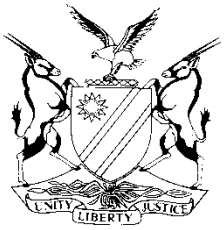

REPUBLIC OF NAMIBIA

CASE NO: CA 27/2011

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

PETER ITAI

Appellant

and

THE STATE

Respondent

CORAM: **VAN NIEKERK *et* PARKER, JJ**

Heard: 21 May 2012

Delivered: 25 June 2012

APPEAL JUDGMENT

VAN NIEKERK, J: [1] This is an appeal against sentence from the regional court sitting at Katutura, Windhoek. The appellant, who had legal representation in the court *a quo*, pleaded guilty to ten counts of fraud with a total value of N$299 000-00. The regional court magistrate took the counts together for purposes of sentence and sentenced the appellant to eight years imprisonment of which three years are suspended for five years on condition that the appellant is not convicted of the offence of fraud committed within the period of suspension.

[2] Before us Mr *Uirab* appears for the appellant as he did in the court *a quo*. Mr *Small* acts for the respondent.

[3] The appellant committed the acts of fraud in relation to his employer, a welfare organisation, while he was holding the position of administrative consultant and financial manager. He did this by adding a digit to the amount payable on each of ten cheques legitimately made out in his name. In other words, where a cheque had been made out for, say, N$1 515 with the approval of the complainant's Board, he would afterwards increase the amount by $50 000 by adding a 5 before the amount. It is not known whether he cashed the cheques or whether they were paid into his bank account, but it is common cause that he received the inflated amounts. The offences were committed on the following dates and involved the following amounts:

16 Dec 2006	N$50 000
17 Jan 2007	N$40 000
2 Feb 2007	N$10 000
9 Feb 2007	N$10 000
22 Feb 2007	N$60 000
22 Feb 2007	N$10 000
2 March 2007	N$50 000
19 March 2007	N$9 000
28 March 2007	N$40 000

18 April 2007 N$20 000

N$299 000

[4] The appellant is a first offender of Zimbabwean nationality. He was 30 years old when he committed the offences and 33 years old when he was convicted and sentenced. He is married and has two young children aged 6 and 2 years. In fact, the younger one was born while he was in custody awaiting trial and at the time of sentence he had not yet seen her in the flesh. The appellant spent just over 3 years in custody awaiting trial. The appellant experienced some health problems while awaiting trial, namely severe headaches and chest pains related to a heart condition and post-traumatic stress after his mother died. He received treatment and medication for these problems.

[5] The appellant completed his secondary education in Zimbabwe. He obtained a diploma in accounting under difficult personal circumstances before enrolling for a degree in accounting, which he had almost completed by the time of his arrest on 23 July 2007. The appellant worked for the complainant at a salary of N$15 000 for about 1½ years before he resigned and moved back to Zimbabwe, where he worked for a foundation which provides funding

for organisations like the complainant. His employment there was for a mere two months. He earned N$30 000 per month.

[6] The appellant told the court *a quo* that the committed the crimes because he needed money to purchase medicine for his mother who became very ill as a result of HIV-AIDS. She was allergic to the medication freely provided by the medical services in Zimbabwe, which led him to steal the money in order to purchase the required drugs at great cost. I shall revert to this in more detail later.

[7] The appellant called a witness who testified that he is willing to employ the appellant at his garage as an accountant at a salary of N$16 500 per month. He also offered to lend the appellant money for payment of a fine up to about N$20 000, should it be imposed.

[8] The State presented no evidence on sentence.

[9] The notice of appeal mentions eight grounds of appeal, which were expanded in Mr *Uirab's* heads of argument and in his oral submissions. By way of introduction counsel made the general submission that the judgment of the court *a quo* on sentence is riddled with misdirections and that should this Court find that there was indeed any such misdirection or irregularity committed, the appeal must succeed. This is clearly incorrect. It is only when the irregularity or misdirection is material that a court of appeal would be at large to interfere (*S v Tjiho* 1991 NR 361 (HC) at 366B).

[10] I now turn to the grounds of appeal. It is convenient to consider the fourth and fifth grounds together. They are that the trial magistrate misdirected himself by finding that there was no real need that led the appellant to defraud the complainant and by finding that the appellant defrauded the complainant because of greed.

