NOT REPORTABLE
CASE NO.: CA 50/09

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PFEIFFER HELLA **APPELLANT**

and
THE STATE **RESPONDENT**

CORAM: **SIBOLEKA J, NAMANDJE AJ**
Heard on: 11 October 2010
Delivered on: 03 November 2010

APPEAL JUDGMENT

NAMANDJE, AJ.: [1] This appeal arose from the appellant's conviction and sentence by the Swakopmund Magistrate's Court on the 25th of September 2008. The appellant was convicted of sixteen counts of theft of monies totaling the amount of N$55,558.35. She was sentenced to three years imprisonment of which one year was suspended for a period of four years on certain conditions.

[2] Subsequent to her conviction and sentence the appellant duly noted an appeal against both her conviction and sentence. She further brought bail pending appeal in the same Magistrate's Court which was refused but subsequently granted by this Court on appeal pending the finalization of this appeal. The appellant has resultantly been on bail on certain conditions since June 2009.

[3] From January 2004 the appellant worked as the Information Officer at Namib I *"the*

complainant' at Swakopmund until 21 February 2005 when she resigned with immediate effect.[1] The complainant is a non-profit organization with its main objective to promote tourism in Erongo Region in particular and, the whole of Namibia in general. The appellant was accused of stealing divergent amounts of money initially totalling the sum of N$56,118.85 during the period from August 2004 to mid February 2005. She was acquitted of one count hence the amount initially alleged to have been stolen was reduced to the amount of N$55,558.35 for conviction purposes. At the start of the trial the appellant pleaded not guilty and filed a statement in terms of Section 115 in which she simply denied all allegations in the charge sheet.

[4] The State called a number of witnesses two of whom were appellant's erstwhile superiors[2] and another witness, who temporarily worked for the complainant as trainee under the appellant's supervision. Further witnesses called by the State were tour operators on behalf of whom the appellant received money from tourists to pay it to them (tour operators) after they have delivered tour services to the concerned tourists. The complainant is essentially a reservation agent for the tour operators. Tourists who may need to undertake tour adventure trips that are offered by tour operators in Swakopmund sometimes make their bookings through the complainant. The tourists would approach the complainant's office and the complainant, represented by the appellant in all the incidents of theft attendant to this case, would contact the tour operators to inquire whether they can offer services to the concerned tourists. The appellant, on behalf of the complainant, would then, after concluding terms of the agreement with a particular tour operator, make reservations for and on behalf of the concerned tourists. The complainant would receive money from tourists including the money meant to be paid to a particular tour operator for his/her services. The tour operators would later claim their fees from the complainant upon rendering services.

[5] The appellant worked at the complainant's office at Swakopmund and was *inter alia* responsible for the tour reservations for tourists. She, in relation to all the theft counts in respect

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1 She resigned when she was confronted about the missing funds. She admitted to have taken the amount of N$3,000.00. Her version that she took such money with the complainant's consent was, in my opinion, correctly rejected by the trial court. When she were to be suspended pending the investigation she resigned from her employment with immediate effect.

2 The Chairperson of Namib I and the Chief Executive Officer Cum-bookkeeper.

of which she was convicted, received cash from tourists. This is common cause. Counsel for the appellant, to his credit, readily conceded that there is no dispute that the appellant in fact received the total amount of N$55,558.35. It is also common cause that such money has not been accounted for by the appellant, or more appropriately, the money disappeared after receipt by the appellant. That being common cause the only remaining crispy question is whether the State, on the evidence presented proved, beyond reasonable doubt, that the appellant stole the money she received.

[6] The appellant relies on a single ground in her appeal against conviction which is crafted in the following terms:

> "the *learned Magistrate erred in the Court a quo in law and/or on facts in finding that by inference the appellant is guilty of the offence of theft'.*

[7] I must be quick to point out that it is not entirely correct that the appellant was wholly convicted through circumstantial evidence. Only a small portion of the State's case was proved through circumstantial evidence. The State in accordance with the law proved that the appellant in course and scope of her employment with the complainant received the sum total of N$55,558.35 from a number of tourists, that the appellant did not keep documentary proof of receipts of such money as required, that there were no entries in the receipt books[3] for money received by the appellant, that the amounts of cash received by the appellant were not, as required, recorded in the till register, that the money received by the appellant was not in the safe wherein the appellant alleged to have placed it; that the appellant's supervisor who does weekly cash ups in the presence of the appellant was not aware of the money received by the appellant as such was not entered in the receipt books and does not appear on the till register and that the appellant had a key to the safe. The Chairperson of the complainant who also have a spare key to the safe does not open the safe in the absence of the appellant. There is no evidence that she obtained access to the safe, in any way, during the relevant period during which the money was stolen.

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[3] The complainant's receipt books wherein the appellant ought to have entered money received and which books are numbered sequentially were produced but no entry of cash received was made by the appellant.

[8] A court of appeal is customarily reluctant to interfere with the factual findings of a trial court unless there is a material misdirection on the facts.[4] The material findings by the trial court were *inter alia* that the appellant is the only person with the unhindered and unsupervised access to the safe where she is required to safely store money she received. The +appellant's evidence on whether or not she in fact placed the money shereceived in the safe is very bad and was correctly rejected. The complainant's Chairperson who also have a spare key to the safe does not have access to the safe in absence of the appellant. In view of the appellant's legal practitioner's tenor of cross-examination of the relevant State witnesses on this issue and appellant's contradictory and improbable evidence on the same issue, the learned Magistrate's findings that the Chairperson of the complainant did not have access to the safe unless in presence of the appellant was factually justified. The fact that the appellant did not enter the relevant sums of money she received in the receipt books as required and her failure to have such amounts recorded in the till register is significant and squarely consistent with the State's case that the appellant stole the money.

