



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HD-MD-CRI-APP-CAL-2022/00047

In the matter between:

JENNY GAROES

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Garoes v The State* (HD-MD-CRI-APP-CAL-2022/00047) [2023]
NAHCMD 191 (14 April 2023)

Coram: JANUARY J and CLAASEN J

Heard: 07 October 2022

Delivered: 14 April 2023

Flynote: Criminal Procedure – Grounds of appeal – Not concise, wide and general –
Misdirection – Grounds partly considered – Judgment on conviction is riddled with
“indistinct” portions which makes it difficult to discern from the reasons how the court a
quo resolved the issues of fact and law – It is alarming that the Magistrate did not
supplement the reasons after the notice of appeal was filed and stated he had no
additional reasons to add – Duty and rationale for court to provide reasons for its

decision – Evidence – Evaluation of – Misdirection – Considered evidence as that of single witness – Corroborating evidence of second witness who also conducted an inspection of the stock records and came to same conclusion as to the shortfall – Re-evaluation of evidence – Proven beyond reasonable doubt – Convictions confirmed – Criminal Procedure – Sentence – Cumulative effect – Position of trust – No misdirection – Sentence confirmed.

Summary: The appellant was an employee at Khomasdal post office. She was in charge of serving clients at the counter, selling products such as stock. She further handled stock on the computer system. She misrepresented to the postmaster that her physical stock corresponded with the stock on the computer system. In the meantime, she took physical stock and sold it externally for her own gain. Her actions caused a shortfall in the amount of N\$299 119.21. She furthermore used the illegally obtained proceeds to pay off debtors of her late mother, thereby laundering money. Many of the appeal grounds were couched in general and vague terms, thus, disqualifying them from being considered by the appeal court. The appeal proceeded on the remaining grounds and the appeal was dismissed on both conviction and sentence.

Held, that the grounds of appeal must be set out in clear and specific terms to apprise the parties of the case it has to meet in the appeal court.

Held further that the typed record was riddled with indistinct portions and the magistrate did not supplement the reasons once the appeal was filed. Furthermore, it was a terse judgment making it difficult to understand how he resolved the issues of fact and law.

Held further that the duty to give reasons for a decision cannot be relegated as it serves to promote public confidence in the administration of justice; it informs the losing party of the reasons for being unsuccessful in court and it enables the appeal court to comprehend the path that the trial court has taken to a given decision.

Held, further that in the evaluation of evidence, a court is to consider the full conspectus of evidence and cannot ignore parts of the evidence. It was a misdirection by the court a

quo to have considered the evidence of only one witness whilst two witnesses have testified. As such the appeal court reconsidered the evidence and found that the state has proven all the elements of the two charges.

Held further that the state has proven its case on both counts, nor is there any misdirection in the sentence

ORDER

1. The appeal in relation to the conviction on both counts and the sentence imposed on both counts are dismissed.
2. The matter is considered finalised and removed from the roll.

APPEAL JUDGMENT

Introduction

[1] The appellant was convicted of fraud in the amount of N\$299 119.21 and acquisition, possession or use of proceeds (N\$299 119,21) of unlawful activities in contravention of s 6 read with ss 1, 7, 8 and 11 of the Prevention of Organised Crime Act 29 of 2004.

[2] The appellant was sentenced on count 1 to six years' imprisonment of which two years is suspended for a period of three years on condition that the appellant is not convicted of fraud committed during the period of suspension. On count two, the appellant was sentenced to four years imprisonment ordered to be served concurrently with the sentence on count one.

[2] This appeal is against both conviction and sentence.

[3] The appellant is represented by Mr Kanyemba and the respondent by Mr Lipinge.

