



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 65/2013

In the matter between:

**THE STATE**

**APPELLANT**

and

**MARGRETH EIGOWAS**

**RESPONDENT**

**Neutral citation:** *S v Eigowas* (CA 65/2013) [2017] NAHCNLD 9 (20 February 2017)

**Coram:** TOMMASI, J and JANUARY, J

**Heard:** 18 November 2016

**Delivered:** 20 February 2017

**Flynote:** Criminal Procedure – Appeal – Sentence – Periodical imprisonment – 2000 hours – Not a lenient sentence – Considered over the period of which the respondent served it – Her family life disrupted and inconvenienced – Imprisonment inevitable – No misdirection – Sentence confirmed

**Summary:** The respondent pleaded guilty in the magistrate's court on a charge of theft of N\$63 180. She was sentenced to 2000 hours periodical imprisonment in terms of section 276 (1)(c) of the Criminal Procedure Act, Act 51 of 1977. The sentence is found not to be lenient considering the period over which it was served. It disrupted and inconvenienced the family life of the respondent over a period spread over 8 to 10 months. This court found no misdirection and encourages magistrates to impose periodical imprisonment more often. The sentence is confirmed.

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### **ORDER**

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1. The appeal is dismissed.
  2. The sentence is confirmed.
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### **APPEAL JUDGMENT**

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#### **JANUARY, J; TOMMASI, J (CONCURRING)**

[1] This is an appeal by the State. The respondent was convicted on her plea of guilty in the magistrate's court Tsumeb on a charge of theft of money, N\$63 180, stolen from the lawful possession of Mwangala Charles and/or the University of Namibia. Leave to appeal was granted by this court pursuant to application by the appellant in terms of section 310(1) read with sections 310(2)(a) and 310(3) of the Criminal Procedure Act, Act 51 of 1977.

[2] The respondent was sentenced to 2000 (two thousand) hours periodical imprisonment. It was ordered that she serves her sentence over week-ends on every Friday at 18h00 and to be released at 18h00 every Sunday. The sentence had to start on 12/07/2013.

[3] The grounds of appeal are as follows:

- '3.1 The sentence imposed by the honourable court is so lenient that it induces a sense of shock.
- 3.2 The learned magistrate misdirected himself or erred in law and/or facts by failing to consider that a custodial sentence was inevitable;
- 3.3 The Learned magistrate misdirected himself alternatively erred in law and/or facts by attaching insufficient weight to the facts of the case in that the sum of money in the amount of N\$63 180 stolen by the respondent was not recovered;
- 3.4 The Learned magistrate misdirected himself by underemphasizing the seriousness of the offence and the interest of society and over emphasized the personal circumstances of the Respondent;
- 3.5 The learned magistrate misdirected himself alternatively erred in law and/or facts by attaching no weight and/or insufficient weight to the fact that the Respondent was in a position of trust and has used her privileged and trusted position to steal;
- 3.6 There are reasonable prospects of success on appeal that another court might come to a different conclusion that the sentence that was imposed is lenient under the circumstances of this case.'

[4] Sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo*. A court of appeal can only interfere;

- when there was a material irregularity; or
- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;
- or induced a sense of shock; or
- was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;

- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.<sup>1</sup>

[5] In my view, it is necessary to calculate the specific sentence in terms of months and days to come to a just conclusion whether there are merits in the grounds of appeal. Firstly, from Friday at 18h00 to Sunday at 18h00 is 48 hours which are 2 days per week. One day equals 24 hours. 2000 hours divided by 24 hours equals 83.333 days. There are on average 30 days in a month. 83.333 days divided by 30 equals about 2 months and 7 days. This means that the appellant had to spend 42 week-ends in prison i.e. for about a period spread over 8 to 10 months.

[6] At first glance this sentence of 2 months and 7 days for theft of an amount of N\$63 180 from your employer might seem shockingly inappropriate. I should however not look at it with blinkers on. Periodic imprisonment is effective imprisonment. 'Imprisonment has two forms, namely "ordinary" (continuous) and periodical. Other distinctions refer to the term of detention, namely':

- a) Life imprisonment.
- b) Declaration as habitual criminal (see section 286); and
- c) Imprisonment from which the prisoner can be released to correctional supervision..."<sup>2</sup> In Namibia committal to any Institution established by law.