[9] From the above proved facts the only reasonable inference, to the exclusion of others, is that the appellant having received the money from the relevant tourists stole it. That inference is safely consistent with all the proved facts.[5] The decision of the court *a quo* can therefore, in this respect, not be faulted. The appeal against conviction is plainly without merits. In fact during oral submissions counsel for the appellant, not without some hesitations conceded that the appellant's appeal strength lies more with the sentence than conviction. The appeal against conviction should therefore be dismissed.

[10] I now consider the appellant's appeal against sentence. Punishment of a convict is pre-eminently entrusted to the trial court. It is against that background that any court sitting as a court of appeal has very limited and yet defined powers before it interferes with the sentence imposed by the trial court. It is a delicate and difficult function for the court of appeal to consider whether or not to interfere with the sentencing of the trialcourt.[6] Maritz AJA as he then was in Harry de Klerk

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4 S v Noble, 2002 NR 67 at p 69 and R v Dhlumayo and Another, 1948 (2) SA 677 (A) at p 705.

5 R v Blom, 1939 AD 188 at p 202 - 203

6 The trial court is better positioned than a court of appeal to properly consider all factors relevant to sentencing.

v The State,[7] concisely and clearly illustrated the difficulties that confront courts of appeal on matters of sentencing under paragraph 6 of the judgment when he stated that:

> *"Moreover, a sentence is not inappropriate simply because a Court of appeal considers that the imposition of another type of punishment might also have been appropriate in the circumstances of the case. It is also not inappropriate because the Court of appeal would have imposed a slightly different sentence had the matter been called before it in the first instance. It is inevitable, as Schreiner J pointed out in R v Reece 1939 TPD 243 in fine, that different people will take different views on what an appropriate punishment would be in any particular case. Between the two extremities of a sentence which is inappropriately lenient and one which is inappropriately severe, is a range of appropriate sentencing options available to the trial Judge. In the judicial (and judicious) selection of a particular option intended to give effect to the interrelated components of Zinn's oft-applied triad (c.f. S v Zinn, 1969(2) SA 537 (A) at 540G) and best suited to satisfy the objectives of contemporary criminal penology (c.f. S v Vekueminina and Others, 1992 NR 255 (HC) at 257B and S v Khumalo and Others, 1984(3) SA 327 (A)), the trial Judge is allowed a margin of judicial appreciation. The selection of a particular sentencing option and the imposition thereof with a determined degree of severity (or leniency) will only be interfered with on appeal if the trial Judge has not exercised his or her discretion judicially and properly (c.f. S v Gaseb and Others, 2000 NR 139 (SC); S v Shikunga and Another, 2000 (1) SA 616 (NmS) at 631G). The litmus test to pass muster in that inquiry, reduced to its bare essentials - as Holmes JA observed in S v Rabie, 1975 (4) SA 855 (A) at 857E - is whether the imposed sentence is (a) vitiated by irregularity or misdirection or (b) is disturbingly inappropriate (Compare also: S v Van Wyk, 1993 NR 426 (SC) at 447G-H)."*

[11] The appellant's grounds of appeal are that the Magistrate erred in sentencing her to imprisonment when she is a first offender, when she has offered to repay the total amount embezzled and in the alternative that the sentence imposed is shocking and totally inappropriate. Regard being had to the record of proceeding in the court *a quo* it is clear that the court *a quo* sufficiently considered all the factors relevant to sentencing including the personal circumstances

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[7] Case no.: SA 18/2003, Unreported, Judgment delivered on 8 December 2006.

of the appellant. The issue of the appellant's offer to compensate the complainant was also considered. Although, we must all accept, imprisonment remains one of the harshest type of punishment in our country it remains recognized as an effective type of punishment especially in serious offences and where the criminal act committed by a convict is aggravated by particular circumstances. Although there may be a sense in giving a second chance to a first offender each case has to be assessed on its own facts.

[12] In this matter even if I were to be of the opinion that I would have sentenced the appellant slightly differently from what the court *a quo* did, that alone is not sufficient as a basis to interfere with its sentence. During submissions counsel for the appellant emphasised the fact that the appellant is currently out on bail and dismissing her appeal against sentence would mean that she will have to go back to prison having temporarily interrupted her imprisonment when she was granted bail. He, with force, submitted that the dismissal of the appeal against sentence will be devastating to the appellant. While I have sympathy that the dismissal of the appellant's appeal against sentence would rob the appellant of her temporary freedom after having been granted bail pending appeal -that unfortunately is irrelevant at this stage. There being no misdirection on the part of the trial court, the appeal against sentence should also fail. In the result, I accordingly make the following order:

(1) The appellant's appeal against both conviction and sentence is dismissed.

(2) The appellant's bail is cancelled with immediate effect.

NAMANDJE, AJ.

I agree

SIBOLEKA, J

ON BEHALF OF THE ACCUSED:	ADV VAN DER MERWE
INSTRUCTED BY:	STEPHEN F KENNY LEGAL PRACTITIONERS
ON BEHALF OF THE STATE:	MS EN NDLOVU
INSTRUCTED BY:	OFFICE OF THE PROSECUTOR-GENERAL