



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 07/2017

In the matter between:

MAPHOSA SIHLE

FIRST APPELLANT

IRENE NKALA

SECOND APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Sihle v S* (CA 07/2017) [2017] NAHCMD 214 (07 August 2017)

Coram: NDAUENDAPO J and LIEBENBERG J

Heard: 07 July 2017

Delivered: 07 August 2017

Flynote: Criminal Procedure – Appeal – Sentence – Appellants convicted on pleas of guilty – Eight counts of possession of suspected stolen property – Essentially duplication of convictions – Appellants not appealing convictions – Appellants in pleas of guilty admitted to theft of goods found in their possession – Trial court placed too much emphasis on the appellants' admission that they had stolen the goods – Court in sentencing only

mentioned the appellants' mitigating factors – No indication as to the weight accorded to the mitigating factors placed before court – Court did not apply its mind to those factors on record favorable to the appellants – Constituted misdirection – Sentence is excessive and induces a sense of shock – Sentence set aside and substituted with a balanced and suitable sentence.

Summary: Accused persons were charged with eight counts of possession of suspected stolen property arising from the same incident. During their pleas of guilty they admitted to theft of the goods found with them. The appellants are first offenders and vendors from which they made a living as breadwinners of their families living in Zimbabwe. The court in sentencing considered the prevalence and seriousness of the offence; their admission that they stole the goods and the value of the goods. With general deterrence as the main objective of punishment, each was sentenced to four years imprisonment. Court of appeal held that: (1) it was wrong for the State to formulate and the court to convict on eight different charges on the same set of facts which constituted a duplication of convictions. The court however, cannot pronounce itself on conviction seeing the appellants only appealed against sentence. (2) In consideration of the aggravating factors advanced by the State, the trial court was entitled or justified to impose a custodial sentence. However, in sentencing, there is no indication as to the weight the trial court accorded to the mitigating factors placed before the court. In absence of such weight, it appears that the trial court did not apply its mind to those factors on record, found favorable to the appellants. (3) The trial court misdirected itself when it placed too much emphasis on the appellants' admissions that they stole the goods and imposed a severe sentence whereas they were charged and convicted on a lesser offence. As a result thereof, the trial court did not exercise its discretion properly which culminated in a sentence that is excessive and induces a sense of shock. Sentence imposed set aside and substituted with a suitable sentence.

ORDER

1. The appeal against sentence is upheld.
 2. The sentences imposed are set aside and substituted with:
Each accused is sentenced to: 2 years' imprisonment of which 6 months suspended for a period of 5 years on condition that the accused is not convicted of theft, or in contravention of section 6 of Ordinance 12 of 1956 (Possession of suspected stolen property), committed during the period of suspension.
 3. The sentences are antedated to 13 September 2016.
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JUDGMENT

LIEBENBERG J (NDAUENDAPO J concurring):

[1] In this appeal the appellants were convicted on eight counts of contravening s 6 of Ordinance 12 of 1956 (possession of suspected stolen property) and each sentenced to 48 months' imprisonment of which 12 months suspended on condition of good behaviour. Dissatisfied with the sentences received, appellants lodged their appeal against sentence only.

[2] Though the appellants filed separate Notices of Appeal, the grounds of appeal articulated in their respective notices are identical and will for purposes of the appeal be considered as one.

[3] In essence the grounds of appeal are the following: The learned magistrate erred by overemphasising the seriousness of the crime whilst giving insufficient weight to the accused persons' personal circumstances. Both are first offenders and sole breadwinners of five and eight minor children respectively. The property found in their possession were recovered and appellants have pleaded guilty to all charges.

[4] In sentencing the court was cognizant of the accused being first offenders; that they are vendors from which they made a living as

breadwinners of their dependants living in Zimbabwe; that they pleaded guilty, and able to pay fines between N\$2 000 and N\$2 500 each.

[5] The court further took into account the prevalence of the offence of possession of suspected stolen property and that it was serious, moreover, where the appellants in this instance admitted having actually stolen the goods found in their possession. Regard was also had to the fact that they were in possession of a considerable quantity of goods valued at N\$17 721.45. From a reading of the court's reasons on sentence, it is evident that general deterrence was the main objective of punishment, culminating in direct imprisonment being imposed. The court *a quo* was further of the view that the appellants were remorseful when asking the court to show mercy upon them.

[6] The magistrate in response to the appeal lodged, did not advance any additional reasons.

[7] It is settled law that a court of appeal can only interfere with the sentence imposed by the trial court if it is satisfied that that court did not exercise its discretion judiciously or properly, either misdirecting itself on the facts material to sentencing or on legal principles relevant thereto.¹ In circumstances where it could be inferred that the trial court acted unreasonably and the sentence induces a sense of shock, or there exists a disparity between the sentence passed and the sentence the court of appeal would have passed, had it sat as court of first instance, or where the sentence is startlingly or disturbingly inappropriate, interference will be warranted.

