REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 14/2011

In the matter between:

THE STATE

and

IMMANUEL DAVID FREITAS DIAS **ACCUSED ONE**

EDGAR CARDOSO ALVES **ACCUSED TWO**

Neutral citation: *S v Dias* (CC 14/2011) [2022] NAHCMD 191 (14 April 2022)

Coram: UNENGU AJ

Heard: **21 February 2022**

Delivered: **14 April 2022**

Flynote: Criminal Procedure – Sentencing – Accused convicted of multiple counts of fraud of goods against his employer – Accused first offender even though convicted of the offence of theft before – The conviction of theft for which a sentence of six [6] years imprisonment half thereof suspended for five [5] years on certain conditions imposed on him previously forms part of these fraud offenses – The accused was in a trust position – In this regard, personal circumstances of the accused changed – Two

Correctional Officials testified on his behalf and handed in reports – Accused went through a Risk Assessment Programme – Re-offending not possible – Company confiscated accused and co-accused pension money – Prosecutor on behalf of the Company submitted letter for compensation in terms of s 300 of the Criminal Procedure Act 51 of 1977 – Court declined to grant the request.

Summary: The accused before court and accused 2 who has absconded since then, were acquitted on counts 1 – 137 during the trial in this court. They, were, however convicted of theft, an alternative count to count 139 and were punished accordingly. The prosecution appealed against the acquittal of the 137 counts of fraud to the Supreme Court and the appeal was successful. The Supreme Court sent back the matter to this court for sentencing of the two accused. In view of the punishment of imprisonment imposed on the accused for the alternative count of theft; the evidence of the two Correctional Officials testifying for the accused; the change in his marital status; the forfeiture of his pension money to the Company, the court imposed a sentence with an option of a fine coupled with a suspended sentence.

Held that accused does not pose a risk of reoffending according to the report handed in without opposition.

Held further, that it is an established principle of law that each case should be dealt with according to its own facts, connected with the crime and the criminal, and no countenance should be given to any suggestion that a rule may be built up out of a series of sentences which it would be irregular for the court to depart from.

Held furthermore, that sending the accused to jail will do harm than good to the accused who has rehabilitated already.

ORDER

All counts (1–137) are taken as one for the purpose of sentence:

Sentenced to pay a fine of two hundred thousand (N$ 200 000) Namibia dollars or five (5) years imprisonment plus an additional five (5) years imprisonment which five (5) years imprisonment is suspended for a period of five (5) years on condition that accused is not convicted of fraud or theft committed during the period of suspension and for which a sentence with an option of a fine is not imposed.

JUDGMENT (SENTENCE)

UNENGU AJ

[1] This is a judgment on sentence in respect of accused 1 (Dias). Accused 2 has absconded while accused 3 was acquitted and discharged at the stage when the state's case was closed.

[2] They were arraigned in this court for various offenses of fraud (counts 1 – 139) a first and second alternative counts of theft and theft of general deficiency and theft by false pretenses to counts 139. After a trial, both Dias and accused 2 were acquitted and discharged of counts 1 to count 137 but were convicted of theft which is the alternative count to count 139, while accused 2 was also convicted of fraud as an alternative count to count 141. However, the conviction of accused 2 of fraud was not appropriate and competent in view of the fact that he was not charged with fraud as an alternative count to count 141.

[3] As a consequence of the conviction alluded to, Dias was sentenced to six (6) years imprisonment of which half thereof was suspended for a period of five (5) years on the condition that he is not convicted of theft committed during the period of suspension. Accused 2 was sentenced to three (3) years imprisonment of which one year thereof was suspended for five (5) years on the same conditions as those in respect of Mr Dias. On the alternative count 141, accused 2 was cautioned and discharged.

[4] Aggrieved by the verdict of acquittal on counts 1 – 137 though, the state appealed to the Supreme Court against the acquittal and on 13 April 2021 the Supreme Court upheld the appeal in whole. The acquittal by this Court with regard to counts 1 – 137 was set aside and substituted with a conviction of fraud in respect of all counts 1 – 137 and referred back the matter to this court for sentencing. These proceedings, therefore, concern the sentencing of Mr Dias in respect of counts 1 – 137 (fraud).

