REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 36/2011

In the matter between:

VICTORIA SKRYWER **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Skrywer v State* (CA 36/2011) [2012] NAHCMD 7 (3 October 2012)

Coram: VAN NIEKERK J and PARKER AJ

Heard: **21 October 2011**

Delivered: **3 October 2012**

Flynote: Criminal procedure – Sentence – Youthful offenders – Importance of taking into account such personal circumstances – Crime committed by appellant together with older accused persons – Court should be alive to possibility that appellant was influenced by the older co-accused.

Summary: Criminal procedure – Sentence – Custodial punishment not suitable punishment for youthful offender, particularly when he or she is also a first offender – Where crime committed by accused together with older accused persons – Court should be conscious of the possibility that the appellant could have been influenced by her older co-accused.

ORDER

The sentence imposed by the court below is set aside and there is substituted therefor the following:

A fine of N$1,000.00 or five months' imprisonment wholly suspended for five years on condition that the appellant is not convicted of theft committed during the period of suspension. The sentence is backdated to 5 October 2010.

JUDGMENT

PARKER AJ (VAN NIEKERK J concurring):

[1] The appellant (accused No. 4) and three co-accused were charged with one count of theft of N$2,000.00 in the Mariental magistrate's court. All four accused persons pleaded not guilty. After their trial, they were all convicted, and each accused person was sentenced to 12 months' imprisonment. This appeal concerns accused no. 4 only; and she appeals – as appears in the notice of appeal filed on 8 April 2011 – against sentence only. In the notice of appeal the appellant sets out seven grounds of appeal; and the learned trial magistrate filed her response thereto.

[2] In summary the conviction is based upon the following facts:

Accused no. 1, a police officer, was on duty on 14/3/2009. That evening accompanied by a colleague, he gave a lift in the police van to three female friends namely, accused no. 2 and no. 3 and the appellant. While on their way to the residential area they encountered the complainant, who was lying in the street, clearly drunk. The two policemen loaded the complainant into the back of the van where accused no. 2 and no. 3 and the appellant were sitting. Accused no. 1

instructed the three women to search the complainant to see if they could find anything on him. According to the appellant she was afraid and sat in the corner of the van. Her two co-accused searched the complainant. Accused no. 3 found a wallet and threw it at her, saying that she should check its contents. She did so and found only papers, whereupon she threw the wallet back. A short while later accused no. 1 stopped the van, the three women and accused no. 1 got off and accused no. 1 enquired whether they found anything. Accused no. 2 handed accused no. 1 N$100. He drove off again. Accused no. 2 also gave the appellant N$100, but later asked it back. It later transpired that accused no. 2 took N$2 000 from the complainant. The three women spent the evening drinking alcohol bought with some of the money.

[3] Although the appellant initially pleaded not guilty and denied taking any money, she did not challenge any of the State witnesses and admitted her role in the crime when she testified. During submissions she admitted that she was guilty as she knew from the beginning that the money was taken from the complainant without his consent, but she nevertheless proceeded to enjoy the benefits of the money by drinking the alcohol bought with the stolen money. Based on common purpose the four accused were convicted of the theft of the money.

[4] At the commencement of the hearing of this appeal, Ms Husselman, counsel for the respondent (the State), sought to impugn parts of the heads of argument of Mr McNally, counsel for the appellant, on the basis that they deal with issues that, according to Ms Husselman, were ‘not raised in the original Notice of Appeal’ and so the Court should not entertain them. The reason, according to Ms Husselman, is that as respects those issues ‘the learned trial magistrate did not have a chance to respond’ thereto and ‘so therefore it is difficult for the State to argue on them because the State does not have the magistrate’s input’.

[5] I accept Ms Husselman’s argument as having some merit – in principle. But it must be remembered that this being an appeal, it is to the record of proceedings that the Court must have recourse as it considers the appeal. Of course, the grounds of appeal are indubitably peremptory in such proceedings, and the response thereto by the trial magistrate in question is crucial. Thus, I make the point that while counsel’s

heads of argument are always of assistance to the Court in an appeal such as the present, they are not grounds of appeal; neither are they capable of supplanting or supplementing the grounds of appeal filed by the appellant. With these conclusions in my mind's eye, I now proceed to consider the appeal based on the grounds of appeal and against the backcloth of the record of proceedings, and in doing so, I have consulted the authorities referred to the Court by counsel in their submissions.

[6] It is trite that punishment falls within the ambit of the discretion of the trial court and that the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by irregularity or misdirection. Another test applied by an appellate court is whether the sentence is so manifestly excessive that it induces a sense of shock in the mind of the appellate court. And in deciding whether a sentence is manifestly excessive, the court ought to be guided mainly by the sentence sanctioned by statute, if applicable, or sentences imposed by this court in similar cases, of course, due regard being had to factual differences. (See *S v Simon* 2008 (2) NR 500 where authorities in Namibia and outside Namibia are cited with approval.)