[8] Though the court briefly summarised the personal circumstances of the appellants and acknowledged the fact that they pleaded guilty, there is no indication as to the weight accorded to the mitigating factors placed before the court. The fact that the appellants were convicted on their own pleas of guilty, coupled with genuine remorse – which the court seemingly found to exist – is in itself mitigating factors which should have weighed in their favour at

¹ *S v Gaseb and Others* 2000 NR 139 (SC); *S v Tjiho* 1991 NR 631 (HC).

sentencing. In the absence of reasons showing otherwise, it would appear to us that the court *a quo* did not properly apply its mind to those factors on record favourable to the appellants.

[9] Regarding their convictions on eight counts of being found in possession of suspected stolen property, the court took into account that the appellants admitted having stolen the property from different shops and by selling same to unexpected customers, made a profit from their criminal behaviour. The opinion was expressed that there is a need to protect shop owners and the community against such behaviour. From the court *a quo*'s reasoning it clearly regarded the fact that the appellants admitted having stolen the goods found in their possession to be aggravating. It should be borne in mind that the appellants were not convicted of theft but the unlawful possession of suspected stolen property, a lesser offence. The trial court simply placed too much emphasis on the appellants' admission that they had stolen the goods and resultantly imposed a more severe sentence than what it would have done, had the origin of the goods not been made known. By so doing the trial court misdirected itself.

[10] I pause to reflect on the charges preferred against the appellants. Each of the eight counts against the appellants relate to a single incident on 01 September 2016 when they were found in possession of suspected stolen property. It would appear that, from information provided by the appellants as to how the goods came into their possession and they admitting having stolen it from various shops, the prosecution decided to formulate multiple charges which would have been proper, had they committed theft. This was clearly wrong because, if the State was in possession of evidence that could prove the different incidents of theft committed, then they should have charged the appellants accordingly, and not with a lesser offence. To formulate eight different charges against the appellants on the same set of facts constituted a duplication of convictions as the appellants should have been convicted of only one count of having been found in possession of suspected stolen property. Appellants however did not lodge an appeal against conviction and

in view of the outcome of these proceedings there is no reason to *mero motu* upset the convictions.

[11] Though the court *a quo* summarised the mitigating factors and circumstances relevant to sentencing, this court, sitting as a court of appeal, is left in the dark as to the weight accorded to those factors considered mitigating. It is not sufficient to merely mention or list the relevant factors without giving proper consideration to each factor. To do so, unfortunately, amounts to nothing more than merely paying lip-service. Furthermore, there is nothing showing that the weight the court ought to have accorded to those factors found favourable to the appellants, are borne out by the sentence imposed. This was likely brought about due to the court having over-emphasised the seriousness of the offence committed, and the need to deter would-be offenders, thereby losing sight of the actual blameworthiness of the appellants.² For the court to have ignored or given insufficient weight to circumstances favourable to the appellants, clearly constituted a misdirection.

[12] Though the unlawful possession of suspected stolen property is considered a lesser offence to theft, it remains serious as the same penalty on a conviction of theft may be imposed. The seriousness of the offence is further aggravated by the quantity of goods involved, valued at more than N\$17 000. The court *a quo* was further entitled to take into account the prevalence of the offence committed in its jurisdiction. This would indeed justify a sentence with general deterrence as objective of punishment. Taking into account the aforesaid reasons, it is my considered opinion that the imposition of a custodial sentence, even on a first offender, would be justified. Counsel for the appellants did not present argument to the contrary.

[13] As court of appeal we are alive to the accepted rule that sentencing primarily falls within the discretion of trial court and may only interfere with that court's discretion where it is clear that the trial court did not exercise its discretion judiciously or reasonably.³

² *S v Alexander* 1998 NR 83 (HC) at 88.

³ *S v Shapumba* 1999 NR 342 (SC) at 344G.

[14] When considering the appellants' interests in relation to the interests of society, I am satisfied that although society's aversion to crimes of this nature and condemnation thereof should be reflected in the sentence imposed, it does not in the present circumstances justify a sentence of four years' imprisonment. The sentence in our view is excessive and induces a sense of shock. The sentence imposed by the trial court therefore falls to be set aside and substituted with a balanced and suitable sentence.

[15] In the result, it is ordered:

1. The appeal against sentence is upheld.
2. The sentences imposed are set aside and substituted with:
Each accused is sentenced to: 2 years' imprisonment of which 6 months suspended for a period of 5 years on condition that the accused is not convicted of theft or in contravention of section 6 of Ordinance 12 of 1956 (Possession of suspected stolen property), committed during the period of suspension.
3. The sentences are antedated to 13 September 2016.

JC LIEBENBERG
JUDGE

GN NDAUENDAPO

JUDGE

APPEARANCES

APPELLANT

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RESPONDENT

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