Grounds of appeal

[4] The grounds of appeal raised in the notice of appeal are as follows:

'AD CONVICTION

1. 'The court erred in law and/or fact in that even though there was no sufficient evidence, credible, and reliable evidence placed before court to support and/or to prove the charges against the appellant, the court a quo nevertheless proceeded and convicted the appellant
2. The court applied a wrong approach applicable to the evaluation of evidence in a criminal trial and failed to consider material facts and admitted and relied upon inadmissible evidence.
3. The court erred in law and/or in fact by accepting state witness Nakatimba's evidence, who was a single witness in all material respects, and whose testimony was uncorroborated in many material respects.
4. The court erred in fact and/or in law by considering irrelevant evidence and/or testimony from state witnesses on issues that were not placed in dispute and finding that the said irrelevant evidence and/or witness testimonies were corroborated on material aspects.
5. The court erred in law and/or in fact by using a wrong test of "*proof of a prima facie*" case against the Appellant as opposed to the test of "*proof beyond reasonable doubt*" after the defense case was closed, to convict the Appellant.
6. The court erred in law and/or in fact by convicting the Appellant on Count 2 which is not a competent verdict of the first count and was part of the Prosecutor-General's decision letter (PGD) which instructed as to which charges and in which court the Appellant should be prosecuted, as handed up on record.
7. The court erred in law and/or in fact by relying on case law authorities which are distinct from the Appellant's case and find no application.

AD SENTENCE

8. The sentence imposed is manifestly excessive in that it induces a sense of shock.
9. The court erred and/or misdirected itself by sentencing the Appellant to direct imprisonment without an option of a fine on both counts.

10. The court erred in law and/or in fact by not considering the fact that the Appellant paid back part of the amount of money she was convicted of, thereby significantly reducing the total actual loss suffered by the complainant.
11. The court erred and/or misdirected itself by failing to take into account material facts and/or over-emphasised the importance of other facts during sentencing.
12. The sentence imposed is startlingly inappropriate, 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.'

Point In Limine

[5] Respondent raised a point *in limine* that: grounds one to four and seven are defective in that they fail to meet the mandatory requirements of rule 67(1) of the Magistrate Court Rules. Respondent's counsel submitted, amongst others, that the grounds are not clear neither concise as required and are so vague that one needs to re-evaluate all the evidence presented at the trial to adjudicate if the learned magistrate committed an error(s) for purposes of this appeal.

[6] The respondent elaborated in oral submissions that ground one alleging that there was no sufficient evidence or otherwise no credible evidence is wide and vague, requiring this court to peruse the whole case record to adjudicate on the issue. Further, that there is no clarity on ground two in what wrong principle was applied by the court a quo to evaluate the evidence. It was submitted that from ground three one can infer that the court erred by finding the evidence of a single witness reliable. In relation to ground four it is unclear what irrelevant evidence was considered by the court a quo. He argued that this court should only consider grounds one, three and six.

[7] Mr Kanyemba countered the point *in limine* by submitting that the grounds of appeal are not vague and that they should be considered by this court. He submitted further, that it is not a requirement that a ground of appeal should be succinct and he was of the view that the grounds were all set out sufficiently to meet the requirements.

[8] It is trite that grounds of appeal in a notice of appeal should be set out clearly and specifically as is required by rule 67(1) of the Magistrate's Court Rules. In considering

the argument by Mr Kanyemba, the rule does not require an appeal ground to be succinct, but it requires it to be clear and define in precise terms what aspects are being attacked, so that a party will know the case it has to meet in the appeal court.

[9] There is an abundance of case law in our jurisdiction that reiterates the above principle.¹ In *Kamuro v S*² it was held that grounds of appeal must apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues and that the notice of appeal must be set out clearly and specifically the grounds on which it is based.

[10] In our view, the grounds of appeal are such that the appellant casts her net as wide as possible. Many of the grounds were stated in such general terms that they do not meet the established requirements. That approach is frowned upon by the appeal courts. In this regard it was stated in *Hindjou v The Government of the Republic of Namibia*³ that:

'To ramble through the whole judgment in the hope of finding something wrong or an error which leads to success of the appeal, is not in the interest of justice. It tends to waste the time of the parties and the court.'

[11] Consequently, this court upholds the point *in limine* in relation to grounds 1, 2, 4, 7, and 11 and will deal with grounds 3, 5, 6, 8, 9 10 and 12.

