or ought to have assessed their value differently from what she appears to have done (as to which see *S v Fazzie* 1964 (4) SA 673 (At) at 684 B-C.) The sentence imposed in this case, regard being had to the facts, is way out of line with what this Court would have imposed if it sat as a Court of first instance. It cannot therefore be allowed to stand."

[7] *In casu,* the magistrate had regard to the 'previous convictions' of the appellant when he should not have done so. He also considered the fact that the appellant is a foreigner as an aggravating factor without elaborating why that is the case on the facts of this case. One is to be forgiven for thinking that the magistrate took the view that the appellant, merely for the reason that he is a foreigner, deserved more severe punishment. Another ground relied on is that the learned magistrate did not take into account the fact that the appellant had already spent some time awaiting trial in prison before sentence was imposed. It is clear from the record that the magistrate did not pay any regard to the time the appellant had spent in prison awaiting trial. If the magistrate properly considered the issue he might very well have imposed a different sentence. The complaints raised about the way the magistrate approached the sentencing have merit. The magistrate clearly misdirected himself and this Court is at large as to sentence.

[8] I agree with the State that the appellant has by his actions demonstrated a proclivity to commit fraud. His explanation for why he committed the crime is unconvincing and the fruit of his crime has never been recovered. That the appellant should receive a substantial custodial sentence is inevitable. Taking his personal circumstances and all the relevant mitigating factors into account, I am prepared to deduct 1 year and 6 months from the period of 5 years considered appropriate by the Court *a quo* and to sentence him to 3 years and 6 months. It was for these reasons that we made the order we did after hearing oral argument.

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DAMASEB, JP

I agree

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PARKER, J

ON BEHALF OF THE APPELLANT: **MR S NAMANDJE**

INSTRUCTED BY: **SISA NAMANDJE & COMPANY**

ON BEHALF OF THE RESPONDENT: **MR LS MATOTA**

INSTRUCTED BY: **OFFICE OF THE PROSECUTOR-GENERAL**