



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CALL-2017/00055

In the matter between:

EUNICE POLLMANN

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Pollmann v S* (HC-MD-CRI-APP-CALL-2017/00055) [2019] NAHCMD 96 (12 April 2019)

Coram: NDAUENDAPO J et SHIVUTE J

Heard: 25 March 2019

Delivered: 12 April 2019

Flynote: Criminal Procedure – Appeal against sentence – Appellant convicted of theft – Custodial sentence imposed – Appellant first time offender – Twenty one years old and has a one month old baby – Option to pay fine not considered – Failure to enquire about ability to pay fine a misdirection – Personal circumstances outweigh seriousness of the offence – Appeal

succeeds – Appellant to pay a fine in default imprisonment – Partly suspended

Summary: The appellant was convicted, on her guilty plea, of theft from her employer. She was sentenced to two years direct imprisonment of which one year was suspended. She appealed against sentence on the ground that it was shocking and induces a sense of shock. The appellant is a first offender, twenty one years of age, has a one month old baby and expressed remorse. The stolen money was recovered.

Held that, the magistrate should have considered imposing a fine as custodial sentence was not mandatory in the circumstances.

Held further, that the magistrate should have enquired whether she was in a position to pay a fine and failure to enquire was a misdirection.

Held further that, a fine coupled with a suspended imprisonment would equally have achieved the objectives of sentencing.

Held further, that appellant is ordered to pay a fine and in default, imprisonment, part of sentence suspended.

ORDER

In the result, I make the following order:

1. The appeal succeeds.
 2. The sentence is set aside and substituted with the following;
 - (a) The appellant is sentenced to pay a fine of N\$20 000 or in default two years imprisonment of which N\$10 000 or one year is suspended for a period of five years on condition that the appellant is not convicted of theft committed during the period of suspension.
 - (b) It is further ordered that the fine should be paid on or before the 18th of April 2019 before noon. In the event that the fine is not paid the appellant must report herself at the clerk of the magistrate's court office, Luderitz Street, Windhoek.
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JUDGMENT

NDAUENDAPO J (SHIVUTE J concurring):

Introduction

[1] The appellant was convicted in the magistrate's court, Windhoek, on her own guilty plea, of theft of N\$20 000 from her employer. The appellant was a team leader at Standard Bank, Wernhill agency, Windhoek where she stole the N\$20 000. She was sentenced to two years imprisonment of which one year was suspended for a period of five years on condition that she is not convicted of theft committed during the period of suspension. She appeals against sentence only.

Ground of appeal

[2] The ground of appeal is stated as follows; 'The learned magistrate erred in the law and or on the facts by imposing such a sentence which induces a sense of shock as it is too harsh and inappropriate in the circumstances as appellant is a first offender, 21 year old and is the mother of one month old baby.'

Submissions by counsel for appellant

[3] Counsel argued that deterrence can be achieved by imposing a fine or a suspended sentence and the court should have considered these two sentences. Counsel further argued that deterrence cannot only be achieved through direct imprisonment alone, the offence committed is a common law offence where the alternative of a fine or wholly suspended sentence is optional under the prevailing circumstances. Counsel referred this court to the matter of *S v Scheepers*¹ where the following was said.

'Imprisonment is not the only punishment which is appropriate for retributive and deterrent purposes. If the same purposes in regard to the nature of the offence and the interest of the public can be attained by means of an alternative punishment to imprisonment, preference should, in the interest of the convicted offender, be given

¹ *S v Scheepers* 1977 (2) SA 154 A at 155A-B.

to alternative punishment in the imposition of sentence. Imprisonment is only justified if it is necessary that the offender be removed from society for the protection of the public and if the objects striven for by the sentencing authority cannot be attained with any alternative punishment.'

[4] Counsel for appellant further submitted that the appellant is not a grave danger to society and as such the direct imprisonment imposed by the court *a quo* is not justified. The nature of the offence and the circumstances in which it took place do not warrant a custodial sentence.

Submissions by counsel for respondent

[5] Counsel argued that it is trite that a court of appeal will not interfere with the sentence imposed on insignificant grounds and neither will it do so simply because it would have imposed a different sentence had it sat as the court of first instance. It will only interfere if the trial court failed to exercise its sentencing discretion judiciously. Counsel further argued that when it comes to sentencing in theft cases, Hoff J (as he then was) in the case of the *State v Bezuidenhout and 2 others*,² said the following:

'The many reviews that this court is dealing with every day and the outcry from the society are all proof of the prevalence of crime and more particularly crimes such as housebreaking and theft. Those who commit this crime overlook nobody. No distinction is made between the rich and the poor. All levels of society has fallen victim to thieves and housebreakers alike. Whether we want to believe it or not we are involved in a war against crime which at present shows no sign of abating. The situation calls for exceptional measures and in the process courts play an important role. In this regard the imposing of a prison sentence for housebreaking and theft, even in the case of a first offender, has become more or less general rule.'

