

**REPUBLIC OF NAMIBIA**

REPORTABLE



**HIGH COURT OF NAMIBIA, MAIN DIVISION**

**JUDGMENT**

**CR No: 20/2017**

In the matter between

**THE STATE**

and

**MUSHE MUCHAKA**

**HIGH COURT MD REVIEW CASE NO 109/2017**

*Neutral citation: S v Muchaka (CR 20/2017) [2017] NAHCMD 69 (10 March 2017)*

**CORAM: LIEBENBERG J et SHIVUTE J**

**DELIVERED: 10 March 2017**

**Flynote:** Criminal procedure – Sentence – Previous convictions – Weight accorded – Court has discretion – Petty offences – Remains such despite number of previous convictions.

**Summary:** The accused was convicted of theft of a packet of biscuits valued at N\$41.85 and in the light of two similar previous convictions, was sentenced to two years direct imprisonment. The trial court was of the view that accused has not learnt his lesson and is disrespectful of the criminal justice system. On review found the court misdirected itself by overemphasising the offence which was clearly less serious (petty) and did not justify direct imprisonment for two years. A partly suspended sentence found to have the necessary deterrence.

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### **ORDER**

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1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following sentence: 18 months' imprisonment of which 9 months is suspended for 5 years on condition that the accused is not convicted of theft, committed during the period of suspension.
3. The sentence is antedated to 21.12.2016.

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### **JUDGMENT**

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LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused was convicted on his plea of guilty on a charge of theft of one packet of biscuits, valued at N\$41.85, and sentenced to two years' imprisonment. The conviction is in order and will be confirmed on review.

[2] When the matter came on review, I directed a query to the presiding magistrate enquiring whether the sentence imposed is not disproportionate to the offence committed, despite the accused's previous convictions. Also whether the court considered suspending part of the sentence.

[3] In response thereto the magistrate reasoned that it was evident that the accused had not learnt any lesson from his two previous convictions and the sentences imposed thereof, and that a deterrent sentence was called for, the reason being that theft in the Zambezi Region was prevalent. It was also said that society will have full confidence in our criminal justice system if deterrent sentences are imposed.

[4] The accused was convicted of having stolen the packet of biscuits from Megasave Store on 15 December 2016 and said he committed the offence due to hunger. The State proved two previous convictions of theft dated 18.02.2016 and 20.09.2016 for which the accused on each occasion was sentenced to fines of N\$200 and N\$300, respectively. From the sentences imposed it could reasonably be inferred that these were deemed less serious by the court. In sentencing in the present matter, the court opined that the imposition of fines in the past was a futile exercise as it did not rehabilitate the accused.

[5] Previous convictions will invariably be regarded as aggravating when it comes to sentencing and more over where the subsequent offence is committed shortly after the previous one. In the present instance these offences were all committed within the

same year. Earlier convictions impact on the character of the offender, especially where he or she was not deterred by the experience of previous convictions and sentences. In this instance that seems to be the position with the accused who, despite having been convicted and sentenced to the payment of fines in the past, has neither reformed himself, nor does he seem to have been deterred by the earlier sentences imposed. Against this background, a more deterrent sentence seems justified. In determining what sentence in the circumstances of the case would be suitable, the court must still have regard to all those principles applicable to sentence. The court is still required to consider the accused's personal circumstances (of which his previous convictions is but one factor) against the seriousness of the offence committed, and the interests of society. What weight should be accorded to this factor, lies within the discretion of the court.

[6] It has been said that the accused should primarily be punished for the offence he committed and not so much for his previous convictions for which he has already been sentenced. In *S v Baartman*<sup>1</sup> at 305b-e it is stated thus:

'But the period of imprisonment must be reasonable in relation to the seriousness of the offence. Otherwise it inevitably overemphasises the interests of society at the expense of the interests of justice and the interest of the offender. If it does this, it cannot be a just sentence.

In a case as this it is necessary to be aware of three considerations:

- (a) The accused should be sentenced for the offence charged and not for his previous record;
- (b) The public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and
- (c) While it might be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased.'

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<sup>1</sup> 1997(1) SACR 304 (E).

I respectfully endorse these sentiments.

[7] The accused in the present instance stole one packet of biscuits which could be described as a petty offence. Though the offence remains such, no matter the accused's previous convictions, punishment will escalate due to the previous convictions; not because the offence has become more serious, but because the accused repeatedly reoffends and should be deterred. In the present circumstances a custodial sentence seems justified, however, punishment should still be in relation to the offence committed and must be aimed at deterring the accused in the least harmful way. This would mainly be achieved by suspending part of the sentence which should serve as inducement to the accused not to reoffend.

[8] The learned magistrate's reasoning that a suspended sentence might encourage the accused to commit further crimes as he clearly had not learnt his lesson and disrespected the criminal justice system, is not supported by the facts of the case. The sentencing court clearly overemphasised the interests of society at the expense of the accused's personal interest, resulting in a misdirection in that the court failed to exercise its discretion in sentencing, judiciously. In addition, the court equally gave no consideration to suspend part of the sentence and opted for direct imprisonment of two years, a sentence which is not reasonable in relation to the seriousness of the offence. The accused had not previously been given a custodial sentence and the mere fact that he is at risk of going to prison if he reoffends, should have the necessary deterrent effect on him. There is however no justification for imposing a wholly suspended sentence as that might send out the wrong message, hence the accused should at least serve part of the sentence.

[9] In the result, it is ordered:

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following sentence: 18 months' imprisonment of which 9 months' is suspended for 5 years on condition that the accused is not convicted of theft, committed during the period of suspension.
3. The sentence is antedated to 21.12.2016.

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**J C LIEBENBERG**

**JUDGE**

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**N N SHIVUTE**

**JUDGE**