CASE NO.: CA 192/2008

"Not Reportable"

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HELLA PFEIFER **Appellant**

vs

THE STATE **Respondent**

***CORAM*:** **PARKER, J *et* TOMMASI, J**

Heard on: 2009 June 12
Delivered on: 2009 June 12 *(Ex tempore)*
Delivered on: 2011 November 2 *(Reasons)*

APPEAL JUDGMENT

TOMMASI, J [1] The appellant was convicted of 16 counts of theft and sentenced to three years' imprisonment of which one year was suspended for a period of 5 years on conditions. The appellant applied for bail pending appeal and the application was dismissed by the court *a quo*. The appellant appealed to this Court against the refusal to admit her to bail.

[2] The Court upheld the appeal and granted bail in the amount of N$5,000.00 with further conditions that: the appellant should not leave the district of Okahandja without obtaining the consent of the Station Commander of the Namibian Police in Okahandja; should she obtain employment, she must immediately inform the Station Commander of Okahandja of the employment address and likewise any change of address; the appellant's valid passport or any travel document be handed to the Station Commander of the Namibian Police in Okahandja; and that the appellant should not apply for a new passport or any travel document until finalization of the appeal. What follows are the reasons for the order granted.

[3] The appellant raised the following grounds in the notice of appeal:

> 'The learned Magistrate erred and misdirected herself in finding that the appellant failed to proof (sic) on a balance of probabilities that there are reasonable prospects of success on appeal more specifically:
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> 1. Ad Conviction
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> The learned Magistrate erred and misdirected herself in finding that:
>
> 1.1 the only reasonable inference is that the Appellant committed the crime of theft;
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> 1.2 any further evidence if accepted, on appeal will not reasonably lead to a different verdict;
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> 2. Ad Sentence
>
> The learned magistrate erred and misdirected herself in finding that:
>
> 2.1 In the light of the seriousness of crime, direct imprisonment is the only appropriate form of punishment and thus over emphasized the seriousness of the crime and the interest of justice at the expense of the appellant's personal circumstances'

[4] The single issue thus raised on appeal was whether the magistrate was wrong when she refused to admit the appellant to bail on the grounds that there are no reasonable prospects of success. It was accepted by the court *a quo* that the appellant does not pose a flight risk. The appellant led evidence that she intended to apply to this Court for leave to lead further evidence and that she had filed a notice of appeal against the conviction and/or sentence.

[5] Conviction: The record of the proceedings of the trial was not complete. The record contained no charge sheet, some pages were omitted from the typed record, parts of the testimony of the witnesses and the appellant were not recorded and therefore not typed, and no exhibits were included in the record. The record of the sentencing proceedings and the bail application however was properly before this Court. The ultimate responsibility for ensuring that the record is properly before the Court rests on the appellant, or in this instances her legal representative.[1] In the result this Court was not in a position to determine whether there were reasonable prospects of success in respect of the conviction.

[6] Application to lead further evidence: A brief summary of the facts, gleaned from the judgment of the court *a quo,* is as follows: The appellant was employed by a business providing information services to tourists and who acted as an agent for tour operators. The appellant was the responsible accounting officer at all material times. She received payment from tourists who booked various activities with various different tour operators. The appellant did not keep a record of having received payment although she confirmed payment in writing on the booking vouchers and faxes. She further did not record the payment on the till rolls and/or in the proper receipt books. This was discovered when one of the stakeholders of the business, who was also a tour operator, did not receive payment made to the center.

[1] Rule 54(4) of the High Court Rules

The appellant admitted to taking the money for two transactions alleging that it was a loan agreement between her and the stakeholder. The tour operators did not receive payment for the tours arranged by the information center. The appellant's defence was that she did not take the money and that she was not the only person who had access to the cash. The majority of the transactions took place over a period of six weeks.

[7] The appellant testified that she wanted to call an ex-employee to testify in her defence. The trial record reflects that her counsel, on 24 July 2008 indicated that there were other witnesses that he would like to call and warned that he might request a postponement as one witness was not in the country. On 25 July 2008 the matter was postponed to 4 September 2008. The record of proceedings of 4 September 2008 was not placed before this Court. On 25 September 2008, the legal practitioner of the appellant applied for the proceedings to be adjourned to March 2009 in order to call a witness who was abroad and expected to return during March 2009. The application for postponement was opposed and the court *a quo* refused a further adjournment. During the bail hearing the appellant testified that her witness was available on 4 September 2008 but the matter was postponed. Her witness thereafter left for Germany. She testified that, although this witness was no longer employed by the complainant at the relevant time, she would testify in respect of the bookkeeping practices and the problems she encountered during her period of employment.