[7] Periodical imprisonment may be imposed by virtue of section 276(1)(c) of the Criminal Procedure Act, Act 51 of 1977 (The CPA) which reads *inter alia* as follow:

'1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely'-

- (a) ...;
- (b) ...;

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<sup>1</sup> *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G

<sup>2</sup> Hiemstra's Criminal Procedure, Issue 2009, at p28-27 to p28-28

- (c) periodical imprisonment;
- (d) ...;
- (e) ...;
- (f) ...;
- (g) ...'

[8] Section 285 of the CPA provides as follow:

'285 Periodical imprisonment

(1) A court convicting a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, may, in lieu of any other punishment, sentence such person to undergo in accordance with the laws relating to correctional facilities, periodical imprisonment for a period of not less than one hundred hours and not more than two thousand hours. (my emphasis)

[Subsec (1) amended by sec 134 of Act 9 of 2012.]

- (2)...;
- (3)...;
- (4)...;
- (5)...'

[9] Although less severe than a similar term of ordinary imprisonment, periodical imprisonment is a severe sentence. In my view it is more severe in this instance where the magistrate imposed the maximum hours of periodical imprisonment. It reflects the seriousness of the crime and how serious the learned magistrate regarded it to be.

'Periodical imprisonment is clearly a more severe sentence than a fine, but less severe than a similar term of ordinary imprisonment'<sup>3</sup>

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<sup>3</sup> Guide to Sentencing in South Africa, 2<sup>nd</sup> Edition, 2007, S S Terblanche, Lexis Nexis at p249 paragraph 8.5

[10] The repealed Criminal Procedure Act, Act 16 of 1959 introduced periodical imprisonment. At introduction it was commended as a severe form of punishment with the smallest disruption of family life of the prisoner. Courts were urged to impose it as often as possible.<sup>4</sup> There is, in my view, no reason why courts should not impose it as a form of sentence especially with the notorious fact that prisons are overcrowded. Presiding officers are encouraged to consider it more often.

[11] The address of the respondent is reflected on the charge sheet as Kondombolo Street Tsumeb. It is safe to accept that the respondent was not residing in Grootfontein at the time of sentencing. It is a notorious fact that Tsumeb is about 60 km from Grootfontein. Considering that the sentence was served over a period of 8 to 10 months it is a substantial punishment in that the respondent had 'to forfeit her comfort and leisure for a considerable period.'<sup>5</sup> The sentence must have inconvenienced her to travel to Grootfontein and back to Tsumeb every Friday and Sunday respectively.

[12] The respondent pleaded guilty and in mitigation the record reflects the following:

'Accused says, I am not justify my action first of all. Whatever the choice was, it was my choice and I made a wrong choice. I was in abusive relationship, emotionally, financially, my arm was broken because of the abuse as I was beaten and as a result I needed a phenaphy in Windhoek, that's why I stole that money for transport to go to Windhoek every second week, some of the reasons are too personal, I made an agreement with UNAM to pay back that money with leave days, and pension money. I have one child and my mom is almost 70 years old. I am the only child.

I am dismissed now from my job and I lost my pension money now. It is on myself to seek for other employment. I was put in a position of trust of my ex-employer, my child and the community. I disappointed everybody. That is all.'

[13] The guilty plea and what the respondent mitigated in my view, show genuine remorse. These are mitigating factors to consider in conjunction with the facts that she was without employment and has a child and parent to care for. The crime is indeed

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<sup>4</sup> Guide to sentencing (*supra*) at p247 paragraph 8.1

<sup>5</sup> Guide to Sentencing (*supra*) at p248 paragraph 8.3.1

serious and imprisonment was inevitable. I do not find the maximum periodic imprisonment to be lenient.

[14] I do not find any misdirection, irregularity or irrelevant consideration by the learned magistrate.

[15] As a result:

1. The appeal is dismissed.
2. The sentence is confirmed.

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**HC JANUARY, J**

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**MA TOMMASI, J**

**APPEARANCES:**

For the Appellant: Adv. Nghiyoonanye

**[Office of the Prosecutor-General]**

For the Respondent: Ms Boois

**[BB Boois Attorneys]**