REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 07/2019

In the matter between:

THE STATE

and

ISAK SERFONTEIN

Neutral citation: *S v Serfontein* (CC 07/2019) [2020] NAHCMD 56 (20 February 2020)

Coram: LIEBENBERG, J
Heard: 07 February 2020
Delivered: 20 February 2020

Flynote: Criminal Procedure – Sentence – 'White-collar' crimes – Alarming increase of these crimes in Namibia – Conclusion drawn from large number of cases coming before courts – Court may take judicial notice of the increasing prevalence of 'white-collar' crimes committed in its jurisdiction.

Criminal Procedure – Sentence – Principle of individualisation – Sentence must be tailored in such way that it fits the particular accused before court – Accused's former convicted by another court of almost similar offences committed under the same circumstances – Circumstances under which accused and former wife found themselves differ – Former wife pleaded guilty however she was convicted of a more serious offence of fraud – Accused on the other hand did not plead guilty neither did he testify in mitigation to show his remorse – Accused's blameworthiness on *par* with his former wife – Lengthy custodial sentence inescapable.

Summary: The accused was convicted on 32 counts of Theft totalling N$4 038 691.90 and, in respect of the money stolen, on one count of Money-Laundering in contravention of section 4 of the Prevention of Organised Crime Act 29 of 2004 (POCA). The accused's former wife, whilst employed by the complainant company, fraudulently syphoned large sums of money away from the company's bank account and deposited the proceeds into the accused's savings account. Despite the accused having disputed knowing that these funds were the proceeds of unlawful activity conducted by his former wife, the court at the end of the trial convicted him on the basis that the accused worked hand in hand with his former wife. Once the funds were deposited into his account, he effected the transfer of funds into various other accounts to the financial benefit of both. Court tasked to decide what sentence would be just and proper in the circumstances of the case.

Held, that, there is currently an alarming increase of 'white-collar' crimes in Namibia. In sentencing the court is thus entitled to take judicial notice of the increasing prevalence of the said crimes committed in its jurisdiction.

Held, further that, with regard to uniformity of sentences in similar cases the principle of individualisation must be given equal consideration to the extent that a sentence must be constructed and tailored in such way that it fits the particular accused before court and should not be one of general application.

Held, further that, there is a notable difference in circumstances as far as his former wife was convicted of the more serious crimes of fraud and who stood in a relation of trust towards the complainant, opposed to the accused's conviction on the lesser crime of theft. However, unlike the accused, the accused's former wife owned up to her actions and demonstrated sincere remorse, a factor that must have weighed heavily with the sentencing court.

Held, further that, given the gravity of the crimes committed by the accused, it seems inevitable that lengthy custodial sentences would be required to have the necessary deterrent effect, individually and generally.

ORDER

Counts 3 – 34:- Theft (counts taken together for sentence): 13 years' imprisonment of which 5 years' imprisonment suspended for a period of 5 years on condition that the accused is not convicted of theft (without the option of a fine), committed during the period of suspension.

Count 35:- Money-laundering (c/s 4 of Act 29 of 2004): 6 years' imprisonment.

In terms of section 280 (2) of Act 51 of 1977 it is ordered that the sentence imposed on count 35 be served concurrently with the sentence imposed on counts 3 – 34.

JUDGMENT

LIEBENBERG J:

Introduction

[1] On 17 January 2020 the accused was convicted of 32 counts of Theft totalling N$4 038 691.90 and, in respect of the money stolen, one count of Money-Laundering in contravention of section 4 of the Prevention of Organised Crime Act 29 of 2004 (POCA). It is not in dispute that the accused's former wife, Stephanie, whilst employed as Office Administrator at Ferrodrill (Pty) Ltd Namibia (hereafter Ferrodrill), fraudulently syphoned money away from the company and deposited the proceeds into the accused's savings account. Despite the accused having disputed knowing that these funds were the proceeds of unlawful activity conducted by Stephanie, the court at the end of the trial rejected the accused's defence and convicted him on the basis that he worked hand in hand with Stephanie. Once the funds were deposited into his account, he effected the transfer of funds into various other accounts to the financial benefit of both. The actual prejudice suffered by Ferrodrill was N$4 253 013.50, although the accused's involvement concerns the lesser amount of just over N$4 million.

