



NOT REPORTABLE

CASE NO: CA 12/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SHAROUNA HEATHER ABERTT

APPELLANT

and

THE STATE

RESPONDENT

CORAM: NAMANDJE AJ *et* UEITELE, AJ.

Heard on: 2010.10.08

Delivered: 2010.10.28

APPEAL JUDGMENT

UEITELE, AJ. [1] The appellant, who, at the time of the trial was 22 years of age, was convicted in the Magistrate Court of Windhoek on a charge of fraud (Count 1) and a charge of theft (Count 2).

[2] She pleaded not guilty and she was tried, found guilty and sentenced to a direct term of twelve months imprisonment as regards Count 1 and two years

direct imprisonment as regards Count 2 which

sentences were ordered to run concurrently. The appellant was further ordered, in terms of section 300 of the Criminal Procedure Act, 1977(Act 51 of 1977) to pay an amount of N\$ 5 000-00 as compensation to the complainant her erstwhile employer.

[3] Appellant, dissatisfied with the sentences, filed a notice of appeal against both sentences imposed. The grounds of appeal contained in the notice of appeal are quoted *verbatim* below: -

"AD THE SENTENCE

1. The Learned Magistrate failed to take into account or take into account adequately, that

1.1. The Appellant was a first offender.

1.2. The Appellant was only 22 years old at the relevant time.

1.3. The value of the goods was only N\$ 19 624-00.

2. The Learned Magistrate over-emphasized the seriousness of the offence and the interest of society.

3. The sentence imposed is so unreasonable, that no reasonable Court could have imposed.

4. The Learned Magistrate failed to take into account or take into account adequately the personal circumstances of the accused. "

[4] The appellant, in the court *a quo* and on appeal was represented by Mr Murorua. The State was represented in the court *a quo* by Mr Lino and on appeal by Mr Marondedze.

[5] Mr Murorua, on behalf of the appellant, in appellant's main heads of argument and during the hearing of the appeal, in addition to the grounds reflected in the notice of appeal referred us to a list of cases and an article which appeared in a local newspaper, in which persons who were convicted of fraud or theft were fined instead of direct imprisonment:. After citing the cases Mr Murorua argued that-

"The Court is relevantly entitled to have regard to the effect which the particular punishment is likely to have on the appellant who was at the time rearing a 1% year old infant, enjoys stable employment, and is a fineable Appellant, young adult (22 years old) first offender and an ideal candidate for rehabilitative type of sentencing. There is it is submitted no need for incapacitation of the Appellant as the ill effects of that particular type of sentence will manifests in loss of employment for the appellant and negatively affect her infant dependant. The community interest will further be negatively affected in that the community will be burden with support of the appellant's infant dependant if she gets a prison sentence or even just lose her job. Sentence of imprisonment will furthermore result in loss of status, employment and employment benefits to the Appellant and the minor child will moreover be deprived of a bread winner."

[6] Mr Maroneddze who appeared for respondent countered and argued that "it is a settled rule of practice that punishment falls within the discretion of the trial court. As long as the discretion is judicially, properly and reasonably exercised, an appellate court ought not to interfere with the sentence imposed".

[7] The approach of the court sitting as an appeal court on matters pertaining to sentence was elucidated by Levy J in the case of ***State v Tjiho*** 1991 NR 361 when he said:

"Both in the High Court of Namibia and in various Divisions of the Supreme Court of the Republic of South Africa it has frequently been said that the sentence which the trial Court imposes on an accused is in the discretion of such trial court... This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial court fail to do so, the appeal Court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal Courts will interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial court as such erosion could undermine the administration of justice. Conscious of the duty to respect the trial court's discretion, appeal Courts have over the years laid down guide-lines which will justify such interference...

In terms of the guidelines to which I referred above, 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 sentence proceedings;
 - (iii) the trial court failed to take into account material facts or over-emphasised 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 the court of appeal.

[8] The basis on which we can interfere with the sentence is very clear the Magistrate should have committed a misdirection, either in the way he approached the sentencing procedure or in taking into account irrelevant considerations or failing to take into account relevant considerations. No such misdirection on the part of the magistrate has been demonstrated to us and, as a Court of Appeal, even if, had we sat first instance we would have imposed a different sentence, that alone would not have entitled us to interfere with the sentence imposed by the magistrate.

[9] In the absence of any misdirection or other irregularity in the process of sentencing we would only be entitled to interfere with the sentence imposed by the magistrate if the sentence was startlingly disproportionate or induced a sense of shock.

[10] I have read and re-read the judgment in respect of sentence imposed by the trial Court. I have considered the arguments advanced on behalf of appellant. I am satisfied that the sentence of two years imposed on appellant may be robust but not so that it creates a sense of shock or that it is startlingly inappropriate. I am also satisfied that the trial magistrate has exercised his discretion properly and in accordance with the relevant sentencing legal principles.

[10] In the result the Appeal against sentence is dismissed.

[11] The appellant's bail is cancelled with immediate effect.

[12] The appellant's bail money be refunded to the depositor.

UEITELE AJ

I agree.

NAMANDJE AJ

ON BEHALF OF APPELLANT

MR L MURORUA

Instructed by:

MURORUA & ASSOCIATES

ON BEHALF OF DEFENDANT

MR E E MARONDEDZE

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL