

CASE NO.: CA 56/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ESTER SHIVUTE

APPELLANT

versus

THE STATE

RESPONDENT

CORAM:

DAMASEB, JP *et* UNENGU, AJ

Heard on: 2011 March 11

Delivered on: 2011 March 11

APPEAL JUDGMENT

UNENGU, AJ [1] The Appellant, a 27 years old mother of two minor children was charged with malicious injury to property in the Swakopmund Magistrate's Court. She pleaded guilty to the charge, was questioned by the learned Magistrate in terms of s. 112(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act), convicted as charged and sentenced to three (3) years imprisonment. This happened on 29 September 2010.

[2] Before the Record of proceedings in the matter could be submitted to the High Court for automatic review, the Appellant drafted a letter in her own handwriting in which she gave Notice to appeal the sentence. The letter was dated 6 October 2010 which is within the prescribed period of fourteen (14) days after she was sentenced. In this letter of Notice of Appeal, she indicated that she was appealing against the sentence, because it was too

harsh.

[3] She indicated further that the property (damaged) belonged to her boyfriend, the father of her children. Furthermore, Appellant submitted that the learned Magistrate misdirected himself to send her to prison without the option of a fine.

[4] The Appellant conducted her own defence in the court *a quo* and again is prosecuting the appeal in person, while Respondent is represented by Ms. Jacobs from the Prosecutor-General's office. In *S v Rabie* 1975 (4) SA 855 at 857 D-E, Holmes, JA laid down the following guidelines:

"1. In every appeal against the sentence, whether imposed by a magistrate or a Judge the Court hearing the appeal -

(a) should be guided by the principle that punishment is 'preeminently a matter for the discretion of the trial Court'; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

See also *S v Giannoulis* 1975(4) SA 867 at 865 F-H.

[5] It is also trite that in search of an appropriate sentence the Court must always consider the crime, the offender and the interests of society (*S v Zinn* 1969 (2) 537 (A)). The punishment should fit the criminal as well as the crime, be fair to society and to the

accused and be blended with a measure of mercy. (*S v Sparks* 1972 (3) SA 396 at 410 H). The Court should also have in mind that the convicted person should not be visited with punishment to the point of being broken. (*Sparks supra*).

[6] In this appeal, Appellant was found guilty on her own plea of guilty to a charge of malicious injury to property of her boyfriend. The annexure to the charge sheet only alleged that the Appellant (accused) "on or about the 21st day February 2010 at House number 947, Lukas Nehoya Street, Mondesa in the district of Swakopmund did wrongfully, unlawfully and maliciously break and/or damage and/or various properties valued at N\$11 931.25, the property or in the lawful possession of Abel Amutenya with intent to injure the said Abel Amutenya in his property" without specifying which properties were damaged.

[7] However, Appellant, on her own accord and honesty listed the items she allegedly damaged. The same goes with regard to the value of the damaged property. Appellant herself admitted the value being N\$11 931.25.

[8] In mitigation of sentence Appellant told the court, amongst others, that she was no longer living with the boyfriend but was in a domestic relationship with complainant at the time she committed the offence. She said that she was a mother of two children of five (5) and three (3) years old with complainant. Further, that she was employed at a China Shop in Mondesa as a cleaner earning N\$500.00 per month and as such, asked for a suspended sentence. In spite of this, coupled with the fact that she had pleaded guilty to the charge against her -which is in itself a mitigating factor - and that this was her first offence in her life, the learned Magistrate sent her to jail for three (3) years.

[9] In our view, the Magistrate over-emphasised the seriousness of the offence and the interests of the society and paid very little attention or none to the personal circumstances

of the Appellant. More so, when he failed to consider other options of punishment like a suspended sentence. It is apparent from the reasons for sentence of the Magistrate that he made up his mind to send Appellant to jail for a long period of time. He resorted to strong words like "it is thunder and lightning sentence that is required to protect the community", "the message here is deterrence to denounce the pulsive conduct of the accused", "the sentence will not be a mere slap on the wrist" and also words like "the sentence should reflect the determination of the Swakopmund Magistrates to give effect to and protect the constitutional values of the inviolability of human dignity, right to property and equality between men and women". Ms. Jacobs, Counsel for the Respondent, submitted written Heads of Argument, which she amplified with oral submissions in support of the sentence. She referred the Court to various cases dealing with sentencing and concluded that the appeal against the sentence be dismissed. We disagree.

[10] In our view the sentence imposed on Appellant is too harsh, disturbingly in appropriate and induces a sense of shock. That being the case, the sentence imposed by the learned magistrate cannot be allowed to stand as it is. Where the trial Court misdirected itself, this Court is entitled to interfere and impose the sentence afresh.

[11] For the reasons stated above, the appeal should be allowed.

[12] Consequently, the following orders are made:

1. the appeal against the sentence succeeds partially.

2. the sentence of three (3) years imprisonment imposed by the Magistrate is set aside and is substituted for the sentence hereunder:

Six (6) months imprisonment.

3. The sentence is antedated to 29th of September 2010.

UNENGU, AJ

I agree

DAMASEB, JP

COUNSEL ON BEHALF OF THE APPELLANT:

In Person

COUNSEL ON BEHALF OF THE RESPONDENT:

Ms. Jacobs

Instructed by:

The Office of the Prosecutor-General