[2] This court now has the invidious task to decide what sentence would be just and proper in the circumstances of the case and with due regard to the particular circumstances of the offender before court.

Legal principles applicable

[3] It is trite law that in consideration of what appropriate sentence to impose, certain guidelines are of general application. These are generally referred to as the *triad*, comprising the personal circumstances of the offender, the nature of the offence and the interests of society.[1] The court must at the same time consider the objectives of punishment and what sentence, in the light of the particular circumstances of the case, would be just and appropriate. It is

[1] *S v Zinn* 1969 (2) SA 537 (A).

settled law that the applicable principles need not be given equal weight as the circumstances may be such that it becomes necessary to emphasise one at the expense of others. This will mainly depend on the facts of each case and often the court is required to balance and harmonise competing factors to arrive at a fair and just sentence. Punishment should fit the offender, reflect the seriousness of the crime, be fair to society and be blended with a measure of mercy according to the circumstances.[2]

Personal circumstances of the Accused

[4] The accused elected not to give evidence in mitigation and his particulars and personal circumstances came on record from the Bar. He turns 50 during this year, is divorced and has two adult children who are independent. The accused is a first offender. As alluded to in the judgment, during the accused's lifetime he ventured into several small businesses which were not met with any success. After his arrest and subsequent release pending the trial, he started doing renovation work in Walvis Bay, generating an income of N$5 000 per month. Upon conviction the court ordered the accused's further detention pending finalisation of the matter. The accused owns no fixed property or other property of value. A friend offered to lend him N$50 000 if the court were to impose a fine.

[5] Mr *Wessels,* counsel for the accused, alluded to a letter he received from the accused in which the latter expresses remorse for his participation in their wrongdoing and extended an apology to the court for not taking the court into his confidence from the outset. He further commits himself to do anything to reform himself. Counsel further submitted that it is possible that genuine remorse could come at a later stage and is not *per se* dependent on an accused's plea of guilty.

[2] *S v Rabie* 1975 (4) SA 855 (A) at 862G-H.

[6] Ms *Moyo,* representing the state, argued that the fact that the accused was convicted of the lesser offence of theft (opposed to the fraud charges preferred against the accused), does not minimise his blameworthiness; neither do the two counts withdrawn against him, as these involved smaller amounts. In essence, the gist of the submissions by the state in aggravation of sentence is that there should be no distinction made between the accused and Stephanie, despite her having been convicted on charges of fraud. Both benefitted from the stolen funds and enjoyed a lavish lifestyle. Counsel further submitted that there is an increasing trend in 'white-collar' crime of which the court may take judicial notice and, for this reason, a deterrent sentence is called for.

[7] With regards to the accused's proclaimed contrition it was argued that, if the accused was at all sincere in what he said in the letter to his lawyer, then he would have taken the opportunity in mitigation of sentence to explain how he became involved and how he spent the money. This he elected not to do and is silent as to what happened to the stolen money.

[8] Both counsel for the state and the defence are of the view that sentences similar to what the court imposed on Stephanie would be appropriate and satisfy the principle of uniformity. This would include to take together counts 3 – 34 for purposes of sentence while the court should exercise its discretion as to whether or not the sentence imposed on count 35 should be served concurrently with the first sentence.

The nature and circumstances surrounding the crimes committed

[9] The crimes the accused stand convicted of are indeed serious. Moreover, when these crimes were committed over a period of two years and eight months and involves the loss of large sums of money suffered by the

complainant.[3] A disquieting aspect of so-called 'white-collar' crime is that there is currently an alarming increase of these crimes in Namibia. This conclusion is fortified by the large number of cases coming before the lower courts as well as those tried in this court. In sentencing the accused the court is thus entitled to take judicial notice of the increasing prevalence of 'white-collar' crimes committed in its jurisdiction.

[10] When considering the nature of the crimes committed and the surrounding circumstances, regard must be had to the 32 incidents where money, which he knew were the proceeds of crime, were paid into his account over a period of time. There was thus ample time and opportunity for him and his former wife to stop their criminal behaviour and reflect on their actions. According to Stephanie she at one point wanted to come clean, but was threatened by the accused if she were to do so; the accused however disputed that. Whether true or not, they continued until such time Stephanie got arrested. Whilst the court erroneously in the judgment said that the accused only left a balance of N$65 in his account, the closing balance was N$8 868.34. What is evident is that very little remained in the account compared to the total sum received by the accused – despite knowing it to be stolen money.