Submissions by parties on grounds that meet the requirements

[12] In brief, in respect of the grounds pertaining to the conviction, Mr Kanyemba argued that not only did the court a quo misdirect itself when it made reference to and applied the standard of prima facie proof of the evidence, but that the court a quo also had no basis to find that the state had proven its case. He argued that witness Mr Nakatimba extracted the admission from the appellant when he followed her and waited outside the toilet to question her. Furthermore, that Mr Nakatimba`s evidence did not

¹ *S v Gey von Pittius and another* 1990 NR 35, *S v Kakololo* 2004 NR 7, *Kanoge v S* (CA 39/2012) [2012] NAHCMD 45 (12 October 2012).

² *Kamuro v S* (HC-MD-CRI-APP-CAL- 2019/00001) [2021] NAHCMD 135 (29 March 2021).

³ *Hindjou v The Government of the Republic of Namibia* 1997 NR 112.

satisfy the single witness test and that there was no independent forensic audit. He also argued that it was not proper to have proceeded on count 2 as it was not included in the decision of the Prosecutor General. As for the sentencing, he urged the court to consider that the appellant paid part of the money back to the complainant and that the sentence was excessive in the circumstances.

[13] Mr Lipinge argued that the court *a quo* did not err when it spoke of *prima facie* evidence in the final judgment. He was of the view that if one considers it in the context of the appellant opting to remain silent, she did not rebut that *prima facie* evidence, which entitled the court *a quo* to regard it as conclusive and sufficient to prove the state's case. He also submitted that there was nothing irregular when the witness discovered the anomaly, as the witness merely was standing outside the toilet and overheard the appellant conversing with a person and saying words to the effect that they must hurry up as she had been discovered.

[14] He also referred this court to case law⁴ as regards to an objection to the charge and stated that in the matter before court the appellant did not protest to the second charge. As regards to the sentence, he expressed the view that there was no misdirection in sentence and that it was not shockingly inappropriate.

Summary of the evidence

[15] The State called two witnesses to prove its case. The charges are based on evidence that the appellant was employed at the Khomasdal Post Office as a counter clerk serving the public at counter no. 1. She was also acting postmaster in the absence of the postmaster. The first witness is the postmaster, Abraham Nakatimba, at this post office and the supervisor of the appellant. The appellant lost her safe's key at the beginning of December 2017. Attempts were made to obtain a duplicate spare key that was kept at the main Windhoek Post office, however, to no avail.

[16] The appellant was responsible for the sale of products, which consisted of tango cell phone recharge vouchers, stamps, flexi recharge call cards, postal orders, revenue

⁴ *Mosinga v National Director of Public Prosecutions and Another* (AR 517 (2013) [2015] ZAKZPHC 24 (7 May 2015).

stamps and other products that can be sold at the post office at her counter no.1. All these items are referred to as stock at the counter.

[17] The issue of the lost key was only resolved in March 2018. In the meantime, the appellant could not access her safe at counter no.1. As a result, there was no movement of stock from counter no. 1. The first witness, Abraham Nakatimba, transferred counter no. 2, which was assigned to him, to the appellant to continue with her duties and responsibilities. Mr Nakatimba instructed the appellant to finish selling the stock of counter no.1 within one month before their expiry after the issue of the lost key was resolved. After the instruction, the witness detected on a sales report that there was no movement of stock at counter no.1.

[18] Surprisingly, the appellant reported two days thereafter that she had sold all the stock at unit number one, referring to counter no.1. Mr Nakatimba was satisfied but suspicious and enquired how the appellant managed to do that. The appellant responded that she succeeded by selling the stock with another clerk, Elizabeth Nangombe, at the said post office at Khomasdal. Mr Nakatimba became suspicious because on record the stock at counter one was quite a lot and it was impossible to be sold in two days. The witness drew the stock level at counter one and established that there was no stock on hand. He further cross checked with the sales report and could not find corresponding movement of stock.

[19] On 02 April 2018, the witness went to the post office to perform reconciliation of the stock, balancing the stock for the entire post office to establish the stock available for sale and what shortage there was. He detected that there was a new stock unit, no. 5 allocated and created in his name. Previously there were only stock units from numbers one to four. The witness testified that he did not create this new stock unit. The witness phoned Elizabeth Nangombe to establish what stock she sold with the appellant. Nangombe denied any knowledge of stock having been sold with the appellant.