[5] Mr Makando appeared on behalf of Dias with Ms Moyo acting on behalf of the state in the absence of Miss Husselmann who represented the state during the trial of the matter. Both Mr Makando and Ms Moyo filed written heads of argument which they augmented with oral submissions. Further, in mitigation for sentence, Mr Makando called Dias and two witnesses from the Windhoek Correctional Facility who observed and supervised him during his incarceration and during the time he was on parole at Swakopmund, to testify. They were Helmut Harold Noabeb, then Assistant Commissioner at the Windhoek Correctional Services and Julius Shindinge, currently a Chief Correctional Officer at the Swakopmund Correctional Facility.

[6] Mr Dias informed the court that he was a first offender, 50 years old, recently married with two children of whom one is a student at a University in South Africa while the other is working. Further, he testified that he was a businessman in retail at Oshikango selling mostly building materials and has fifty two (52) employees working for him. He said that he was convicted and sentenced to six (6) years imprisonment of which three (3) years imprisonment was suspended on certain conditions; that he served twenty one (21) months of the three (3) years sentence in the Windhoek Correctional Facility with other prisoners; that he suffers from two types of diabetes for which he has to inject himself on a daily basis and has his colon removed.

[7] Furthermore, Dias testified that while in prison, he was sent to a course for six months which changed his thinking; that he was sorry for what he did; that he was naive at the time he committed the offenses and will not repeat the same mistake. He said, due to the medical issues he has, it will not be possible for him to do community service

but may pay a fine if given an option of fine to pay. In cross-examination Dias repeated that his son of 18 years old works with him while the daughter of 21 years old is a student at University in Cape Town and is responsible for all her needs. When it was put to him by Ms Moyo that he betrayed the trust put in him by his employer and that he did not apologize for his actions, Dias replied that he did not apologize because Mr Pupkewitz had died while Mr Gallagher is no longer working at the company. In addition, he indicated that the course he went through while in jail reformed him in the sense that he will take one or two steps before doing something similar to what he did and that he was very remorseful. The testimony is almost similar to the testimony he presented in mitigation when he was sent to prison after he was convicted of theft. The glaring difference in the two testimonies is the change in his health condition and his marital status.

[8] His testimony was supported by the evidence of Mr Helmut Harold Noabeb who amongst others, was responsible for the classifications of inmates in units by looking at their behaviours. According to him, Dias was also classified in a unit by looking at how he was interacting with his fellow inmates, wardens and observed that he was willing to assist fellow offenders. Mr Noabeb testified that he received a Report attached to a recommendation for the release of Dias on parole and was of the view that sending Dias to jail will not help much because the risks of re-offending or otherwise have already been identified when he served his term of imprisonment and will not assist the Correctional Service officers, therefore, he recommended a fine or community services as suitable sentences in the instance. During cross-examination, Ms Moyo pointed out to him that the Report was silent on the aspect of remorse for what he had done while concentrating on Mr Dias' businesses.

[9] Mr Makando also called Mr Julius Shindinge, a Chief Correctional Officer stationed at the Swakopmund Correctional Facility who testified that in 2020 his position changed to Deputy Head Sentences Management at the same facility; that he supervised Mr Dias when he was released on parole and compiled a Community

Supervision Termination Report in respect of him when he was released on 15 March 2018.

[10] In his written address supplemented by oral submission, Mr Makando, pointed out that in deciding what a proper sentence would be, the court has to look at three factors (the triad), which are the personal circumstances of the accused, the crime committed and the manner in which the crime was committed as well as the interest of society. In that regard and in support of his argument, he referred to the judgments of *R v Karg*[1] *and S v Zinn*[2]. He also referred the court to the usual quoted judgment of Holmes, JA in *S v Rabie*[3] where the following was said about the element of mercy:

> 'Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.'

