



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR75/2013

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

And

JEREMIA J. TUMUNA

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 1564/2013)

Neutral citation: S v Tumuna (CR 75/2013) [2013] NAHCMD 327 (8 November 2013)

CORAM: SMUTS, J et UNENGU, AJ

Delivered on: 8 November 2013

ORDER

That the conviction is confirmed but, not the sentence. The Registrar is directed to provide a copy of this judgment to the office of the Prosecutor-General.

JUDGMENT

SMUTS, J.: [1] This matter has come before me by way of automatic review. The accused was charged with theft of N\$16 483 on 28 December 2012 at Marina Toyota, Otjiwarongo. On 16 October 2013 the accused pleaded guilty in the magistrate's Court, Otjiwarongo but stated that he 'only stole N\$9000 and not the amount stated'. The State then accepted the plea of theft in the amount of N\$9000.

[2] In the course of questioning by the magistrate under s112(1)(b) of Act 51 of 1977, the following was, *inter alia*, stated:

'Q: Were you forced or influenced to plead guilty?

A: No

Q: Why do you plead guilty what did you do wrong?

A: Because I took the money without permission because of the problem that I was having as my mother was sick and in the hospital and y daughter was also operated on.

Q: Was that on 28th December 2012?

A: Yes.

Q: Was that or near Marina Toyota Otjiwarongo in the district of Otjiwarongo?

A: Yes it was at Marina in the store.

Q: It is alleged that you stole money the property of or in the lawful possession of Van Wyk Andreas Bathlomeus or Marina Toyota. Do you admit or dispute that?

A: I admit that.

Q: How much money did you take?

A: I took N\$9000.

Q: How did you take the money?

- A: I was working at the till and the people used to come and pay at my till and then I took it from there.
- Q: Did you have owner's permission to take the money?
- A: I had no permission.
- Q: What did you want to use the money for?
- A: I used that money for the treatment of my mother and my daughter and I took it for myself and was not having the intention to take it back.
- Q: It is alleged that you intentionally stole the money?
- A: Yes, I had the intention to steal the money because those things were pressuring me as I was the only one who was working at home.
- Q: Did you know that what you were doing was wrong?
- A: Yes I knew that but I was trying to save the life of those people.
- Q: Did you also know that it was unlawful to do so?
- A: Yes I knew that.'

[3] The accused thus admitted the elements of the crime and the presiding magistrate correctly convicted him of theft.

[4] The prosecutor thereafter stated that the accused had no previous convictions and requested that the matter be finalised. After the accused's rights were explained to him, he stated in mitigation that he is 42 years of age, single and a father of 5 children and also looking after 2 children of his brother. He stated that he was unemployed and made a living by doing part-time work. He asked the court to sentence him to a fine of N\$300 and further stated that he was sorry for what he had done and said that it was because of problems he experienced at the time.

[5] The presiding magistrate sentenced the accused to a fine of N\$3000 or twelve months imprisonment of which an amount of N\$2000 or six months imprisonment were suspended for a period of 3 years on condition that the accused was not again convicted of the offence of theft during the period of suspension. In passing the sentence, the court referred to the fact that the

accused was a first offender and had shown a degree of remorse for his action. But the magistrate correctly acknowledged that the offence was serious and correctly referred to the aggravating feature of the offence being 'that the accused stole the money from his employer which action is tantamount to biting the hand that feeds you'. The presiding magistrate thereby clearly acknowledged that the theft had occurred in circumstances where the accused was in a position of trust in the context of his employment. The magistrate further referred to the fact the amount of N\$9000 had not been recovered. The magistrate also referred to the accused's version that the amount was used to assist his ailing mother and daughter but further noted that the accused had not taken the court to do his confidence in placing evidence before the court to demonstrate that the money was used for that purpose.

[6] Despite the fact that the accused was a first offender and the mitigating factors raised by him with reference to his personal circumstances, (being the father of 5 children and also looking after two children of his brother), I find that the sentence is startling inappropriate in the circumstances by failing to properly take into account the seriousness of the offence and interests of society.

[7] The magistrate had, as I have already pointed out, correctly acknowledged that the crime had been perpetrated by the accused who was in a position of trust to his employer. It would also appear from the record, as was also acknowledged by the magistrate, that the money had not been recovered. These are aggravating factors. Insufficient weight was given to them. The magistrate also did not investigate the ability of the accused to pay a fine and repay what he had stolen. This should have occurred.

[8] Despite the acknowledged aggravating features, the magistrate proceeded to impose a fine. The fine itself does not in my view accord sufficient weight to the seriousness of the crime. The accused admitted stealing an amount of N\$9000 from his employer. The effective fine imposed upon him is N\$1000,

given the suspension of the balance. Despite being a first offender and taking into account his personal circumstances, this is a shockingly inappropriate sentence. What message does it send out? Theft of N\$9000 – not recovered – resulting in an effective fine of N\$1000 without any compensatory order, is plainly hopelessly disproportionate. I accordingly find myself unable to confirm the sentence and I decline to do so.

[9] The conviction is confirmed but I decline to confirm the sentence. The Registrar is directed to provide a copy of this judgment to the office of the Prosecutor-General.

DF Smuts
Judge

I agree

EP Unengu, AJ