

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 102/2016

In the matter between:

**LORENZO PIETERSE**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Pieterse v S* (CA 102/2016) [2017] NAHCMD 91  
(17 March 2017)

**Coram:** NDAUENDAPO J and LIEBENBERG J

**Heard:** 14 December 2016

**Delivered:** 17 March 2017

**Flynote:** Criminal procedure – Appeal – Against sentence – Convicted of theft of bicycle – Sentenced to three (3) years' imprisonment of which one (1) year suspended – Principles relevant to sentence confirmed and applied – Theft direct consequence of accused's alcohol addiction – Stolen bicycle recovered with accused's assistance – Important factors ignored by trial court

– Seriousness and prevalence of offence over-emphasised – Direct imprisonment considered only suitable sentence – Court closed its mind for other forms of punishment – Sentence found startlingly inappropriate and shocking – Sentence substituted with a fine coupled with suspended term of imprisonment.

**Summary:** The accused stole a bicycle from a young boy which he then sold in order to get money to buy liquor with. Accused a first offender aged 28 years, gainfully employed for nine years and financially supported his family. He had an alcohol addiction which led to the commission of the crime and at the time of sentence he was receiving counselling from a psychologist. The stolen bicycle was recovered and the accused was convicted following his plea of guilty. These were important factors the trial court completely ignored or gave insufficient weight to. The seriousness of the offence was over-emphasised at the expense of other factors favourable to the accused's interests. The court in sentencing clearly followed a wrong approach which in turn resulted in a distorted sentence being imposed. The sentence of direct imprisonment imposed is set aside and substituted with a fine and suspended term of imprisonment.

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### **ORDER**

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1. The appeal against sentence is upheld.
2. The sentence imposed is set aside and is substituted with: N\$3 000 or 6 months' imprisonment, plus a further 6 months' imprisonment suspended for a period of five (5) years on condition that the accused is not convicted of theft, committed during the period of suspension.
3. The sentence is antedated to 23 September 2016.

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### **JUDGMENT**

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LIEBENBERG J (NDAUENDAPO J concurring):

[1] Appellant was arraigned in the magistrate's court Windhoek on a charge of theft of a 'KHE stunt bike' valued at N\$3 000 and upon his plea of guilty, he was convicted as charged. He was sentenced to three (3) years' imprisonment of which one (1) year is suspended on condition of good behaviour. Disgruntled with the outcome of the proceedings, appellant lodged an appeal against sentence only.

[2] No less than ten grounds of appeal are enumerated in appellant's notice of appeal, the gist of which suggesting that the trial court erred in its evaluation of several factors relevant to sentence and over-emphasised the seriousness of the offence at the expense of appellant's personal circumstances. These grounds are intertwined and there is no need to deal with each ground individually.

[3] Appellant asserts that the court failed to adequately take into account his personal circumstances. He was unrepresented during the trial in the court *a quo* and elected to mitigate from the dock. He is a first offender at the age of 28 years and though single, is the father of a two year old girl who stays with her biological mother. Appellant at the time of the incident was employed for the past nine years as cleaner with the Namibian Defence Force where he earned N\$2 900 per month. He rented a government flat and his mother was residing with him. He also cared for two of his siblings. The appellant admitted that he had an alcohol addiction and that he took the complainant's bicycle in order to sell it and buy alcohol with the money it yielded. Upon his arrest he co-operated with the investigation and the bicycle was recovered and returned to its lawful owner. At the stage of sentencing, appellant received counselling from a psychologist for his addiction and conveyed to the court that he had entered into an adult literacy programme to improve on his qualifications.

[4] The court in its reasons on sentencing recounted the appellant's personal circumstances and was mindful that a balance must be struck between the competing interests of the appellant and that of society, regard being had to

the offence involved. The court was also alive to the objectives of punishment and concluded that a custodial sentence was required as it would sufficiently deter appellant from reoffending and, at the same time, address his addiction.

[5] As regards the offence, the court reasoned that the offence was serious and prevalent in its district. Pertaining to the victim being a young boy, it was found that the appellant abused the trust and respect the boy had towards elder people when appropriating his bicycle. The court then associated itself with the frustration this must have brought upon the boy, whom the court regarded as a vulnerable member of society who needed to be protected against persons like the appellant. It was further said that the appellant's addiction does not justify his actions; neither did the recovery of the stolen bicycle lessen the seriousness of the offence.