[7] The pith and marrow of the appellant's grounds of appeal is primarily that a custodial sentence is not appropriate on account of the youthfulness of the appellant at the time of the commission of the offence and the limited part she played in the crime. She was 19 years old. Of course, I accept Ms Husselman's argument that 'youth per se is no reason to impose a more lenient sentence on the appellant: 'A suitable sentence', counsel submits, 'must serve as a warning to her in order to warn (her away from) the path of crime.' Mr McNally's argument contrariwise is primarily that the learned magistrate dismissed the youthfulness of appellant out of hand without any compelling reasons to do so,... and the learned magistrate 'reasoned that the appellant should have known better since she was the mother of a child'. I accept Mr. McNally's submission that such approach is, with respect, fallacious. In my opinion, it is a misdirection. The irrefragable fact that remains is that although the appellant was not a juvenile, she was still a youth and the learned magistrate ought to have treated her as such. By introducing the qualification of motherhood, the learned magistrate without justification took the appellant from the bracket of youthful

offenders and thereby denied her the advantageous considerations which the authorities have proposed when sentencing youthful offenders. (See, e.g. The *State v Timi Issack and Others*, High Court Review Case No. 2880/92 (Unreported); *George Jonker v The State* CA 58/95 (Unreported); *The State v Sagarias Frederick*, Case No. High Court Review Case No. 2722/93). (Unreported).

[8] Of course, I accept Ms Husselman's argument that there is no rule of law which precludes a court from sentencing a youth to a term of imprisonment. But as Mr McNally submitted – correctly, in my opinion – a youthful offender who is a first offender, as is in the instant case, should as far as possible be kept from prison. (See *S v Salome van der Berg* 2003 NR 69 (HC); *S v Erickson* 2007 (1) NR 164.) And from the record it seems to me that there are clear and ample markers pointing in that direction, namely that the appellant should be kept from prison.

[9] But that is not the end of the matter. Ms Husselman argues that 'the appellant knew that her co-accused (accused No. 1) was a police officer who was on duty and as such in a position of trust and power. In acting in concert with him she participated in and facilitated his (that is, accused No. 1's) abuse of such trust and power'. For that reason, it would seem, Ms Husselman does not see how the learned magistrate can be faulted when the learned magistrate 'made it perfectly clear that she had convicted the five accused on the doctrine of common purpose and for that reason imposed the same sentence on all four accused'. I do not, with respect, think the submission has merit in favour of the respondent. With respect, I fail to see by what imagination – legal or scientific – can one say that a 19-year old person 'participated in and facilitated his (that is, accused No. 1's) abuse of such trust and power', considering the fact that accused No. 1 is an adult and the repository of trust and power – official police power.

[10] In this regard, I cannot do any better than to refer to the following statement by Strydom AP (as he then was) when faced with a similar situation in *The State v Timi Issack* High Court Review Case No. 2880/92 (Unreported) at p. 3:

In this instance the crime was committed together with other older accused and the magistrate should at least have been conscious of the possibility that accused numbers 2 and 3 could have been influenced by their co-accused.

[11] Accordingly, in my opinion, Ms Husselman's submission tends to undo, rather than advance, the case of the respondent. I find that the fact that the 19-year old acted 'in concert', as Ms Husselman puts it, with an adult who is in authority – official police authority – should be a strong mitigating factor in favour of the appellant. I also bear in mind that accused no 2 and no 3 were respectively 21 and 29 years old and readily complied with accused no 1's instruction that they should search the complainant, before accused no 3 involved the appellant by throwing the wallet at her and telling her to go through its contents. This is a further indication of influence by older companions. In any case, I do not think it is reasonable for a court to simply impose the same sentence on all the participants charged with an offence on the doctrine of common purpose without more. It is my view that if a court did that it would not be far-fetched to conclude that the court failed to take into account the element of personal circumstances of the accused persons which is part of the triadic factors to be taken into account in sentencing, as well as the circumstances of the crime which 'a sentence', according to Strydom JP (as he then was), 'cannot ignore' (*Immanuel Reynecke v The State* Case No. CA 63/1996 (Unreported) at p.3). In any case, Ms Husselman did not refer to the Court any binding authority to support the submission that where more than one accused persons are convicted of an offence on the doctrine of common purpose, then the court must – without any more consideration – impose the same sentence. I do not think *S v Nakale and Others* (No. 2) 2007 (2) NR 427 (HC) which Ms Husselman referred to the Court is authority for any such proposition of law. In my view, therefore, where a youth is such a participant he or she must be punished, but she should not lightly be punished with imprisonment, taking into account, of course, the facts and particular circumstances of the case. (See the high authority of Strydom JP (as he then was) in *The State v Timi Issack and Others* supra.)

[12] Thus, in imposing the same sentence on all four accused persons the learned magistrate misdirected herself.

[13] A somewhat related ground of appeal rests on the basis that the learned magistrate erred in failing to apply her mind to considering a punishment other than imprisonment in view of the appellant's limited participation in the commission of the crime, her personal circumstances, 'coupled with the learned public prosecutor's suggestion of a fine as punishment'. In my view, the last leg has no merit. As I have said previously, it is trite that punishment is within the ambit of the discretion of the trial judicial officer. He or she does not share that discretionary power with any public prosecutor.