[11] The magistrate in his judgment made certain calculations also mentioned during the cross-examination of the appellant by the prosecutor and stated (the insertions and omissions are mine):

> "Accused committed these offences over a period of four months and two days. Accused testified under oath and informed the court that the cost for the drug tablets for his mother cost .....N$4 000 ..... to N$5 000 per week. As Ms Tait pointed out during cross-examination if the cost was N$ 5000 per week, multiply 4 gives ..... N$20 000 [per month]. Multiply 4 gives one N$80 000 for the 4 months Accused committed these offences. Accused also indicated that he spent N$40 000 to repair his motor vehicle. A total then of ..... N$120 000. As the Court understood Accused with the rest of the money he supported his wife and children in Zimbabwe. At the time the Accused committed these offences he was employed earning a bruto income of ... N$15 000 per month. During the four months in which he defrauded the complainant with the amount of N$299 999 ... he also earned ... N$60 000 as salary. Having regard to the size of amounts the Accused defrauded the Complainant with and the amount remaining after the cost for the drug tablets was deducted, it shows that he had used the proceeds of his crimes to finance a lifestyle that was beyond his financial means. Which clearly shows that the commission of the offences was motivated not by need but by greed."

[12] Mr *Uirab* submitted that the magistrate misdirected himself by making careless, reckless, rough and unreasonable calculations on which he based his conclusions. He submitted that the magistrate erred by failing to consider that the amounts for the costs of the medication were mere estimates, that the appellant also had to pay the persons he hired to purchase the drugs in South Africa and for their transport; and that he had to maintain his ill mother and pay for a qualified nurse to look after her. Counsel emphasized that these facts were never disputed by the State.

[13] In regard to the fifth ground of appeal counsel submitted that the evidence about his mother's condition, her allergy and the purchasing of the medicine was not disputed and that it was clear that the appellant did not have the means to finance his mother's medical treatment and care. As such, it was submitted, there was a real need that motivated the appellant to defraud his employer.

[14] In regard to these submissions there are several observations to be made. Firstly, the State disputed by means of cross-examination that the initial motivation to defraud the complainant was triggered by his mother's illness and I think rightly so. The appellant admitted that the first offence was committed on 16 December 2006 when he altered a cheque for N$1 515 to one for N$51 515. That was before he took leave and left for Zimbabwe on 20 December 2006 for the Christmas holiday. It was only during that holiday that he learnt about his

mother's illness and that she was allergic to the medication routinely offered. Initially he stated a number of times during cross-examination that he found out about her condition during January 2007. After the prosecutor requested to inspect the charge sheet, which clearly shows that he already committed the first offence on 16 December, he changed his testimony by saying that he learnt about his mother's condition during December 2006/ January 2007. The appellant further testified that he started arranging for the medication from about 15 January 2007 onwards when he returned to Namibia.

[15] The appellant testified that at first he used part of his salary to purchase the drugs, but that was not sufficient for a whole months' supply. He recounted at length how he then began to borrow money from almost all his friends and how he could not keep up with the repayments until they stopped helping him. Later he continually had to borrow from a new person every time, because he had exhausted all his options without paying back. He also tried borrowing from the complainant, but as there was no policy in place for providing loans to employees, this was problematic. He even tried to take the issue to the complainant's board, but to no avail. Eventually as a last resort he began defrauding and stealing from his employer in a desperate effort to save the life of his mother with whom he allegedly had a very strong bond. Although the appellant did not mention a specific period of time during which all this was going on, the clear and logical implication of

his testimony is that at least some weeks must have passed before he turned to fraud and theft.

[16] Yet he already committed the second offence on 17 January 2007, a mere two days after his return from holiday, when he stole N$40 000. Thereafter he stole N$90 000 in rapid succession on four occasions during February 2007. To my mind it is abundantly clear that, at the very least, the first two offences, if not more, were not motivated by any need to purchase drugs or help his mother and that the appellant clearly lied about such an alleged need.

[17] A second observation concerns the submission that the magistrate made "rough" and "unreasonable" calculations by, *inter alia* calculating the cost involved in providing the medication at N$4 000 to N$5 000 per week. Counsel submitted that the magistrate failed to take into regard that, apart from the cost of the medication, there were also service, transport and delivery costs. However, a reading of the record clearly shows that the magistrate's calculations are squarely based on the appellant's testimony. During evidence in chief these were the exchanges recorded between him and his counsel (Record p 49, lines 7 - 13):

> "What was the cost of these tablets to provide them to your mother? --The cost overall, four, five thousand a week is what I would spend to get someone [to] get them from South Africa and pay for them and leave them in Zimbabwe for her.

> Around four to five thousand per week (intervention) --- Yes, four to five thousand per week."