[6] I pause here to remark that, indeed, the commission of any crime in order to feed an addiction is not justifiable; neither does the recovery of stolen property derogate from the seriousness of the offence of theft. However, these factors cannot simply be ignored when the court is tasked to decide what sentence, in the particular circumstances of the case, will be suitable for the accused before court. In other words, what sentence will 'fit the criminal' as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'<sup>1</sup>. (Emphasis provided)

[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 the latter court did not exercise its discretion judiciously or properly, by either misdirecting itself on the facts material to sentencing or on legal principles relevant thereto.<sup>2</sup> 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 the sentence is startlingly or disturbingly inappropriate, interference will be warranted.

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<sup>1</sup> *S v Rabie* 1975(4) SA 855 (AD) at 862G-H.

<sup>2</sup> *S v Gaseb and Others* 2000 NR 139 (SC); *S v Tjiho* 1991 NR 631 (HC).

[8] In response to the grounds of appeal noted in the notice of appeal, the magistrate advanced additional reasons as to why a custodial sentence in the circumstances of the case, in his view, was justified; even though appellant is a first offender. Argument was advanced on behalf of the appellant that the trial court misdirected itself in its approach to sentence in that it is clear from the court's reasoning that, in the absence of having found any 'compelling and substantial circumstances' which might have persuaded the court otherwise, the custodial sentence imposed on the appellant was the only proper sentence. This, it was argued, makes plain that the court never considered alternative punishment like imposing a fine. Also, that the court considered the personal circumstances and interests of the appellant separately when coming to the conclusion that it fell short of persuading the court not to impose a custodial sentence.

[9] From a reading of the court's reasons it is clear that the court at no stage considered imposing a fine and from the outset formed the view that a custodial sentence was the only proper punishment to be imposed. The court was cognizant of the appellant's personal circumstances, moreover that he was a first offender and had pleaded guilty. However, the court notwithstanding reached the conclusion that the seriousness of the offence and the prevailing circumstances during the commission of the offence were aggravating, and called for direct imprisonment. Factors also deemed aggravating by the trial court were: the appellant tricked a young child who, due to their age difference, was a vulnerable person, to hand over his bicycle; which was subsequently sold to feed appellant's alcohol addiction; and the latter considered a form of greed. In the court's opinion recovery of the bicycle did not make the offence less serious.

[10] As regards the objectives of punishment, the trial court was of the view that at sentencing the appellant, prevalence of the offence was a factor to be taken into account and that emphasis should be on deterrence as an objective of punishment. In the end the court was satisfied that the seriousness of the offence and the interests of the community significantly overshadowed the

personal circumstances of the appellant, justifying a sentence of direct imprisonment.

[11] Criticism levelled against the court *a quo*'s approach to sentencing as regards direct imprisonment seemingly being the only option and the personal circumstances of the appellant not persuading the court otherwise, is not without merit. From a reading of the *ex tempore* judgment and additional reasons furnished by the magistrate it is evident that the court completely closed its mind to even consider other forms of punishment. This is likely to have been brought about by the court's stance that the offence was of such serious nature, considered together with the need to deter the appellant and other likeminded criminals that direct imprisonment was the only suitable form of punishment; moreover where appellant's personal circumstances did not convince the court otherwise.

[12] The presiding magistrate rightly pointed out the triad of factors which have to be considered namely the personal circumstances of the appellant, the offence committed and the interests of society. He also referred to the main purposes of punishment namely, prevention, deterrence, rehabilitation and retribution and was cognizant that a balance must be struck between these factors, and not to over- or under-emphasise any of these elements. Also that situations may arise where the personal interests of the offender are outweighed by the seriousness of the offence, the prevalence thereof and the interests of society.

[13] In sentencing, the trial court emphasised the need to impose a deterrent sentence, particularly in view of the seriousness of the offence, the fact that appellant stole from a young child, and the prevalence of the offence in its jurisdiction. The court took issue with appellant who instead of protecting the rights of the victim (being a child), he 'abused the trust and respect the child has towards the elders and crooked the child to give him the bike' which he then sold in order to buy liquor. As regards appellant's alcohol addiction, the court expressed the opinion that a sentence of direct imprisonment will address this problem.