Holmes, JA, further said, that punishment is pre-eminently a matter for the discretion of the court, a duty of the courts to impose sentences which they (the courts) may not abdicate in favour of anybody. And in *S v Holder*[4], the court held that imprisonment should not be imposed lightly, in particular, when another form of punishment will satisfy the purposes of punishment.

[11] Mr Makando conceded though, that in the consideration of sentence, the time comes when one factor may be emphasized at the expense of another. But pointed out that our courts are in agreement that in consideration of what just and suitable sentence would be in a particular matter, regard must be had to the purpose of punishment, namely; deterrence, prevention, reformation and retribution. He then urged the court to give due weight to Dias 'mitigating circumstances and not sacrifice him on the altar of deterrence resulting in him receiving an unduly severe sentence. He repeated the personal circumstances of Dias and listed them as follows: that Dias was 39 years old when he committed the offences; that he was imprisoned for the crime he had admitted without reservations; that he suffers from Crohn's disease of the colon, diagnosed in

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[1] *R V Karg* 1961 (1) SA 231 (AD) at 236 A–B.
[2] *S V Zinn* 1969 (2) SA 537 (AD) at 540 G.
[3] *S V Rabie* 1975 (4) SA 855 at 862 G.
[4] *S V Holder* 1979 (2) SA 70 (A).

2010 – and suffers from diabetes Mellitus for which he must take medication, such as Galuesmet 50/1000 mg and Optisulin.

[12] Mr Makando further submitted that Mr Dias has two children, a daughter and a son both whom are still depended on him and as a businessman, he provides employment to a number of people; that he was in custody for two years pending his trial – that he ceded his pension to M Pupkewitz and Sons upon his dismissal and that some of the goods stolen were recovered by the complainant. In addition, Mr Makando requested the court to consider in favour of Dias that he was already punished for count 139 to six (6) years imprisonment of which half thereof was suspended for a period of five (5) years on certain conditions; to give due consideration to the report of the Correctional Services Officials as the programme is there to take care of the risks of the offender regarding re-offending.

[13] Furthermore, and while asking to extend leniency to Dias, counsel also acknowledged that it is not unusual that retribution and deterrence do come to the fore and that rehabilitation of the offender therefore, plays a relatively small role. In support hereof, counsel quoted from *R v Karg* above, where Schreiner, JA said the following:

> 'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retribution aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach, it is not wrong that natural indignation of interested persons and the community at large should receive some recognition in the sentences that Courts impose'.

[14] In conclusion while referring to various judgments of this court and the Supreme Court, Mr Makando stressed the point that the interests of justice permit that his client ought not to be re-incarcerated as such would in essence serve no purpose beyond subjecting him to cruel and inhumane punishment. Counsel thereafter, handed in an index of authorities referred to in his written and oral submissions and prayed for a wholly suspended sentence or a fine.

[15] Contrasting the submission of Mr Makando, Ms Moyo in her written heads of argument supplemented by oral submission, argued that Dias was employed as a branch manager by the complainant at the Oshikango branch of the Pupkewitz Megabuild. She argued that the complainant suffered a potential loss of N$ 4.9 million worth of disputed goods, but payment of an amount of N$ 3. 7 million thereof was received from Hauanga t/a as B H Motors Spares CC leaving a shortfall of N$ 1.2 million which the Supreme Court indicated in its judgment.

[16] Ms Moyo further argued that theft and fraud offences committed by employees against employers have always been considered by our courts as very serious offences due to the fact that the offences involve betrayal of trust by the perpetrators. According to her, Dias was entrusted with oversight of the Pupkewitz Megabuild Oshikango Branch which he admitted. Counsel re-iterated that Dias breached the trust because of greed and the desire to own his own business which he built at the expense of his employer and clients of the employer by exploiting the client credit to his advantage.