[18] The third observation I wish to make is that the prosecutor clearly questioned the probability that the appellant did in fact spend the money he stole in the way that he said he did. Apart from what I have already dealt with before in this judgment, the prosecutor took issue with the fact that the appellant did not provide any proof for any of the disbursements made. In some instances the appellant stated that there were no receipts, for instance in relation to several transactions in which he handed over large sums of money, e.g. up to N$20 000, to certain bus drivers. This evidence is inherently highly improbable. Furthermore, the appellant testified that the receipts for the drug purchases were handed to his wife upon delivery. Yet none of these were handed in as exhibits.

[19] The appellant allegedly hired a full time nurse to care for his mother. He signed no written contract nor obtained any receipt reflecting payment for her services.

[20] The appellant was at pains to hand in documentary evidence, such as birth certificates of his children, a marriage certificate, death certificates of his parents and documents relating to his medical condition. Yet about matters which allegedly were the very motivation why he was driven to commit the offences he did not provide a scrap of paper. As Mr *Small* submitted, one would have expected that the

appellant, being an accountant, would have been more aware than most of the need to obtain and keep documentary records. It further seems to me that the appellant must have realized that sooner or later his crimes would be discovered and that an explanation would be required. If it indeed were so that the only reason why he committed these offences was because of noble concern for his mother, the probabilities are overwhelming that he would have kept documentary records of his expenses.

[21] Apart from this, a reading of the evidence shows that the appellant himself was vague about the amounts he paid the nurse and provided to his wife and child and spent on his own travelling. Mr *Uirab* stressed that the State did not dispute his evidence. Without any proper details and documentation if would be difficult for the State to have done so. It seems to me that the appellant forgets that the onus is on him to prove the mitigatory factors on a balance of probabilities. This being so, one expects that the appellant should have provided more detailed figures. In my view the appellant can count himself fortunate that his explanation for committing the crimes was to some extent accepted by the trial magistrate. Even if the magistrate in doing so overlooked that some of the money was spent on the nurse and some other expenses, it is clear that the appellant's testimony does not account for all the money stolen and that he had large amounts at his disposal for which no satisfactory explanation has been

given. Coupled with this, the frequency with which the money was stolen and the huge amounts involved do convey an impression of greed. Mr *Uirab* submitted that the magistrate erred by concluding that the appellant stole "to finance a luxurious lifestyle". However, this is not what the magistrate stated. He only referred to a lifestyle beyond the appellant's means.

[22] In conclusion, I can find no misdirection by the magistrate which could form the basis of upholding these grounds of appeal. They are dismissed.

[23] A further ground of appeal is that the magistrate misdirected himself by finding that the appellant showed no remorse without properly considering all the circumstances of the case and ignoring the appellant's plea of guilty. The portion on the judgment complained about reads:

> "Accused informed the Court that he has remorse for what he did. It might be so that Accused now after he was caught out and convicted has remorse. But his conduct of committing these offences for 10 times over a period of time hardly shows remorse on his side."

[24] It is so that the appellant pleaded guilty. In his written plea explanation as well as throughout his testimony on various occasions and in different ways he stated that he knew he acted unlawfully and that he is remorseful. These are indicators which would tend to support a finding of genuine remorse.

[25] On the other hand there is the fact that the appellant was not truthful about the reason for starting to commit the offences and about how he spent the stolen money, at least in respect of the first two offences. For the reasons already discussed elsewhere in this judgment there are also other questions that hang over the credibility and probability of his explanation. In my view genuine remorse cannot be expressed if lies are told about the motivation and explanation for committing the offences to place the perpetrator in a more favourable light (see *S v Seegers* 1970 (2) SA 506 (A)).

[26] Furthermore, the appellant must have realized that he would be found out in the end, partly because all the cheques were made out in his name. Once apprehended there seems to have been no sensible alternative but to plead guilty. Perhaps this is a neutral indicator which neither favours nor detracts from a finding about whether he had genuine remorse.

[27] The magistrate, somewhat unfairly, in my view, stated in his judgment that the appellant might have remorse after he was convicted. In truth the appellant pleaded guilty and already expressed remorse before conviction. The magistrate also states that “his conduct of committing these offences for 10 times over a period of time hardly shows remorse on his side”. Here the magistrate may have misdirected himself to some extent. Perhaps he intended to convey that the appellant had ample opportunity to reflect and stop his

criminal course of conduct. However, it is quite possible for an offender to repeat the same criminal conduct over a long period of time and still express genuine remorse once caught.

[28] Any misdirection by the magistrate in the assessment of the appellant's remorse is in my view not material and overshadowed by the fact that the appellant clearly lied as discussed in paragraph [16] above. As such the expressions of remorse sound hollow and suspect.