[20] On 03 April 2018, which was a day for pensions pay out, the witness provided the appellant with operational capital. Thereafter, he did a surprise check on counter

one of the appellant, in her presence. Eventually the witness established that there was less physical stock whereas the records indicated that there should have been more stock on hand. The witness enquired from the appellant where the missing stock was. She got nervous and stated that the stock was in the safe. The appellant grabbed her telephone and went out of the office to a toilet. The witness followed and at some stage overheard the appellant talking to someone on the phone asking the person to bring the things as something was detected. The appellant took some time to come out of the toilet.

[21] The witness and the appellant together went to the safe to see the physical stock. However, there was no stock of counter one in the safe. The appellant then said that the stock was at the counter. She was sent to collect the stock, took some time and eventually said the stock was in the safe of which she lost the key. An inspection of that safe, did not produce the missing stock. On further enquiries, the appellant remained silent, looked at the ceiling and eventually confessed that she stole the stock and offered to refund it. She further stated that she was the one responsible for having created the new stock unit no.5.

[22] At that time the shortage of all stock amounted to N\$299 119. 81. It was a lot of money and the appellant stated that she was going to sell her house and car to refund the amount. She stated that she sold the stock externally and not in the post office. She further indicated that she manipulated the stock on the computer. Mr Nakatimba demanded something in writing about her accountability. She offered to write a letter of 'commitment' and stated that she was going to refund the money on 07 of April 2018. On 07 April 2018, she refunded N\$40 000 and N\$30 000 on 09 April 2018. After a reminder on 12 of April 2018, she refunded a further N\$10 000. Thereafter the appellant did not make any further payments causing the witness to report the matter to the police.

[23] The police did not open a criminal case at the time but only made an entry in their incident report book (IB). That was because the appellant had refunded some money in the hope that she would refund the balance. On 13 April 2018, the witness opened a criminal case because no further payments were forthcoming from the

appellant. The witness thereafter, did a comprehensive audit and compiled reports on counters one, two and five where he gave a breakdown of the shortages of specific amounts in relation to the respective counters. The witness did all this in the presence of the appellant and they both co-signed the documents. He eventually handed the findings to his supervisor who is the control postmaster, Ms Dora Garises. Thereafter, the appellant was suspended.

[24] The witness produced two letters written by the appellant wherein she acknowledged the shortage and gave a reason and undertook to refund at the end of the week of 07 April 2018. She stated that it happened because her late mother had a lot of debt which she (the appellant) had to settle. She further undertook in one of the letters that she wanted to sell her house and motor vehicle and will settle by the end of April when the property would have been sold.

[25] The witness testified that after the appellant was suspended on 16 April 2018, a disciplinary hearing was scheduled, but she resigned a day before the disciplinary hearing. The witness opened the criminal case because the appellant was reluctant to settle the amount of the total shortage of stock.

[26] The evidence of the witness was not seriously attacked and centred mostly on a disciplinary code that was not complied with and whether or not the appellant was threatened to make the admissions and writing the letters. The witness denied any threats and stated that although he was the supervisor of the appellant, they had a good relationship and that he trusted her.

[27] The second witness, Dora Garises, was the control postmaster from the Windhoek Post Office. She was responsible for the control of a group of post offices, amongst others, the Khomasdal Post Office under her supervision, operational affairs and management. The previous witness and the appellant were employed at the Khomasdal Post Office. On 15 April 2018, Mr Nakatimba, the previous witness, reported to her that the appellant operated stock units numbers one, two and five at the Khomasdal Post Office and that she had transferred stock to and from the stock units. The witness further reported that he discovered a shortage of stock in the amount of

N\$299 119. 21. He also reported and discussed with her about the offer of the appellant to refund the amount to the value of the shortage.

[28] The witness requested the assistance of two other postmasters and together investigated and double checked the reported shortage of stock at the Khomasdal Post Office. They confirmed the shortages and how stock was moved hence and forth between the three units. The witness also confronted the appellant who confirmed the findings. The witness confirmed that the issue of the lost safe's key was reported to her. The appellant offered to settle the shortage by selling her house and car. The witness instructed Mr Nakatimba to report the matter to the Namibian Police. The appellant was also to be dealt with at a disciplinary hearing but the appellant resigned a day before the hearing. The witness identified the documents that were handed to her by Mr Nakatimba and confirmed the correctness of shortages of stock indicated therein, corresponding with the internal audit that she and another postmaster did. She confirmed that the appellant was one of the post office's top trusted employees.