[17] Like Mr Makando, Ms Moyo also submitted that in sentencing, the court must consider the purpose of punishment and the factors that affect punishment, namely the offender, the seriousness of the offence and the interest of society in a legitimate sentence as pointed out in *S v Ngunovandu*[5] and *S v Brand and Various Cases*[6] respectively. In addition, she urged the court to impose a custodial sentence which must reflect the seriousness of the offence to deter him and other like-minded persons.

[18] Similarly, as was done by Mr Makando, Ms Moyo also referred the court to a variety of relevant judgments of this court where guidelines are laid down regarding suitable and appropriate sentences for fraud and theft offences. However, if regard is had to all these judgments quoted by counsel, it is apparent that different sentences were imposed in each case, even though, in most of these cases referred to, the

[5] *S v Ngunovandu* 1996 NR 306 (HC) at 318-320.
[6] *S v Brand and Various Cases* 1991 NR 356 at 357.

accused persons involved were convicted of either fraud or theft of money from their employers. The different sentences imposed, in my view, is an indication that when sentencing an accused, the court has to consider the merits of the matter at hand. The personal factors of the accused, the crime and the interests of society which are the important attributes dictating a suitable and appropriate sentence the court must impose.

[19] The personal circumstances of Mr Dias have already been placed before court by himself and his counsel. I do not wish to repeat the same again as they are already captured above in the judgment. However, there are factors submitted on his behalf which stand out in his favour. These are that he was earlier convicted of theft, an alternative count to count 139 by this court and was sentenced to six [6] years imprisonment of which half thereof was suspended for a period of five (5) years on certain conditions. This count formed part of the current counts for which he is to be sentenced now. It is common knowledge that Dias is a first offender; that the complainant confiscated his pension money and that of accused 2 to mitigate the loss suffered by the complainant as a result of their conduct. In other words, the complainant has been compensated for part of the loss suffered. I agree with Mr Makando that the sin he and his co-accused committed was that they disobeyed the guidelines of the company when they extended the credit limit of Mr Hauanga without permission from management which credit facility they then abused for their own benefit.

[20] Two Correctional Service Officials testified on his behalf and submitted an assessment report each which were received as exhibits without objection from counsel for the state. Ms Moyo did not call a witness or witnesses to refute the oral evidence of the officials and the content of the reports. In the Risk Assessment Report (Exh “A”) at page 6 para 4, at the conclusion, the following appears:

‘At the end of the programme, Manny does not seem to pose any of risk of reoffending, and has come to realize where, how, and why he put himself on the wrong side of the law. As such, an aim of the intervention was to ensure a higher quality of life for Manny in future, as his demanding thinking and stringent work ethic seem to have added to the physical health

difficulties he experienced before his incarceration. Additionally since he is the owner of a company that employs quite a few individuals it became paramount that his social awareness and caring be developed further. This seems to have been achieved as he indicated his new interest in his employees' wellbeing, and hinted at social/community development projects he wants to become involved in.'

The Report concluded that Dias, also known as Manny, appears to have made a genuine and motivated effort to improve himself and his life, and as such would likely be a pillar of the Namibian community after his release.

[21] In a matter between *Zedekias Gaingob and Others v The State*[7], the Supreme Court quoted passages from an affidavit of the Deputy Commissioner-General of the Namibian Correctional Services, Anna-Rosa Katjivena where the Deputy Commissioner-General made the following conclusion.

'5.1 ……

5.2 In the premises long custodial sentences do not assist the Correctional Service in achieving one of its primary objectives. Furthermore long custodial sentence put an unnecessary financial burden on the resources of the State as offenders who could contribute positively towards nation building are not able to do so because of their sentences.'

[22] In the instant matter, according to the risk assessment report placed before court unopposed, attest to the fact that Dias does not seem to pose any risk of reoffending and that he has already started contributing positively towards nation building after his release by employing other people working for him in his company. It appears from the report further, that the sentence of imprisonment imposed on him on the alternative count to count 139 has rehabilitated and deterred him from reoffending. Therefore, it will serve no purpose, in my view, to send him back to jail to repeat the same risk assessment programme he successfully completed. It is further my view, that sending him to jail in spite of the evidence not to do so, will do harm than good to him. But, this does not mean that he will get a slap on the wrist. He will definitely atone in one or the other way for the crime he had committed.