[29] A further ground of appeal is that the court *a quo* erred in not imposing a fine or a wholly suspended sentence. In this regard Mr *Uirab* submitted that the appellant had before conviction already been punished in several respects. Firstly, the appellant had already spent slightly over 3 years in custody awaiting trial. This, he submitted, was already more than reasonable punishment for having committed this offence. If this is so, the logical effect of counsel's submission is that the appellant should not receive any further punishment, not even a fine or a wholly suspended sentence! Ultimately counsel was not prepared to submit this in so many words.

[30] Secondly, counsel pointed out that the appellant had lost the lucrative employment he had in Zimbabwe. Thirdly, he suffered as he could not be with his family for so long. I note that the second child was born while he was in custody and that he had not seen her since her birth. Fourthly, all these factors contributed to a deterioration in the

appellant's health. Finally, the appellant lost his mother as he was detained and could no longer provide her with the required medication.

[31] All these events are indeed traumatic not only for the appellant but also for his family. However, when it comes to the question of whether a custodial sentence is appropriate in the circumstances of this case I can do no better than quote from the judgment of *S v Sadler* 2000 (1) SACR 331 (SCA) in which MARAIS AJ so eloquently stated the following (at 335G-336B):

> "So called 'white-collar' crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of 'white-collar' crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for 'white-collar' crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from 'respectable' backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.
>
> [12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it.
>
> [13] It is unnecessary to repeat yet again what this Court has had to say in the past about crimes like corruption, forgery and uttering,

> and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration."

[32] The words in paras [11] and [13] were adapted by the Namibian Supreme Court in *S v Munyama* (Case No. SA 47/2011 – unreported judgment dated 9 December 2011) when it stated (at p10):

> "[19] It is unnecessary to repeat yet again what the Court below had said about crimes like fraud and corruption. It is sufficient to say that that Court was on point. They are serious crimes, the deleterious impact of which upon societies is too obvious to require elaboration. Dishonesty of the kind perpetuated by appellant for no other reason than self-enrichment, and entailed *(sic)* gross breaches of trust should be visited with vigorous punishment where necessary".

[33] In the *Sadler* case the State appealed against wholly suspended sentences and a fine of N$500 000 for several counts including corruption, forgery and uttering and fraud. The Supreme Court of Appeals set aside the non-custodial sentences and stated that the circumstances of that case called for the imposition of direct imprisonment and that the interests of justice will not be adequately served by leaving the sentences of the court below undisturbed. The Court took 13 counts together and sentenced the respondent to four years' imprisonment. In doing so the Court said (at 337C-D):

> "..... I bear in mind that respondent has already suffered in many ways. He has had to bear the strain and anxiety of the criminal

> proceedings for an unusually long time. His trial had to recommence after it had run for well-nigh a month because of a successful recusal application. The appeal by the Attorney - General has prolonged the process and respondent has had to endure the suspense of not knowing what his fate would ultimately be. He has no doubt had to live with a constant sense of guilt for subjecting those near and dear to him to the trauma and disruption of their family life which his fall from grace must have caused. One cannot but feel deeply for them. Regrettably, one cannot allow one's sympathy for them to deter one from imposing the kind of sentence dictated by the interests of justice and society."

[34] In the appeal before us the amount involved is large, the appellant was in a position of trust, ironically defrauding and stealing from a welfare organisation assisting sufferers of HIV-AIDS. A large part of the money stolen was used for no other reason than self-enrichment. The manner the appellant committed the crimes entailed gross breaches of trust. The appellant was not genuinely remorseful. In my view his moral blameworthiness and all the circumstances of the case call for the imposition of a period of effective imprisonment.

[35] Appellant's counsel raised an argument before us, namely that the trial court misdirected itself in concluding that the fact that the appellant committed offences over a period of time must be viewed as an aggravating factor. This submission is not covered by the notice of appeal and I shall not spend more time on it.

[36] Another ground of appeal is that the trial court imposed a sentence that is so excessive that no reasonable court would have

imposed it in the circumstances of this case. It was further submitted that the court erred by not imposing a shorter period of imprisonment which is partly suspended. In this regard appellant's counsel relied on the *Munyama* case (*supra*) and submitted that the case is comparable to the present one. In the *Munyama* case the appellant was given a sentence of 10 years imprisonment of which 3 years were suspended. The Supreme Court found on appeal that the trial Court did not commit any misdirection, but that the sentence conveyed a sense of shock and that there was a striking disparity between the trial Court's sentence and the sentence which the Supreme Court would have imposed (p. 10, para [18]. This would be an indication that the trial Court's discretion in imposing sentence was unreasonably exercised (p. 9, para [15]). The Supreme Court set the sentence aside and replaced it with a sentence of 6 years imprisonment of which 3 years were suspended.