[11] A factor that cannot be ignored and which to a certain extent mitigates the accused's circumstances, is that he was invited into the scheme by Stephanie, without whom none of this would have happened. On the other hand, well-knowing that she – according to his knowledge – had a history of dishonesty, he should not have been taken by surprise when she confided in him. Instead of discouraging her or bring his wife to her senses, it suited him like a glove where after he immediately indulged in the spoils and improved on his lifestyle.

[12] As stated, the accused has no property that could be set off against the financial loss suffered by the complainant. Neither did the accused come

[3] *S v Flanagan* 1995 (1) SACR 13 (A) at 16I-17A.

clean with the court as to what happened to all or at least part of the stolen money and why is there nothing to show for it? Furthermore, the damage suffered by the complainant is permanent as there are no prospects of the accused or Stephanie ever reimbursing the complainant for the loss Ferrodrill has suffered.

[13] Turning to the question of contrition, it is indeed the case that the expression of remorse following conviction after a trial, may still be considered a mitigating factor. However, much will depend whether such penitence is sincere. A matter that is often referred to in this jurisdiction with approval, is *S v Seegers*[4] where Rumpff, JA had the following to say on remorse as a mitigating factor:

> 'Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.' (at 511G-H)

[14] When applying these principles to the present facts, one is unable to come to the conclusion that the accused at any stage of the trial took the court fully into his confidence when expressing remorse; moreover, when he had the opportunity to do so on oath in mitigation. The genuineness of the accused's alleged contrition has certainly not been demonstrated in any form or manner, besides mentioning it to his counsel, and therefore cannot be determined or considered a mitigating factor.

[15] All the afore-going substantially increases the accused's moral blameworthiness and should therefore have a significant bearing on the punishment meted out for him.

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[4] 1970 (2) SA 506 (A).

The interests of society

[16] The interest of society in this type of crimes lies therein that society expects that those making themselves guilty of serious crimes, must be given punishment of equal measure. Society's interests are not served by a sentence which is out of proportion to the seriousness of the crime and thus requires a fine balance.[5] Given the gravity of the crimes committed herein, the proper approach would be to emphasise deterrence as an objective of punishment, lest others might think the game is worth the candle. Thus, for the court to derive at a just sentence it need to strike a proper balance between the interest of the accused, as well as that of society.

Evaluation of facts

[17] Whilst mindful that similar cases should attract more or less the same punishment, the principle of individualisation must be given equal consideration to the extent that a sentence must be constructed and tailored in such way that it fits the particular accused before court, and should not be one of general application i.e. a 'fit all' sentence. Though the court should have regard to sentences imposed in similar cases,[6] it is an accepted principle of our Criminal Justice System that even where offenders of the same crime are more or less in identical situations, the punishment meted out may differ, depending on the personal circumstances of each accused. In *S v Cambinda, S v Agostino, S v Carvalho*[7] the court stated the following;

'Where similarly placed accused commit similar crimes, in the absence of special aggravating circumstances and remarkable divergent personal circumstances, the sentencer is constrained to pass similar or not widely divergent sentences.'[8]

[18] Whereas this court (differently constituted) has already passed sentence on Stephanie who was convicted of fraud and money-laundering based on the same facts, this court should as far as it is reasonably possible,

[5] *S v Maki* 1994 (2) SACR 414 (E) at 419H where it has been held that society is best served if offenders are rehabilitated, or at least deterred from committing crime.
[6] It is referred to as the principle of uniformity.
[7] 2006 (2) NR 550 at 551D-E.
[8] See also; *S v Stauss* 1990 NR 71 (HC) at 76D-F.

avoid imposing sentences that are substantially different. Counsel on both sides agreed to this approach.

[19] There is however a notable difference in circumstances as far as Stephanie was convicted of the more serious crimes of fraud and has stood in a relation of trust towards the complainant, opposed to the accused's conviction on the lesser crime of theft. However, unlike the accused, Stephanie owned up and demonstrated sincere remorse, a factor that must have weighed heavily with the sentencing court. To this end their blameworthiness seems to be on par. As for the money-laundering charge, here the accused took the lead and although he partly acted on the instructions of Stephanie regarding the transfers made to the creditors, he very much acted with impunity with the remaining money in his account. In this regard his participation was key in the commission of the crime of money-laundering, with the accompanying increase in blameworthiness.