[8] The court *a quo* in its judgment stated the following:

> 'She also told this court that Ms Rothmans was supposed to testify on the books and management of the books at the center and the

> problems they had with the keys. This is the same Mrs Rothmans that the lawyer of the applicant did not consult with. It is indeed so as Mr Van Der Merwe said, that in a Higher Court if this case goes on appeal, that they do have according to the Criminal Procedure, the right to Appeal to call a witness but then that would be a separate application and will be considered on the merits in that Court. In this Court, in the facts in the matter that is now before this Court, it is my opinion that the accused did not prove on a balance of probabilities, that there is reasonable prospects to succeed against the conviction.'

[9] Counsel for the respondent submitted that the provisions of section 316[2] are applicable. These provisions are however applicable for applications for leave to lead further evidence when applying for leave to appeal from this Court to the Supreme Court. Section 19 of the High Court Act, 1990 (Act No. 16 of 1990) empowers this Court, on hearing an appeal to receive further evidence, or to remit the case to the court of first instance or the court whose judgment is the subject of the appeal, for further hearing. In *S v De Jager*[3] Holmes JA gave the following reasons why it should only be done in exceptional circumstances:

> 'It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty.'

[10] The criteria for granting leave to lead further evidence in cases originating from the district court would therefore be no different than those applicable to applications brought under section 316 which provides that the applicant should show that:

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[2] Criminal Procedure Act, 51 of 1977
[3] 1965 (2) SA 612 (A) page 612 A-B

‘(a) further evidence which would presumably be accepted as true, is available;

(b) if accepted the evidence could reasonably lead to a different verdict or sentence; and

(c) save in exceptional cases, there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial, the court hearing the application may receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court..’

[11] Such an application if granted, may lead to the setting aside of the conviction and sentence and it constituted an important factor for the court *a quo* to have taken into consideration when adjudicating whether or not to admit the appellant to bail. The court *a quo* correctly stated that this Court should determine whether to allow the appellant to lead further evidence. Given the fact that it may have impacted on the outcome of the conviction, the court *a quo* for purposes of determining whether the appellant should be admitted to bail, should have considered whether there was a reasonable possibility that the appellant would succeed with this application by testing it against the criteria for the granting of such an order. The court *a quo* failed to do so; and it is common cause that a postponement was refused but it was not been established that the court *a quo* failed to exercise its discretion properly. Although the appellant testified that she believed that the testimony of this witness would have a major impact on the outcome of the case, she failed to explain how her evidence would be relevant to the outcome of the trial. The facts placed before the court *a quo* therefore, fall far short of persuading this Court that there is a reasonable possibility that the appellant’s application would succeed.

[12] Sentence: The court *a quo* considered the submission made by appellant's counsel that it had erred by not considering the alternatives to imprisonment given the fact that the appellant was a first offender and that she had offered to repay the monies stolen. The court *a quo*, in dealing with the principles applicable to bail pending appeal, referred to *S v Rawat*[4] where it was held that a mere possibility of success is not sufficient but that the appellant is required to show that there are reasonable prospects of success; and that the court should not allow bail procedures to frustrate punishment procedures which have been finalized.

[13] The court *a quo* thereafter dealt with the prospects of success and correctly pointed out that in cases where an employee betrayed the trust of the employer a strong deterrent sentence is called for, particularly considering the vulnerability of the employer. The court pointed out that the appellant abused the trust and stole the amount of fifty five thousand (N$55 000.00) over a period before the theft was discovered. The court further considered the prevalence of crimes of this nature in the country and the interest of the community. No mention was made of the personal circumstances of the appellant, but this does not necessarily indicate that the court *a quo* did not consider this at the time of sentencing. The court *a quo,* in its reasons for sentence took into consideration that the appellant was a first offender and that she had dependants to maintain. These are personal circumstances.

[14] The following however appear from the reasons for the court *a quo's* refusal to admit the appellant to bail:

> 'It is also so that the court must give a deterrent sentence. There is a lot of authority, Namibian authority that says, that where an accused person stole from her employer, a deterrent sentence must be given,

[4] 1999 (2) SACR 398 (W)

> and there is also a lot of examples where accused is sent direct to jail as punishment.'

