REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2018/00019

In the matter between:

HELENA KANDJEMKO **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Kandjemko v S* (CA HC-MD-CRI-APP-CAL-2018/00019) [2018] 311 NAHCMD (28 September 2018)

Coram: LIEBENBERG J and SIBOLEKA J
Heard: **17 September 2018**
Delivered: **28 September 2018**

Flynote: Criminal Procedure – Appeal – Sentence – Direct imprisonment – No misdirection by trial court raised – Whether sentence imposed is startlingly inappropriate and induces a sense of shock –Trial court correctly considering evidence placed before it – Sentences imposed on each count not dissimilar to what appeal court would have imposed – Appeal dismissed.

ORDER

The appeal against sentence is dismissed.

JUDGMENT

LIEBENBERG J (SIBOLEKA J concurring):

[1] The appellant was tried and convicted in the Swakopmund Magistrate's Court on four counts of theft committed during the period September – December 2017. On count 1 she was sentenced to 18 months' imprisonment of which 6 months suspended on condition of good behaviour, and to 6 month's imprisonment on each of the remaining three counts. The cumulative effect of the sentences imposed is thus 30 months' imprisonment. Dissatisfied with the outcome of the hearing, the appellant lodged an appeal against the sentences imposed, praying that she be afforded the opportunity of paying a fine.

[2] The appellant argued her appeal in person while Mr *Moyo* appeared for the respondent.

[3] The only question thus for consideration on appeal is whether the magistrate committed a misdirection when imposing sentences of imprisonment instead of fines.

[4] It is settled law that sentencing predominantly falls within the discretion of the sentencing court and a court of appeal is entitled to interfere with the discretion so exercised only if it has been shown that (a) the trial court misdirected itself on the facts or on the law; (b) where an irregularity which was material occurred during the sentence proceedings; (c) where the trial court failed to take into account material facts or over-emphasised the

importance of other facts; and (d) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.[1]

[5] Whereas the appellant has not attacked the sentences imposed on any of the bases set out in (a) to (c) above, the only question that remains for consideration is (d) namely, whether the sentences imposed are startlingly inappropriate, induces a sense of shock and the cumulative effect thereof being disproportionate to the appellant's blameworthiness as regards the offences committed. A sentence is not rendered inappropriate simply because a court of appeal considered another type of punishment also appropriate in the circumstances, or where such court would have imposed a slightly different sentence, had it sat as court of first instance.[2]

[6] In sentencing, the court took into consideration the appellant's personal circumstances and found in mitigation that she is a first time offender, the mother of five minor children, and unemployed, as her services with the complainant company have been terminated as a result of the offences committed. Although the appellant had signed a document authorising the complainant to be refunded directly from the appellant's pension fund, no monies, as per the testimony of the store manager, had been paid over at the time of the trial. In view thereof the court accepted the company to have suffered a loss. On appeal the appellant during oral submissions claimed that the complainant had been refunded in full.

[7] In aggravation of sentence it was found that the appellant, at the time being the system supervisor and as such responsible for the financial running of the company, was in a position of trust. Also that the type of offence (white-collar theft) was very prevalent and called for a deterrent sentence. What the trial court could (and should) have emphasised is that the appellant stole large sums of money from her employer on four different occasions spanning over a period of several months. It was her duty to collect the cash moneys and drop

[1] *S v Tjiho* 1991 NR 361 (HC).
[2] *Harry de Klerk v The State,* Case No. SA 18/2003 (unreported) delivered on 08.12.2006.

it in the safe but instead appropriated same for her personal benefit. Though claiming that she had not personally benefitted from her crimes as she transferred the money into accounts held in South Africa and Nigeria in the name of a certain prophet, this was done in the belief that it was like an investment that would yield a handsome profit. As to be expected, this never materialised and the moneys went missing as per the appellant's explanation. This by no means reduces the appellant's moral blameworthiness. Over a period of three months she on four occasions appropriated cash in the sum of N$42 000 from the business where she was employed. She disposed of the money without any guarantee of recovering it, or part thereof, in the future. What is evident from the facts is that the crimes were not prompted by need, but rather by greed. The trial court's reasoning that in these circumstances the objective of punishment should be on deterrence, in our view, is therefore justified.

[8] Even though the appellant has had a clean record prior to the commission of these offences and where the complainant has subsequently been refunded for the loss suffered, the sentences imposed on each count are not dissimilar to what this court would have imposed in the first instance. Although the appellant pleaded with this court to substitute the sentences of imprisonment with that of a fine, in the absence of any misdirection committed by the trial court in sentencing, there is no basis in law to interfere with the sentences on appeal. The cumulative effect thereof had substantially been reduced by partly suspending the sentence of 18 months' imprisonment imposed on count 1. As regards sentences imposed in other similar cases, we are satisfied that it is more or less in line, and therefore satisfies the principle of uniformity.

[9] In the result, the appeal against sentence is dismissed.

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JC LIEBENBERG

JUDGE

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A SIBOLEKA

JUDGE

APPEARANCES:

APPELLANT	In person
RESPONDENT	E Moyo Of the Office of the Prosecutor-General, Windhoek.