



CASE NO.: CR 79/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

REBECCA BIYANI MITLANG

(HIGH COURT REVIEW CASE NO.: 1356/2010)

CORAM: MULLER, J et SWANEPOEL, J

Delivered on: 26 October 2010

REVIEW JUDGMENT

MULLER, J.: [1] The accused was convicted of the offence of theft and sentenced to pay N\$15 000.00. or serve a term of imprisonment of 18 months. N\$5 000.00. or 6 months were conditionally suspended for 5 years.

[2] I addressed the following queries to the Magistrate:

"Please furnish me with your reasons:

- 1. Why did the Magistrate not enquire whether the accused was able to pay such fine?*
- 2. Why was such a heavy fine imposed?*

[3] In her reply the Magistrate responded as follows:

"The above matter bears reference, I respectfully submit as follows to the remarks made by the Honourable reviewing Judge:

- 1. Why did the Magistrate not enquire whether the accused was**

able to pay such a fine?

With regard to the above query, the Court enquired into the financial position of the accused, and this is apparent from her mitigating factors submitted. The accused indicated that she is self employed, she sells sweets and cigarettes and further indicated that she can afford a fine of N\$1 000.00 if imposed. The court is of the opinion that enquiry into the means of affording a court fine was made, before the sentence was imposed.

2. Why was such a heavy fine imposed?

The reason for giving such a sentence are reflected on record, the CRT have taken into account the nature of items stolen and the substantial value involved. Although the items were recovered, the accused did not voluntarily surrendered the items. CRT has further taken into account the extreme prevalence of the crime of theft in Windhoek. In the matter of the State v Elliot Tjikuma (NmHc) Case No. 55/2001 it was stated that the fines must generally exceed the value of the property stolen to discourage any notion that the crime is worth the risk, qualified by other factors. E.g. for how long has an accused been in custody prior to the finalization of the matter".

[4] Despite the conditional suspension of the sentence, the accused was still effectively sentenced to pay a fine of N\$10 000.00 or in default be imprisoned for 12 months.

[5] The goods stolen were valued at N\$9 045.60. All the goods were recovered. The facts to be considered in mitigation were:

- (a) The accused was a first offender;
- (b) She was 40 years old and a single mother of 3 children, who has no husband and has to support the children on her own;
- (c) She was unemployed and only earned some money from selling sweets and cigarettes;
- (d) She pays N\$500.00 per month for rent of a house in which she (and

the children apparently) stays;

(e) She can pay a fine of N\$1 000.00 with the assistance of a friend;

(f) All the stolen items were recovered; and

(g) She pleaded guilty to the offence.

[6] The Magistrate did take some of the mitigating factors into account. However, the Magistrate strongly relied on aggravating factors, e.g. that she was aware if she would be caught, she would be sentenced; she reconciled herself to steal; and that Edgars (the owner of the items) would suffer a loss of N\$9 045.60 had she not been caught. In her response to my queries the Magistrate alleges that she did enquire into the means of the accused to be able to pay a fine and was told that she can afford to pay a fine of N\$1 000.00. The Magistrate was satisfied that this was enough to impose an effective fine of N\$10 000.00, which she knew the accused could not pay. The Magistrate is of course also wrong in her statement that the accused could afford to pay a fine of N\$1 000.00. The evidence is that with the assistance of a friend she could pay a fine of N\$1 000.00. However, that is not the real issue. The real issue is that even with the assistance of a friend she could only pay a fine of N\$1 000.00. If the Magistrate had the intention to keep her out of prison due to the other mitigating factors, she should have enquired more into the accused's financial position. Despite the fact that the accused was unrepresented, she failed to do so. The reason for failing to do this is obvious, namely the Magistrate intended to make an example of the accused and by imposing a fine that she knew was beyond the accused's means, she effectively imposed a sentence of imprisonment upon an undefended single mother, who supports her children alone, who is a first offender and who did not benefit from her offence at all. In my opinion the sentence imposed is totally out of proportion and inappropriate.

[7] In her reply, the Magistrate referred to an unreported decision of this court, namely the *State v Elliot Tjikuma*, case no. 55/2001. The Magistrate referred to a passage in that judgment where it was stated that fines must generally not exceed

the value of the stolen property to discourage any notion that the crime is not worth the risk. The Magistrate unfortunately misquoted this statement to support her view that in this case the fine should be in correlation with the value of the stolen property (i.e. N\$10 000 for N\$9 045.60). In *S v Elliot Tjikuma, supra*, Maritz J referred to that particular statement which was made in another unreported review judgment, namely in *S v Karin Asieno*, case no. CR 3834/1996, delivered on 20 November 1996. In the very next paragraph on p4 of his judgment in *S v Elliot Tjikuma, supra*, Maritz J distinguishes that remark in *Asieno's* case from the current case (*Elliot Tjikuma*). He says:

"I must pause here to mention that the quoted passage of the review judgment in Asieno's case was not left unqualified. It continues as follows... "the two must not differ to that large extent as in this case, especially where all the property stolen has been recovered and the accused benefited nothing from the offence". That qualification is relevant to this case and if applied, strongly suggests that the sentence of a fine of N\$600.00 to N\$800.00 would have been appropriate - especially if regard is being had to sentencing factors earlier mentioned in this including the fact that the accused, a first offender, was detained for 6 months whilst awaiting trial."

[8] Maritz J also referred to the situation where an accused who cannot afford to pay a fine is sentenced to a term of direct imprisonment. In this regard he referred to i.e. *S v Mynhardt* 1991 NR 336 at 338C-D). Maritz J in particular approved of the remarks by Miller JA in *S v Sithole and Another* 1979(2) SA 67(A) at 69F-G where he said:

"(w)hen a court has decided that a convicted person ought to be afforded the opportunity of staying out of jail by giving him the option of a fine, he should not impose a fine which to his knowledge or believe is utterly beyond the means of such a person to pay."

After taking this judgment and others into consideration, Maritz J said the following:

"It is apparent that the Magistrate misdirected herself by failing to bear these authorities in mind when he decided to impose a sentence of imprisonment without the option of a fine. By imposing a custodial sentence (and one of 12 months imprisonment at that) he not only attributed a degree of moral blameworthiness to the crime by far exceeding the seriousness thereof, but also condemned a first offender to imprisonment when, in our view, an alternative form of punishment would not only have better served the sentencing objectives in modern-day penology, but would have avoided the detrimental aspects associated with imprisonment - both for society and for the appellant." The sentence was accordingly set aside.

[9] In the result the following orders are made:

1. The conviction is confirmed;
2. The sentence of the accused is set aside and is substituted with the following sentence:

"The accused is sentenced to pay a fine of N\$1 000.00, or in default, imprisonment of 4 months. In addition the accused is sentenced to 8 months imprisonment, which sentence is wholly suspended for a period of 3 years on condition that the accused is not convicted of the offence of theft, convicted within the period of suspension."

MULLER, J

I agree

SWANEPOEL, J