



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

Case no: CA 53/2016

In the matter between:

VAN DEN BERGH GIDEON

APPELLANT

and

**THE
RESPONDENT**

STATE

Neutral citation: Van Den Bergh v S (CA 53/2017) [2016] NAHCMD 32 (10 February 2017)

Coram: LIEBENBERG J and USIKU J

Heard: 11 Hearing 2016

Delivered: 10 February 2017

Flynote: Criminal Procedure – Sentence theft – Appellant convicted on 27 counts of theft – Deterrence important due to increase in theft from employer – Message to be sent out in order to show intolerance for dishonesty by employee – Mitigating factors also be taken into account – Appellant having

refunded the complainant whereby showing remorse – Custodial sentence appropriate in this case – However Court entitled to interfere with sentence to a certain extent.

Summary: The appellant pleaded guilty to 27 counts of theft which totalled to N\$196 929. He was convicted on his plea of guilty and sentenced to 8 years imprisonment of which 4 years were suspended for 5 years on condition that the appellant is not convicted of theft, committed during the period of suspension. He now appeals against the sentence. Court on appeal found the trial court to have misdirected itself by over-emphasising the offence and the need impose deterrent sentence at the expense of other equally compelling mitigating circumstances.

ORDER

- (a) The application for condonation is granted.
- (b) The appeal is upheld and the sentence is set aside.
- (c) The appellant is sentenced to four years imprisonment of which one year imprisonment is suspended for five years on condition that the appellant is not convicted of the crime of theft, committed during the period of suspension.
- (d) The sentence is antedated to 9 December 2015.

APPEAL JUDGMENT

USIKU J, (LIEBENBERG J concurring)

[1] Appellant appeared in the Windhoek Regional court on charges of theft, involving 27 counts which totalizes to N\$196 929. He pleaded guilty and was convicted thereafter, and sentenced to eight years imprisonment of which four years were suspended for five years on condition that the appellant is not convicted with theft, committed during the period of suspension.

[2] Advocate Rawanscroft-Jones appeared on behalf of the appellant instructed by Theunissen, Louw and Partners whilst Ms Husselmann appeared on behalf of the respondent to which the Court appreciates all valuable arguments placed before it in this regard.

[3] The appellant now appeals against the sentence.

[4] At the hearing of this matter, counsel for the respondent raised a point in *limine* that the appellant had failed to comply with the court's rule in the noting of the notice of appeal outside the prescribed time limit.

[5] It is trite that an extension of time within which to file the notice of appeal is an indulgence, which will be granted only upon good cause shown for non-compliance and upon the existence of good prospects of success on appeal.

[6] Ms Husselmann elaborated further that the appellant had not furnished full details and an accurate explanation for this delay or non-compliance with the court rules. The latter does not have prospects of success on appeal.

[7] In addition counsel for the appellant conceded to the notice of appeal which was filed outside of the time frame. It is clear from the record of proceedings that after the appellant was convicted, the learned magistrate explained to the appellant his right to appeal even though he had been legally represented. It is further noted that the appellant's erstwhile legal practitioner had advised the latter that his prospects of success were not good.

[8] In this appeal the appellant submitted that he has good prospects of success on the merit. In my view the appellant's application did advance *bona fide* reason

under oath explaining his non-compliance with the rules. Moreover, the respondent has not opposed the application for condonation. In view thereof, and for reasons to follow, the appellant's non-compliance of the court rules will be condoned.

[9] Advocate Ravanscroft-Jones from the outset submitted that based on the grounds raised by the appellant in his notice of appeal, there are prospects of success on appeal. He conceded that a custodial sentence would be the norm under the circumstances at hand, however arguing that the court should interfere and have the sentence reduced to a certain extent.

[10] I will briefly set out the circumstances of the offence of which the appellant was convicted and sentenced. The appellant was a sales manager at Bank Windhoek at the time of the commission of the offence. He had experienced financial problems whereafter he worked out a system to steal money from the bank's dormant accounts which went on for a period of time before it was discovered by the bank. The appellant resigned from the place of employment with an intention to pay back the money with his pension gratification. The crimes were however discovered before he terminated his services with the bank subsequently leading to his arrest and prosecution.

[11] The latter pleaded guilty to the charge and was sentenced to a term of eight years imprisonment of which four years were suspended on condition that the appellant is not convicted for theft during the period of suspension.

[12] Ms Husselmann submitted that such a sentence is in order and is not inappropriate so as to induce a sense of shock, whilst advocate Ravenscroft-Jones argued to the contrary and invited the court to interfere and impose an appropriate sentence as it was too severe under the circumstances of the case.

[13] Indeed all aspects of sentencing are of course within the discretion of the sentencing tribunal and this court cannot interfere on appeal unless the discretion was not exercised judicially *S v Shapunba*¹. Furthermore, when exercising its discretion to determine the length of the sentence of imprisonment the sentencing

¹ S v Shapunba 1999 NR at 345 B.

tribunal must be guided by what is reasonable or as it was put by Van Reenen CJ in *S v Juta*².

‘Ideally the sentence, both primarily fine, and secondly, alternative prison sentence, must satisfy the requirement of justice, in all that that term connotes.’

[14] In my judgment the imposition of eight years imprisonment of which four years are suspended due to circumstances of the present case in which appellant had pleaded guilty, without wasting the court’s valuable time and secondly, he had refunded the complainant, was grossly unreasonable and came nowhere near in satisfying the requirements of justice. The trial court misdirected itself by giving insufficient weight to the mitigating factors, especially in view of appellant being a first offender. Though the crime committed is indeed serious and normally attracts severe punishment, the circumstances of the present case are such that rehabilitation, as an objective of punishment, deserves to be emphasised. This the sentencing court failed to recognise and clearly over-emphasised the offence and the need to impose a deterrent sentence at the expense of other equally compelling circumstances. In this regard the misdirection itself, justifying interference on appeal.

[15] The complainant had not suffered actual losses. I am therefore of the view that this court must interfere with the sentence imposed given the large difference between such a sentence and the one this court would have imposed had it sat as a court of first instance.

[16] In the result, it is ordered:

- (a) The application for condonation is granted.
- (b) The appeal is upheld and the sentence is set aside.

² *S v Juta* 1988 4 SA 926 TKH at 928E.

- (c) The appellant is sentenced to four years imprisonment of which one year imprisonment is suspended for five years on condition that the appellant is not convicted of the crime of theft, committed during the period of suspension.
- (d) The sentence is antedated to 9 December 2015.

DN USIKU
Judge

LIEBENBERG
Judge

APPEARANCES**APPELLANT:****Advocate Ravanscroft-Jone****Instructed by Thuenissen, Louw & Partners****RESPONDENT:****Ms Husselmann****Of the Office of the Prosecutor-General, Windhoek**