[15] Indeed, this Court has in a number of cases found that there is a need for deterrent sentences in cases such as this one.[5] This however does not mean that a court *must* impose a deterrent sentence, no matter the particular facts and circumstances at play. The court remains tasked to weigh up the aggravating and mitigating factors and consider whether, in the circumstances of each case the need for deterrence outweigh the personal circumstances of the accused. Consistency in sentencing has an integral role to play in ensuring that sentences are just and fair but caution should be applied that it does not harden into an unbending principle which would divest the court of its discretion to determine what an appropriate sentence would be. Each case must be evaluated on its unique circumstances. A slavish approach is to my mind not a proper exercise of the court's discretion when sentencing an accused. (*State v Sylvia Condentia Van Wyk* Case No. CC 4/2008 paras 7 and 8 (judgment delivered on 19 August 2011) (Unreported)) The court *a quo* therefore wrongly held the view that it was compelled to impose a deterrent sentence without giving proper consideration to other equally important factors and objectives of sentencing.

[16] The bone of contention for the appellant however was the fact that the court *a quo* did not properly consider the appellant's offer to compensate the complainant. The appellant tendered to repay the full amount to the complainant by securing a loan with the bank. The prosecutor when addressing the court stated the following:

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[5] . See *S v Kambu* 1998 NR 194 (HC), *S v Skrywer* 2005 NR 288 (HC) *Josef Hendricks v The State* 2004 (3) NCLP (HC) *S v Ganes* 2005 NR 472 (HC)).

> ‘Your worship, I did speak to the complainant in this matter with regards to the compensation. She, it is not about money as such. And your worship the State will have to agree with her your Worship that justice done and justice prevail in this matter (sic).’

Counsel for the appellant indicated that he would want to know why the complainant did not want to accept compensation. The complainant in this matter was a non-profitable organization promoting tourism regionally and nationally. The crime the appellant was convicted of clearly impacted negatively on a vital sector of the economy and it, indeed, appears strange that such a non-profitable organization would decline compensation. It is not clear from the record who the prosecutor spoke to and in what capacity this person was acting. This witness was not called to testify before the court *a quo*. The prosecutor was giving evidence from the Bar; and so what he said has no probative value at all.

[17] The court *a quo* in its reasons for reasons for refusing to admit the appellant to bail stated the following:

> ‘It is indeed, so that she was prepared to re-pay the losses of the Complainant but the Complainant were (sic) not interested and there was no application from the side of the State to compensate the Complainant.’

The same view was expressed in the reasons for sentence. From the above it appears that the court *a quo* clearly relied on the information placed before it by the Prosecutor. The court *a quo* further appears to hold the view that it could not make an order for compensation without an application by the complainant. The court has a discretion to grant a compensation order in terms of the provisions of section 297 and not only in terms of section 300 which requires an application by the complainant. The appellant’s offer to compensate consequently was not considered.

For the reason given previously, it is this Court's view that the learned trial magistrate ought not to have relied on evidence from the Bar.

[17] In *S v Clay 1996* NR 184 (HC), it was held that sentence must be considered on the facts placed before the Court either by evidence or by agreement between the prosecutor and the accused. The court *a quo* did not have any evidence, properly adduced before it to conclude that the complainant did not want compensation. It was clear that the appellant's counsel questioned the validity and motive behind the refusal to accept an offer of compensation. One would have expected the court *a quo* to have called this witness before it attached so much weight to the information provided by the prosecutor from the Bar during her submissions.

[18] The appellant in this matter made the offer in order to mitigate the harm caused by the commission of crime she was found guilty of and it deserved a proper consideration by the court *a quo*. Ironically the court *a quo* found that it was an aggravating factor that the money was not recovered.

[19] The court *a quo*, by erroneously feeling itself compelled to emphasize the need to send out a strong message to deter others, whilst not properly considering whether this case, in particular, warranted such an approach; and by attaching so much weight to an untested allegation from the Bar, opened the door for interference by this Court. There is thus a reasonable possibility that the Court may interfere with the sentence.

[21] Having found that that there are reasonable prospects of success on the appeal against the sentence imposed; and that the court *a quo* wrongly refused to

admit the appellant to bail, this Court upheld the appeal and admitted the appellant to bail on the conditions as set out above.

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TOMMASI, J

I agree.

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PARKER, J

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Instructed by:	S Kenny Legal Practitioners
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