That case is in my respectful view distinguishable from the one before us in the sense that, that case involved housebreaking and theft, whereas this one only involves theft.

² *State v Bezuidenhout and 2 others* case no. CA 58/1999 a reported judgment of the High Court, delivered on 17 May 1999.

[6] Counsel further argued that the court *a quo* was justified in this instance to treat the offence of theft serious and attach more weight to deterrence due to the prevalence of the offence of theft and the fact that the appellant was in a position of trust. This calls for imprisonment as a first punishment such sentence would also give the appellant a chance to rehabilitate as she serves her sentence. Counsel further argued that the fact that there was no actual economic loss to the victim as all the money was recovered does not diminish the seriousness of the offence.

The magistrate's reasons considered

[7] The learned magistrate reasoned that the accused stole from her employer and that she was employed at the time she stole and that was out of greed as she was earning a salary and that offences of that nature 'it is trite that a custodial sentence is inevitable regardless that the accused is a first offender.' The reasoning of the magistrate that in cases such as this a custodial sentence is inevitable is in my view a misdirection. The magistrate had an option to impose a fine coupled with a term of imprisonment, but suspended to achieve the objectives of sentencing. A custodial sentence for a first offender is not mandatory as she was charged with theft under the common law. In my view this is a case where the magistrate should have considered imposing a fine. The appellant was a first offender, twenty one years old, expressed remorse and had a one month old baby and to have denied the baby to bond and grow with the mother at that tender age would have been undesirable where an alternative punishment such as a fine coupled with a suspended imprisonment term would have equally served the same objectives of deterrence, rehabilitation and retribution of sentencing, rather than sending her to prison. The learned author Hiemstra³ opines that: 'For the first offender a fine is often a desirable and handy alternative to imprisonment. Coupled with alternative imprisonment and a suspended period of imprisonment it can be used where direct imprisonment would be undesirable.'

'The fine, if there is one, must always be the first choice and, if the convicted person does not or cannot pay it, the alternative imprisonment must be

³ Hiemstra's Criminal Procedure May 2014 at 28-53, 55.

served.⁴ I fully agree with those sentiments. The appellant is not a danger to society and there is no justification to remove her from society.

[8] The learned magistrate did not consider imposing a fine at all. Counsel for appellant in the court *a quo* submitted that '**the accused has no income currently,**' but that did not mean that she was unable to pay a fine. In my respectful view the learned magistrate misdirected himself by not enquiring further about the appellant's ability to pay a fine, she may have had some savings or been able to raise funds from relatives. Hiemstra⁵ opines that 'because ability to pay is such an important factor in the imposition of a fine, the court must purposefully inquire into the accused's ability to pay a fine. 'The court has to make a proper enquiry into the resources available to an accused, otherwise it risks imposing a fine clearly beyond his or her means and failure to do that the sentencing discretion is not properly exercised.'

[9] Having regard to the aforesaid, a custodial sentence in a case such as this without an option of fine was undesirable. In my respectful view the personal circumstances of the appellant were weighty factors that should have been given more weight than the seriousness of the offence and the learned magistrate should have considered an option of a fine or a wholly suspended sentence instead of having imposed direct imprisonment.

In the result, I make the following order:

1. The appeal succeeds.
2. The sentence is set aside and substituted with the following;
 - (a) The appellant is sentenced to pay a fine of N\$20 000 or in default two years imprisonment of which N\$10 000 or one year is suspended for a period of five years on condition that the appellant is not convicted of theft committed during the period of suspension.
 - (b) It is further ordered that the fine should be paid on or before the 18th of April 2019 before noon. In the event that the fine is not paid the

⁴ S v Roindwa 1961 SA 545 O; s v Rulashe 1970 (2) SA 724 (O).

⁵ Hiemstra's Criminal Procedure May 2014 at 28-56 see also the cases he referred to, (S v Sithole 1979 (2) SA 67A; S v Ntlele 1993(2) SACR 610(W) at 612e-l).

appellant must report herself at the clerk of the magistrate's court office, Luderitz Street, Windhoek.

N. G. NDAUENDAPO
JUDGE

N. N. SHIVUTE
JUDGE

APPEARANCES:

APPELLANT:

Ms L. Shikongo
Of Metcalfe Attorneys, Windhoek

RESPONDENT:

Mr Muhongo
Of the Office of the Prosecutor-General
Windhoek.