[29] Cross-examination again mostly centred on the failure to comply with disciplinary procedures as stipulated in the disciplinary code of the post office. The witness testified that she reported the matter to her Regional supervisor. She testified that as acting postmaster in Mr Nakatimba's absence, the appellant was responsible for the stock.

[30] The witness was confronted with a document where Mr Nakatimba conducted a surprise check and found everything in relation to stock to be in order. He even complimented the appellant. The witness was asked, how it was possible that two days thereafter there was this big shortage. The witness responded that it was possible because the appellant was responsible for the transfer of stock between units and could have manipulated the information on the computer system to balance. She stated that the shortage was detected without an external audit because the physical stock was counted and it did not correspond with the system stock i.e. reports and documents on the computer system. The appellant confirmed the shortage to the witness.

[31] The State closed its case after the second witness was called. The defence brought an application for a discharge in terms of section 174 of the CPA. This

application was opposed. Eventually, the application was refused and the appellant was placed on her defence. However, she opted to remain silent and thus, no evidence was presented by the defence.

The judgment of the Magistrate

[32] Although, it is not necessary for this court to deal with the ruling of the s 174 application, we need to refer to it because the magistrate referred to it in the final ruling on the merits. In the section 174 application, he summarized only the evidence of the first witness and did not consider the evidence of the second State witness. On perusal of the submission of the State, it is evident that they only relied on the evidence of Mr Abraham Nakatimba in their opposition to the s 174 application and submitted that he should be treated as a single witness. This may be the reason for the magistrate's rationale to focus only on that one witness in his summary of evidence.

[33] In closing arguments before judgment, the prosecution again submitted on the merits that the State's evidence was that of a single witness. The magistrate delivered an *ex tempore* judgment and referred to his *ratio decidendi* in the 174 application concerning count 1, stating that he is of no different opinion, and convicted on count 2.

[34] We were at pains to decipher what the magistrate's reasons were in the 'final judgment' as the typed record was riddled with 'indistinct' portions which made it difficult for the appeal court to comprehend the reasons. In addition, it is a terse judgment making it difficult to discern from the reasons how the magistrate resolved the issues of fact and law. It is alarming that the Magistrate, did not even attempt to supplement his judgment after the notice of appeal was filed. He simply stated that he has no additional reasons to add. In view of the situation at hand, especially since this case was at Regional Court level, to remind the magistrates of the rationales for the duty to give reasons:

a) it promotes public confidence in the administration of justice;

b) it is important to inform the losing party of the reasons for being unsuccessful in

court;

c) it makes the right of appeal meaningful as it enables the appeal court to comprehend the path that the trial court has taken that lead to its decision. Therefore, the duty to give reasons cannot be relegated at all.

[35] Notwithstanding, we were able to discern that the magistrate only considered the evidence of Mr Nakatimba in convicting the appellant on both counts. This, in our view is a misdirection, as there was another witness who testified. It is apposite to remind magistrates of the need to consider the whole conspectus of evidence, as was stated in *S v Van der Meyden*⁵ that:

‘A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. The process of reasoning which is appropriate to the application of the proper test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of it might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.’

[36] In addition, in the circumstances where the judgment of the magistrate cannot be properly deciphered because of illegible portions it requires a re-evaluation of the evidence.

Evaluation

[37] The evidence of Mr Nakatimba was to the effect that he discovered shortages of stock on the counters of the appellant. He counted physical stock on hand and compared that with stock that was reflected on the computer stock system. He compiled

⁵ *S v Van der Meyden* 1999 (1) SACR 447 W.

reports which were accepted by the court a quo without any objection thereto. These reports reflected a shortfall of stock.

