

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

SENTENCE

Case no CC: 02/2017

In the matter between:

THE STATE

v

TOBIAS ERWIN HANS HAIDUWA

ACCUSED

Neutral citation: *S v Haiduwa* (CC 02/2017) [2019] NAHCNLD 54 (20 May 2019)

Coram: TOMMASI J

Heard: 12 April 2019

Delivered: 20 May 2019

Flynote: Criminal Procedure – Sentence — Theft — Stealing from a person who was found to be in recent possession of stolen money — Moral blameworthiness reduced in the circumstances of this case — This and other mitigating circumstances persuades court to suspend portion of the sentence of imprisonment imposed for the commission of this offence.

Criminal Procedure — Obstructing or defeating the course of Justice — Sentence serious offence impacting on the proper administration of justice — Interest of

society and need for general deterrent outweigh mitigating and personal circumstances. Custodial sentence imposed.

Summary: The accused, a taxi driver, killed a passenger. He was found not guilty of murder. He however dumped the body of the deceased in a dry water pan and took US\$4025 which was in possession of the deceased. The evidence proved that the money was stolen hours before the deceased approached the accused to take him to Oshakati. According to his version, he paid US\$2000 to two friends in order for them not to inform the police of the fact that he had shot the deceased. The accused was convicted of theft of US\$4025 and defeating or obstructing the course of justice.

Held: that the moral blameworthiness of the accused is less than the person who initially stole the money from the complainant and that he acted without pre-meditation. This and other mitigating factors such as the time spent in custody, the fact that he is a first offender and his personal circumstances persuaded the court to reduce and suspend a portion of the sentence for the offence of theft.

Held: that the offence of defeating or obstructing the course of justice is serious impacting adversely on the administration of justice; and the interest of society, the need for general deterrence outweigh the mitigating and personal circumstances of the accused. Custodial sentence found to be an appropriate sentence.

ORDER

In the result the following order is made:

1. Count 2 – Theft - the accused is sentenced to three years' imprisonment of which 18 months' imprisonment is suspended for five years on condition that the accused is not convicted of theft, committed during the period of suspension;
2. Count 3 – defeating or obstructing the course of justice – 2 years' imprisonment;

3. The matter is postponed to 9 July 2019 for determination of the disposal of the exhibits and for the inquiry of terms of s 32 of the Prevention of Organized Crime Act, 2004 (Act 29 of 2004).

SENTENCE

TOMMASI J:

[1] The accused is convicted of theft of US\$4025 and obstructing the course of justice and must now be sentenced.

[2] The accused testified in mitigation and the following personal factors came to light: The accused was arrested on 2 August 2015 and he has been in custody for approximately 3 years and 9 months to date.

[3] He is a 34 year old first offender who earned his living by driving a taxi. He earned between N\$2500 and N\$3000 per month. He owned a *shebeen* but this closed down after his arrest. He is married and has 4 daughters. His eldest daughter is 14 years old and his youngest 6 years old. Two of his daughters are living with his wife whereas the other two are residing with their maternal and paternal grandparents respectively. His wife is unemployed. His health deteriorated since he has been in custody and now suffers from hypertension (high blood pressure). He however receives medical attention whilst in custody.

[4] He testified that he feels bad about his offences. His explanation for obstructing the course of justice is that he was afraid since this is the first time he encountered such a situation. He realized that it was wrong to take the money and undertook never to do this again.

[5] The offences committed by the accused are serious. The accused whilst on duty as a taxi driver, shot and killed a passenger and dumped his body in a dry water pan (*oshana*). According to his testimony he paid two of his friends US\$ 1000 for them not to report it to the police. The police searched for the body of the deceased for some time, in the process wasting scarce resources. If it had not been for the

report by his two friends the police would not have been able to find the body of the deceased timeously.

[6] The theft of US\$4025 is a substantial amount. The accused found it in the vehicle after he shot and dumped the body of the deceased. The same day US\$27 000 was stolen from a vehicle in Oshikango and it was proven that the US\$4025 was part of this money. The recent possession of stolen money by the deceased is clearly suspect. The accused saw an opportunity for enrichment and appropriated the money on the spur of the moment. His conduct was not pre-mediated but he acted dishonestly.

[7] Theft is a prevalent offence but the court bears in mind the peculiar circumstances of this case. The moral blameworthiness of the accused is considerably less than the person who initially stole the money. The accused however is in a position of trust while conveying persons and their property. It is a legitimate expectation that when goods are left behind that it would be returned to the rightful owner. Obstruction of the course of justice has far reaching consequences for the administration of justice and this court is called upon to impose a sentence which will discourage others from committing similar offences. Justice is an important pillar of the society and the efficient and effective operation thereof must be safeguarded.

[8] Both counsel for the State and the accused submitted that the court ought to take into consideration the objects of punishment, weigh the mitigating and aggravating factors and to impose a balanced sentence taking into consideration the competing factors. Mr Mudamburi urged the court not to shy away from imposing a sentence which would “hurt the accused sufficiently to prevent him from committing a similar offence”.¹ He proposed that the court impose a sentence of 3 years’ imprisonment for both the offences. Mr Adams submitted that the accused already spent a lengthy period in custody awaiting trial and that it ought to lead to the reduction of a sentence of imprisonment.

[9] The accused was, according to his testimony, busy with his duties as a taxi driver when trouble came knocking on his door in the form of the deceased who was fleeing from the police. The accused then had to deal with a series of events which

¹ S v Ndllovu 1967 (2) SA 230

he could not have foreseen happening in his ordinary day at work. He has been in custody for a lengthy period and has not been able to earn an income and his business is no longer operational. The circumstances surrounding the offence of theft, the duration of this incarceration together with the fact that he is a first offender are weighty mitigating factors. It however remains a serious and prevalent offence. Having considered these factors, I am persuaded that a partially suspended sentence would be an appropriate sentence.

[10] The manner in which the offence of obstructing the course of justice was committed, the adverse effect it has on the administration of justice, the need for general deterrence and the interest of society are factors which outweigh the mitigating and personal circumstances of the accused. Custodial sentence is therefore inevitable. I have considered the cases cited by the State in this regard and was guided by sentences imposed in similar cases without losing sight of the circumstances of this case and the personal circumstances of the accused.

[11] The State handed in a number of exhibits into evidence and same should now be disposed of. The State further indicated after conviction that they wish to apply for an inquiry in terms s 32 of the Prevention of Organised Crime Act (POCA). The court deemed it feasible at the time to first deal with the issue of sentence and thereafter with the application for a confiscation order by the State in order not to delay the handing down of the sentence. The matter must now be postponed for the determination of the disposal of the exhibits and the hearing of the aforesaid inquiry.

[12] In the result the following order is made:

1. Count 2 – Theft - the accused is sentenced to three years' imprisonment of which 18 months' imprisonment is suspended for five years on condition that the accused is not convicted of theft, committed during the period of suspension;
2. Count 3 – defeating or obstructing the course of justice – 2 years' imprisonment;
3. The matter is postponed to 9 July 2019 for determination of the disposal of the exhibits and for the inquiry of terms of s 32 of the Prevention of Organized Crime Act, 2004 (Act 29 of 2004).

M A TOMMASI

JUDGE

Appearances

For the State:

Mr Mudamburi

Prosecutor General's Office, Oshakati

For the Accused:

Mr Adams

Legal Aid, Tsumeb