[20] The crime of theft – especially of the magnitude encountered in this instance – coupled with money-laundering, have in common that the imposition of deterrent sentences are called for. Given the gravity of the crimes committed by the accused, it seems inevitable that lengthy custodial sentences would be required to have the necessary deterrent effect, individually and generally.

[21] Factors counting in favour of the accused in mitigation of sentence is that he is a first offender at the age of 50 years and, to a lesser extent, that he was not initially part of the fraudulent scheme to steal money from Ferrodrill. However, once the money was deposited into his bank account, he became a major player in keeping up pretences with the creditors and the distribution of remaining funds. The main purpose of his involvement was to disguise the origin of the proceeds unlawfully obtained. When considering the collective personal circumstances of the accused against the gravity of the crimes committed, the only conclusion to come to is that his personal circumstances are by far outweighed and the imposition of terms of direct imprisonment would in the circumstances be just and fair – even on the first offender.

Conclusion

[22] Although the court, for purposes of sentence, may take any number of counts together, this practice is generally discouraged, as separate crimes should be punished separately. Composite sentences may present problems on review or appeal and should therefore be reserved for exceptional cases only. However, where the court, as in the present instance, is faced with multiple charges similar in nature, it would be very difficult, if not impossible, to do justice to the accused by sentencing on the merits of each count and the amount involved. This problem could largely be avoided by taking counts together for purpose of sentence, a practice that has become acceptable in this jurisdiction.[9] The rule which normally applies is that, where counts are closely connected in time, place and circumstance, it may be taken together for sentence. Though the offences in this instance were committed over a period of two years and eight months, the same *modus operandi* was followed. I have for this reason come to the conclusion that it would be proper, and do justice to the accused, to take all the counts together and impose one composite sentence.

[23] As for the sentence to be imposed on the money-laundering count, although the penalty provision in section 11 of the Prevention of Organised Act 29 of 2004 makes provision for a fine not exceeding N$100 million (or to imprisonment for a period not exceeding 30 years), it is evident from the accused's financial status that he is in no position to pay a fine that would be appropriate in relation to the crime committed. A sentence of imprisonment would therefore be inevitable.

[24] With regards to the cumulative effect of the sentences this court in *S v BM*[10] stated the following at para 31:

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[9] *S v Ganes* 2005 NR 472 (HC); *The State v Sylvia Condentia van Wyk* Case No SA 94/2011 delivered on 15.12.2012.

[10] (CC 07/2012) [2013] NAHCNLD 41 (12 July 2013).

'… In addition, if the accused is sentenced in respect of two or more related offences, as in this instance, the accepted practice is to have regard to the cumulative effect of the sentences to be imposed, thereby ensuring that the total sentence the accused in the end has to serve, is not disproportionate to his blameworthiness in respect of the offences committed. By ordering in terms of s 280 (2) of Act 51 of 1977 the concurrent serving of some of the sentences, it will ameliorate the cumulative effect of the individual sentences imposed. The court may exercise its discretion in favour of the accused only when multiple related offences had been committed, and where failure to make the appropriate order would result in an injustice.'

[25] In my view, the present matter is an instance where the cumulative effect of the separate sentences to be imposed should be ameliorated by an order that the sentences are to be served concurrently, as provided for in section 280 (2) of the Criminal Procedure Act 51 of 1977.

[26] In the result, the accused is sentenced as follows:

Counts 3 – 34:- Theft (counts taken together for sentence): 13 years' imprisonment of which 5 years' imprisonment suspended for a period of 5 years on condition that the accused is not convicted of theft (without the option of a fine), committed during the period of suspension.

Count 35:- Money-laundering (c/s 4 of Act 29 of 2004): 6 years' imprisonment.

In terms of section 280 (2) of Act 51 of 1977 it is ordered that the sentence imposed on count 35 be served concurrently with the sentence imposed on counts 3 – 34.

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JC LIEBENBERG

JUDGE

APPEARANCES

STATE C Moyo

	Of the Office of the Prosecutor-General, Windhoek.
ACCUSED	J H Wessels (instructed by Legal Aid) Stern & Barnard, Windhoek.