[38] The shortfalls were not seriously attacked in cross-examination, except for an attempt to cast doubt on them by suggesting that it was not proved beyond reasonable doubt because there was no official internal or external audit in accordance with the disciplinary code of the post office. Further to that, it was suggested that the admissions were made under duress and that Mr Nakatimba was a person in authority and did not warn the appellant that it could be used in evidence against her. When confronted by Mr Nakatimba, the appellant admitted that there was a shortfall and that she was responsible for it. She offered to settle the shortfall at a certain time by selling her house and motor vehicle. She further admitted that she knows computers better than Mr Nakatimba, which increases, the probability that she manipulated the stock and information on the computer system to effect the shortfalls without detection. At the time when the testimony was presented about the admissions, there was no objection against its admissibility. Furthermore, the appellant was represented by a legal practitioner at the time. The correct approach would have been to put the admissibility in issue at the time of the witness' evidence and requested for a trial within a trial to determine the issue. This was not done.

[39] The evidence given by the second State witness was that she and two other postmasters independently investigated the shortage of stock and concluded that indeed there was a shortfall. This evidence was also not attacked. This witness' evidence corroborated the evidence of Mr Nakatimba, thus no longer qualifying him to be a single witness. This evidence was not at all considered by the court a quo, hence a misdirection. Be that as it may, even if he had been a single witness, we would find his evidence to be reliable and truthful in all material respects.

[40] We turn to deal with the contention that the Magistrate erred by applying a wrong test, proof of a prima facie test as opposed to proof beyond reasonable doubt. In this regard the record of proceedings in relation to the judgment reflects the following: (reflecting the challenges this court faced with the judgment on the merits)

'In (indistinct) of this offense there must be another (indistinct) which is (indistinct) in order to create (indistinct), covered by this (indistinct) by the Judge of the High Court. Now having found in my previous Judgment that there is a Prima Facie case of (indistinct) misrepresented (inaudible) institution, as I have (indistinct), I now (indistinct) the stock that there were taken from (indistinct) and the (indistinct) (inaudible), and that is the relevant of the (indistinct). I (indistinct) to go further in much details, however the that is (indistinct) considered in my noting in terms of section 174 (indistinct) the Judgment of the State versus (indistinct). I see (indistinct why I should (indistinct) Here (indistinct) the State versus (indistinct) from the ruling I have previously rules (inaudible) 2021). And as a result you are now found guilty on count 1 fraud as well as count 2, which is under the (indistinct) of Organised Crime Act (inaudible) of the alternative charge.'

[41] It is evident that the extract from the judgment is almost meaningless in its indistinct portions, but it does not mean that the magistrate applied the wrong test or standard of proof at the end of the State's case. One can discern that the Magistrate referred to his ruling in the 174 application. The ruling in the 174 application was clear and intelligible. In that ruling, he considered if the State proved prima facie that there was indeed a misrepresentation as one of the elements of fraud. He further alluded to the fact that if a prima facie case was proven requiring the appellant to testify and respond, failing then the prima facie case becomes conclusive proof.

[42] In our evaluation of the evidence, there was indeed a *prima facie* case, requiring the appellant to answer to. In the absence of her testimony the magistrate was justified to convict. In relation to the misrepresentation, the appellant admitted that she has a better understanding of computers, which is indicative that she would have had little difficulty to manipulate the stock on the computers to inter alia misrepresent the physical stock on hand as well as that on the reports in the system. This misrepresentation was directed to Mr Nakatimba, as representative of the post office. Though he found no irregularities on 31 March 2018, he definitely found anomalies and discovered the shortage of physical stock on 2 April 2018. All in all, the evidence has proven all the elements of the common law offence of fraud.

[43] A further ground of appeal raised was that the Magistrate erred by convicting the appellant on the second charge which is a contravention of s 6 read with ss 1, 7, 8 and

11 of the Prevention of Organised Crime Act 29 of 2004. It was alleged that this crime is not a competent verdict of fraud and not part of the instruction from the Prosecutor-General (the PG). Therefore, so it was argued, it was not a valid charge.