[14] *S v Brand and Various Other Cases* 1991 NR 356 at 357E which Ms Husselman referred to the Court, tells us that –

> 'Not all offences warrant a sentence of imprisonment and a first offender should not be sent to gaol if there is some other punishment.'

In the instant case, did the learned magistrate consider any punishment other than imprisonment? She did; but only perfunctorily, in my view. She did not pursue her enquiry to its logical conclusion. As respects this aspect, Ms Husselman argued that since the appellant indicated that she was unemployed and so she was unable to pay a fine, it would have, in Ms Husselman's words, been 'an empty, meaningless gesture,' relying, I suppose, on *S v Lekgale and Another* 1983 (2) SA 175 (B). With respect, I do not accept Ms Husselman's argument. The *S v Lekgoale* proposition needs qualification. The accused may be poor but her fine could be paid by friends and relatives. In the present case, since the appellant was a youth and unrepresented, the learned magistrate should have enquired further to see if there was anybody – a friend or a family member – who could pay the fine. The learned magistrate did not do that; her failure to do so is unjudicial and an irregularity.

[15] It has been said that an appeal court can interfere with a sentence imposed by the trial court where the dictates of justice are such as clearly to make it appear to this Court that the trial court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently

from what he or she did; then such action by the trial court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh (*Ainackey Shikesho v The State* Case No. CA 111/2008 (Unreported). Keeping in view my finding of misdirections and irregularities, I think this Court is entitled to interfere with the sentence imposed by the trial court in the interests of justice. And on the facts and in the circumstances of the crime, I conclude that the sentence is so manifestly excessive that it induces a sense of shock in the mind of this Court.

[16] In *Van Rooyen and Another* 1992 NR 65 at 188H-I the Court cited with approval the principle enunciated in *S v Scheepers* (1977 (2) SA 154 (A) at 155A-B) that –

> Imprisonment is not the only punishment which is appropriate for retributive and deterrent purposes. If the same purposes in regard to the nature of the offence and the interest of the public can be attained by means of an alternative punishment to imprisonment, preference should, in the interests of the convicted offender, be given to alternative punishments in the imposition of sentence. Imprisonment is only justified if it is necessary that the *offender be removed from society for the protection of the public* and if the objects striven for by the sentencing authority cannot be attained with any alternative punishment. (Italicized for emphasis)

And as respects the efficacy and appropriateness of suspended sentence, in *Persadh v R* (1944 NPD 357), the learned magistrate had stated in her reasons for her decision that a fine or suspended sentence would not have punitive, reformative or deterrent effect. The appeal Court rejected the learned magistrate's approach thus:

> 'In the ordinary way it (suspended sentence) has two beneficial effects. It prevents the offender from going to gaol ... The second effect of a suspended sentence, to my mind, is a matter of very great importance. The man has the sentence hanging over him. If he behaves himself he will not have to serve it. On the other hand, if he does not behave himself, he will have to serve it. That there is a very deterrent effect cannot be doubted (at 358).'

In *S v Goroseb* (1990 NR 308 at 309H-I), this Court as far back as 1990, accepted the approach in *Persadh*, which, the Court then observed, has been adopted in a number of cases.

[17] Ms Husselman referred to the Court a number of cases to support her argument that custodial sentences were imposed by this Court on youthful offenders like the appellant. I accept the submission, but I add this caveat. We are reminded by Strydom JP (as he then was) in *Immanuel Reynecke v The State* supra that sentence cannot ignore the personal circumstances and the circumstances of the crime. I have consulted those cases, and I am not persuaded that the personal circumstances of the appellant in the present case and those of the accused/appellants in those cases and the circumstances of the crime in the present case and in those cases are similar on any pan of scale. For example, none of the youthful offenders in those cases was a young mother; and, furthermore, as Mr McNally, submitted, in *Deon Angula v The State* (judgment delivered on 12 December 2001) the offence involved was fraud. And in *S v Brand and Various Other Cases* supra at 357D, the Court was referring to 'cases which involve violence and housebreaking'. I also bear in mind that the appellant in this case, although she pleaded not guilty, showed remorse by not contesting the evidence against her any further and by admitting her guilt both in the witness box and during her address on the merits of the case. This is to my mind and indication that she is a good candidate for reform.

[18] Keeping the aforegoing reasoning and conclusions and the authorities thereanent in my mental spectacle, I am impelled to the conclusion that a suspended sentence will meet the ends of justice in the instant case.

[19] Whereupon; I make the following order:

The sentence imposed by the court below is set aside and there is substituted therefor the following:

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A fine of N$1,000.00 or five months' imprisonment wholly suspended for five years on condition that the appellant is not convicted of theft committed during the period of suspension. The sentence is backdated to 5 October 2010.

C Parker

Acting Judge

K van Niekerk

Judge

APPEARANCES

APPELLANT:	P McNally Of Lentin, Botma & Van den Heever, Keetmanshoop.
RESPONDENT:	I Husselmann Of Office of the Prosecutor-General, Windhoek.