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[7] *Gaingob v The State* (SA 7 and 8/2008) [2018] NASC (6 February 2018) At p11 Para 23.

[23] No doubt, the crime of fraud Dias committed is a very serious crime. He was convicted of multiple counts of fraud committed against his employer who placed him in a position of trust, namely a position of a branch manager at its Oshikango Mega Built Warehouse. He betrayed the trust placed in him by the employer. In his own words, during the trial, told the court that he was a blue - eyed boy of the late Harold Pupkewitz the then senior shareholder of the M Pupkewitz & Sons Companies. Needless to say, that fraud or the so-called white-collar crimes are serious, therefore, stiff sentences should be imposed on those who commit these crimes to deter them and the like-minded who intend committing the same crime. It is apparent from the judgments referred to by counsel that this Court, the Supreme Court and the South African Courts imposed and are still imposing on those convicted of fraud, heavy sentences. However, it is trite that it is accepted that sometimes a succession of punishments imposed for a particular type of crime provides useful guidance to a court dealing with such a crime. But it is an established principle of law that each case should be dealt with upon its own facts, connected with the crime and the criminal, and no countenance should be given to any suggestion that a rule may be built up out of a series of sentences which it would be irregular for the court to depart from. See *R v Karg*[8].

[24] During oral argument, Ms Moyo handed in a letter dated 18 November 2021 on behalf of the complainant requesting the court to make an order for compensation in terms of section 300 of the Criminal Procedure Act 51 of 1977. Although the Supreme Court convicted both Mr Dias and accused 2 of counts 1 – 137, the letter for compensation does not state how much Dias should pay and how much for accused 2. The letter just states amongst others, that the company seeks compensation in the amount equal to the actual prejudice, which is equal to N$ 1 950 000. The evidence before court is that after Dias left the employment of the complainant, accused 2 still worked for the company and continued with the scheme. For how long accused 2 used the scheme in Dias absence and how much money was involved, is unknown. The letter is also silent on how much pension money of Dias was confiscated and whether that money was deducted from the amount the complainant wants the court to grant an

[8] Supra At 236 G-H.

order for compensation in terms of s 300 of the Criminal Procedure Act 51 of 1977. With the above in mind, I refuse to heed Ms Moyo's request to grant the compensation order against Dias for the whole amount and for Dias then to recoup his share from accused 2. The complainant may claim the money from Mr Dias and accused 2 through other remedies available to it.

[25] As said before, Ms Moyo referred the court to a raft of case law where this court imposed direct imprisonment on the accused who were found guilty of fraud and money laundering. But what counsel should not forget is that facts of cases she cited differ from the facts of this matter. Even the facts in the matter of *S v Homses*[9] differ from the facts in this matter. It is stated in *S v Holder*[10] that imprisonment should not be imposed lightly, especially if another form of punishment will satisfy the purpose of punishment. I totally agree. Therefore, in this matter, when regard is had to the personal factors of Dias, it is my view that a sentence with an option of a fine, will suit the offender, the crime and the interest of society.

[25] Accordingly, the following sentence is imposed:

> All counts (1 – 137) are taken as one for the purpose of sentence:
> Sentenced to pay a fine of two hundred thousand (N$ 200 000) Namibia dollars or five (5) years imprisonment plus an additional five (5) years imprisonment which five (5) years imprisonment is suspended for a period of five (5) years on condition that accused is not convicted of fraud or theft committed during the period of suspension and for which a sentence with an option of a fine is not imposed.

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[9] *S v Homses* (SA12/2014) [2016] NASC (8 June 2016)
[10] *S v Holder* 1979 (2) SA at 70 [A].

E P UNENGU
Acting Judge

APPEARANCES

STATE:	E Moyo Office of the Prosecutor-General, Windhoek
ACCUSED 1 & 2:	SS Makando

Adv SS Makando Chambers, Windhoek