[44] Firstly, the prosecution did not rely on this charge as a competent verdict but requested the appellant to plead to it as a substantive charge. Secondly, there was no authority provided that it was irregular to charge an appellant on a charge for which there was no instruction from the PG. We reiterate what this court stated in *Kahungu v S* (HC-MD-CRI-APP-CAL-2021/00013) [2022] NAHCMD 593 (24 October 2022):

[9] The Prosecutor-General (PG) is appointed by the President to prosecute, subject to the provisions of the Constitution and to delegate to other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any court.⁶ It is a notorious fact, substantiated by an affidavit from PG that she has delegated and delegates the authority to prosecute to Deputy Prosecutors-General, Control public prosecutors and other prosecutors to institute and conduct prosecution in Namibia. It is therefore incumbent on any public prosecutor to decide on what charges an accused is to stand trial. In the instant matter, both the accused persons were summonsed to appear on a charge of assault common and an admission of guilt amount of N\$1000 was stipulated. It is not clear who compiled the summons but, be that as it may, it remained the prerogative of the public prosecutor to amend charges in accordance with the evidence at his or her disposal at the time of going to trial. Furthermore, no objection against the charge was raised at the commencement of the trial. This point in limine has no merit and stands to be dismissed.'

[45] We find in our evaluation to this charge that the admission by the appellant to Mr Nakatimba, in a letter that was handed up as exhibit 'B' that she used the proceeds of the crime in order to settle debts of her late mother which she, as the only elder working child had to settle. Considering the conviction on count one, we find that she on diverse occasions acquired, used and had in her possession property to wit; N\$299 119. 21, knowing that it was proceeds of illegal activity, thereby laundering the money.

⁶ Article 88 of the Namibian Constitution; s 2 and s 3 of the Criminal Procedure Act 51 of 1977, as amended.

Grounds of appeal relating to the sentence.

[46] Contrary to the judgment on the merits, the judgment on sentence by the Magistrate is clear and leaves no room for wondering about the sentences that were imposed. The Magistrate appropriately considered the personal circumstances of the appellant, the nature of the offence and the interest of society. Further, he considered the objectives of punishment.

[47] The appellant is 32 years old. Her mother passed away in 2017. She is single and without children but takes care of siblings and a niece, assisting her stepfather. She did not take up a permanent job since 2018 but is doing training at an international company. She is blind in one eye and suffers from high blood pressure. She is a first offender. The court a quo considered that the appellant showed remorse by admitting to the crimes to Mr Nakatimba and her offer to repay the shortfall. The court considered that the appellant was in a position of trust which is aggravating.

[48] The appellant was sentenced on count one to six years' imprisonment of which two years are suspended for a period of three years on condition that the appellant is not convicted of fraud committed during the period of suspension. On count two she was sentenced to 4 years' imprisonment, ordered to be served concurrently with the sentence in count one.

[49] It is trite that a court of appeal has limited powers when it comes to an appeal against sentence and it can only do so in certain circumstances, as was stated in *S v Tjiho* 1991 NR 361 HC at 366 A-B, where Levy J stated that:

'The appeal court is entitled to interfere with a sentence if:

- (i) *the trial court misdirected itself on the facts or on the law;*
- (ii) *an irregularity which was material occurred during the sentencing proceedings;*
- (iii) *the trial court failed to take into account material facts or overemphasized the importance of other facts;*

(iv) 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 any court of appeal.⁷

[50] We found that the Magistrate misdirected himself by not considering the evidence of the second State witness in relation to the conviction. There is however, no misdirection in relation to the sentence. The crimes are indeed serious in the circumstances where the appellant was in a highly trusted position. The Magistrate considered the cumulative effect of the sentenced and, in our view, blended the sentence with mercy by ordering it to be served concurrently. We do not find any misdirection in relation to the sentences.

[51] In the result:

1. The appeal in relation to the conviction on both counts and the sentence imposed on both counts are dismissed.
2. The matter is considered finalised and removed from the roll.

H C JANUARY
JUDGE

C M CLAASEN
JUDGE

⁷ See: *S v Tjiho* 1991 361 (HC) at 366 A-B

APPEARANCES

APPELLANT:

S KANYEMBA
Of Salomo Kanyemba Inc,
Windhoek

RESPONDENT:

H IIPINGE
Of the Office of the Prosecutor- General, Windhoek