[37] There are indeed many aspects of these two cases that are comparable. The offences were committed at about the same time. The convictions and sentences occurred at about the same time. The appellants were both convicted of fraud involving several acts of deliberate and planned dishonesty over roughly the same period of time. Both appellants offered during the sentencing proceedings to compensate the complainant in future. Both appellant are married and have families with young children who are suffering. Both are first

offenders. In *Munyama's* case the appellant pleaded not guilty, but some time into the trial made material admissions without admitting all the elements, which eased the State's burden in proving the case against him. That appellant never testified during the main trial or during the sentence proceedings. In this appeal the appellant pleaded guilty and exposed himself in the witness box. While the appellant in *Munyama* never offered an explanation under oath, the appellant offered an explanation which is at least partly untruthful and the rest appears suspect. Expressions of remorse, such as they are, in both cases do not carry that much weight. Both appellants suffered health problems for which they were being treated. Both held positions of high trust with their employers which they grossly abused.

[38] The major differences which seem to me to be relevant here are the following. In the case of *Munyama* the potential prejudice was about N$346 000 and the actual amount stolen was just over N$100 000, while in this case the actual loss is N$299 000. In *Munyama* the appellant was 54, whereas the appellant is much younger at 33 years. In the first case the appellant was released on bail early, whereas the appellant in this case awaited trial in custody for over 3 years. In the *Munyama* case the appellant's sentence was reduced from 10 years (of which 3 years are suspended) to one of 6 years imprisonment (of which 3 years are suspended). In this case the appellant received a sentence of 8 years of which 3 years are suspended.

[39] Although the appeal in *Munyama* eventually did not turn on the issue of consistency in sentencing, the Supreme Court has made it clear that in the interests of legal certainty and respect for the judicial system courts should generally strive for uniformity of sentences in comparable cases, while balancing this principle against individualisation of sentences (p 7-8, para [12]). At the same time it has acknowledged that there cannot be perfect equality between accused persons in the conduct and outcome of criminal trials (p.8, para [13]).

[40] Mr *Small* submitted upon a question of the Court that the Supreme Court has not set a "standard" by imposing the sentence that it did. However, I think that all courts below the Supreme Court, including this one, should obviously take note of what and in which circumstances, in the view of the Supreme Court, being the highest Court of the land, is a sentence which creates a sense of shock and use that as a measure in passing their own sentences or in assessing on appeal whether a sentence should be interfered with or not. As was stated in *Munyama* (at p 9, para [17]): "The hierarchical structure of our Courts is such that where ..... difference[s] ..... [exist] it is the view of the appellate Courts which must prevail. (*S v Sadler, supra,* at 335F)."

[41] Applying this reasoning it seems to me that the two cases being compared are such that the Supreme Court's sentence is indeed, with respect, a useful guideline which should be followed. Should the need arise in future to deviate from that guideline, a proper case must be made out, based on the then applicable circumstances of the case, which may include the need to increase sentences because of a failure of earlier sentences to deter perpetrators or because of a significant rise in prevalence of the particular offence.

[42] The fact that the appellant in this case stole about N$200 000 more than was the case in *Munyama* is significant and should be reflected in any sentence imposed. However, I also think that the time the appellant spent in custody should be adequately reflected. If it were not for this latter aspect in the current case, I would not have had, bearing in mind the measure provided by the Supreme Court, any problem with the sentence imposed by the learned magistrate who generally wrote a balanced judgment on sentence. However, if I take into consideration the time the appellant spent in custody, it seems to me that this aspect was not properly accounted for in the sentence imposed. I have debated with myself whether the period of imprisonment imposed should be reduced, or whether merely the period of suspension be increased. Having done so, I think that it would be best to reflect this aspect as a factor reducing the sentence in totality.

[43] Having reached this conclusion, I do not deem it necessary to deal with the remaining grounds of appeal, which are in some sense related to the present.

[44] The result then is as follows:

1. The appeal against sentence succeeds.
2. The sentence of the regional court magistrate is set aside and substituted with a sentence of 7 years imprisonment of which 3 years are suspended for five years on condition that the appellant is not convicted of an offence of fraud committed during the period of suspension.
3. The sentence is backdated to 7 December 2010.

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VAN NIEKERK, J

I agree.

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PARKER, J

Appearance for the parties

For the appellant: Mr B Uirab

Directorate of Legal Aid

For the respondent: Mr D F Small

Office of the Prosecutor-General