[14] Though the court was correct in stating that an accused's addiction does not justify the commission of an offence, it was respectfully, and without hearing evidence in support thereof, ill-judged to conclude that direct imprisonment will solve the appellant's problems in that respect. In his pre-sentence submissions the appellant told the court that he was seeing a psychologist for his alcohol addiction and required further counselling. Bearing in mind that appellant was gainfully employed for the past nine years and the sole breadwinner for his mother and siblings, it was in the best interest of the appellant, and his dependants, to continue seeing his psychologist as part of his treatment, and for him to restore himself to the person he was before his addiction. It would equally have been in the best interest of society to have the appellant back in his job. The appellant was unrepresented at the time and if the trial court entertained any doubt as to the appellant's counselling and continued treatment, it should have postponed the imposition of sentence and called for evidence to elucidate any uncertainty that might have existed pertaining to the appellant's health or mental state. Without such evidence, there was no basis for the court in sentencing to assume that a custodial sentence would be in the best interest of the appellant.

[15] It is settled law that irrespective as to whatever the nature of the crime may be, it is the person who committed the offence who must be punished and his or her personal circumstances will play an important role in deciding what punishment, in the circumstances of the case, will be appropriate. To ignore or give insufficient weight to the interests of the offender, will obviously lead to a warped and distorted sentence being imposed.

[16] In the present instance the appellant was a first offender, had fixed employment for nine years and financially maintained his family. He pleaded guilty and the bicycle he stole was recovered and returned to the complainant. The court accepted the explanation given by the appellant as to why he committed the offence i.e. to get money in order to feed his addiction. I earlier alluded to the court's reasoning on the appellant's addiction and the recovery of the bicycle and although it does not detract from the seriousness of the

offence committed, these are certainly important facts the court could not have ignored in sentencing. Where the victim has suffered no financial loss, then it is a fact to be taken into account; equally where the appellant co-operated from the beginning resulting in the recovery of the bicycle which manifested itself in a plea of guilty. To simply ignore these circumstances, all of which favourable to the appellant, clearly constitutes a misdirection. For the trial court to have mentioned all the facts and circumstances relevant to sentencing in its reasons, unfortunately, amounted to nothing more than paying lip-service as the weight it ought to have accorded thereto is not borne out by the sentence imposed.

[17] The court *a quo*, in my view, was unreasonable by attaching so much weight to the fact that appellant swindled the young boy out of his bicycle. Though theft is a serious offence and most prevalent throughout the country, the court clearly over-emphasised it at the expense of other equally important circumstances such as the appellant's personal circumstances. When considering these circumstances 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 necessitate a sentence of direct imprisonment. It is borne out by the court's reasoning that it never opened up its mind to consider a sentence other than that of direct imprisonment. The approach was that direct imprisonment was appropriate in the circumstances and that the appellant's personal circumstances did not justify a lesser (or other) sentence. Appellant particularly asked the court to impose a sentence of community service which the court clearly did not even consider as a possibility. There is further nothing in the court's reasons from which it could be said that the court considered imposing a fine. Appellant at the time earned N\$2 900 per month and the court should have explored the possibility of him receiving financial assistance from elsewhere, or even to defer payment of a fine.

[18] Though deterrence and retribution as sentencing objectives usually come to the fore where serious crimes of violence are committed, this is not



what the trial court was faced with. Theft of a bicycle does not fall in the same category of cases and the court's sentiments expressed towards the manner in which the appellant tricked the complainant out of his bicycle, were somewhat exaggerated and completely taken out of context.

[19] In the circumstances of the case, a sentence of three years' imprisonment is found to be startlingly inappropriate and induces a sense of shock; whilst there is also a striking disparity between the sentence the trial court imposed and what this court would have imposed had it sat as court of first instance. The sentence therefore falls to be set aside and substituted with a more balanced and suitable sentence.

[20] In the result, it is ordered:

1. The appeal against sentence is upheld.
2. The sentence imposed is set aside and is substituted with: N\$3 000 or 6 months' imprisonment, plus a further 6 months' imprisonment suspended for a period of five (5) years on condition that the accused is not convicted of theft, committed during the period of suspension.
3. The sentence is antedated to 23 September 2016.

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JC LIEBENBERG  
JUDGE

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GN NDAUENDAPO  
JUDGE

## APPEARANCES

## APPELLANT

F Beukes  
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Windhoek.

## RESPONDENT

E Moyo  
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