

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

ASHIKUTUWA WILBARD

Accused

HIGH COURT REVIEW CASE NO. 988/07

CORAM: ANGULA, A.J. et HEATHCOTE, A.J.

Delivered on: 2007.07.31

REVIEW JUDGMENT

ANGULA, A.J.:

[1] This matter came before me for review. The accused was charged in the Magistrate's Court of Oshakati with theft of four mattresses from his employer, each with a value of N\$750,00. He pleaded guilty to the charge and was questioned by the Magistrate in terms of section 112(b) of the Criminal Procedure Act, No. 51 of 1977. He explained that he stole the goods because he wanted to give the mattresses to his children to sleep on; that the mattresses had been recovered and handed back to the owner of the mattresses. He was sentenced to 12 months direct imprisonment

[2] I am satisfied that the accused was correctly convicted. I, however, have a problem with the sentence imposed. The personal circumstances of the accused were that he was a first offender; even though he was not married he has seven children. As a result of the theft from his employer he had lost his employment. He was not able to pay a fine. In mitigation of sentence the accused asked the court to show leniency.

[3] The State prosecutor requested the court to impose a sentence which will deter the accused and would-be offenders. In motivation thereof the State submitted that the offence of theft is serious and is common as a result of which business people are losing their properties; that the accused was employed by the complainant at the time he committed the offence; and finally that the accused was in a position of trust which he breached.

See: S v Muller 1962 (4) SA 77

[4] I consider the direct imprisonment of 12 months startlingly inappropriate, inducing a sense of shock, given the fact that the accused was a first offender and that the value of the goods was by any standard low, coupled with the fact that the goods have

been recovered and returned to the owner. I consider it unnecessary to direct a query to the Magistrate why a suspended sentence was not considered because I have formed the view that this is a proper case for the suspension of part of the sentence of imprisonment subject to certain conditions.

[5] I think that the facts of this matter closely resemble the facts in the review matter of S v Goroseb 1990 NR 308. In that matter the accused was convicted of theft of N\$6 000,00 from his employer. N\$1 010,00 was recovered. He was a first offender. He was sentenced to 30 months imprisonment of which 6 months were suspended on certain conditions. At page 308 G - H Frank J stated the following:

"In Persadh v R 1944 NPD 357 the magistrate had stated in his reasons that a fine or suspended sentence would have neither punitive, reformatory nor deterrent effect. This approach was rejected by the Court per Hathorn JP at 358 in the following terms:

'In the ordinary way it has two beneficial effects. It prevents the offender from going to gaol. . . . The second effect of a suspended sentence, to my mind, is a matter of very great importance. The man has the sentence hanging over him. If he behaves himself he will not have to serve it. On the other hand, if he does not behave himself, he will have to serve it. That there is a very strong deterrent effect cannot be doubted.'

[6] Those remarks are applicable to the case at hand. The Magistrate should have suspended a portion of the sentence. It would appear that the Magistrate gave heed to the plea by the State to impose a sentence which would deter would-be offenders. As stated in the Goroseb matter, a suspended sentence has double effects: prevention and deterrence. I agree that because of the fact that theft is a serious offence and for the fact that there was a trust relationship between the accused and the complainant, an effective term of imprisonment is called for.

[7] In the result the sentence imposed by the Magistrate is set aside and is substituted with the following sentence:

Twelve (12) months imprisonment of which six (6) months are suspended for six (6) months on condition that the accused is not convicted of the offence of theft within the period of suspension.

The sentence is antedated to 24th April 2007.

ANGULA, A.J.

I agree.

HEATHCOTE, J.