

REPUBLIC OF NAMIBIA

CASE NO.: CR 26/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

STATE

versus

JUANITA KIDO

(HIGH COURT REVIEW CASE NO.: 473/10)

CORAM: VAN NIEKERK, J et SIMPSON, AJ

Delivered on: 22 March 2011

REVIEW JUDGMENT

VAN NIEKERK, J [1] The accused was convicted in the magistrate's court of Okahandja after a plea of guilty to a charge of theft of N\$2000 from her employer, Pick n Pay. She was sentenced to 8 months imprisonment of which half was suspended for 5 years on condition of good behaviour and on the further condition that the accused compensates the complainant by a certain date.

[2] The questioning in terms of section 112(1)(b) of the Criminal Procedure

Act, 1977 (Act 51 of 1977) went as follows:

"Crt: where you on the 05/09/09 at or near pick and Pay Okahandja in the district of okahadja?

Acc: yes

Crt: What led to this charge of theft and how were you arrested?

Acc: On Sunday 06/09/2009 i went to pick and pay Okahandja, with intention of borrowing N\$400 from the safe, in that I was going to bring it back on the Monday

Crt: did you have the right to borrow the money? Acc:

No

Crt: did you have access to the safe?

Acc: not on that said date. Somebody was on duty i wrote a letter saying that if anything happens I will take sole responsibility. Crt: Explain, what did u mean?

Acc: the money was in the safe, it, the safe was open, the door was open in the cash office of pick n pay

Crt: is the safe normally left in this manner?

Acc: the person on duty was busy making float, the money that the cashier is given in the morning for their till. I took out a float bag that was used the previous day, and i took N\$4000-00, and i left some money the amount I do not know. I then counted the money and i asked two other person to count the money, the person on duty and another cashier Crt: did they know what your intentions were? Acc: they knew what I was doing

Crt: did they give you any right or permission to remove the money?

Acc: they did not give me right or permission. Crt: proceed

Acc: I sealed the float bag and went to Windhoek Court house to bail out my boyfriend with that money. On Monday, I sent back N\$2000-00, with taxis from Windhoek to take to Pick n Pay. On the Tuesday morning I brought the remaining N\$2000-00 to work and gave the money to my manager, he declined to receive the money, gave me a letter of suspension and took me to the police station where I was then arrested.

Crt: What happened to the other N\$2000-00 that you sent on the previous day?

Acc: they received it that is why they only laid a charge of N\$2000-00 that was missing that Tuesday morning.

Crt: the person who counted the money with you pick and pay, what was there in what capacity

Acc: Acting supervisor

Crt: State alleges that your the intention was to the deprive the owner of this money?

Acc: I disagree it was not my intention, I gave back some money on Monday and the rest on Tuesday

Crt: do you know that money is a consumable and if used and not the same is replaced amounts to theft. Acc: no I did not know

Crt: in that light the state alleges that you had the intention to deprive Prick n pay and/or George Swartz do you agree or disagree Acc: I agree

Crt: The amount per charge sheet N\$2000-00

Acc: yes

Crt: did you know that what you were doing was wrong and punishable by law?

Acc: yes

Crt: did you have any legal right over the money? Acc: No

Crt: Do you agree that the money was in the control of George Swartz and/or pick n pay Acc: Yes

Crt: Are the facts in accordance to the facts available to the state? SP: Yes

Crt: I am satisfied that you intended on pleading guilty to the charge.

[3] On review I posed, *inter alia*, the following question to the trial magistrate:

"Did the accused admit to having *mens rea* in respect of the offence of theft?"

The learned magistrate responded as follows:

"The court informed the accused that money is a consumable and if used its replacement with other money would amount to theft. She then responded by saying she would agree with the states allegation that her intention was to deprive Pick 'n Pay and/or George Swartz of the said amount of N\$2000.00. The court felt that her not disputing the allegation amounted to her admitting mens rea. It was also confirmed when the accused confirmed that she knew what she was doing was wrong and punishable by law."

[4] In my view the exchanges between the magistrate and the accused show that the accused did not admit that she had the necessary *animus furandi*. When the magistrate explained "Do you know that money is a consumable and is used and not the same is replaced [it] amounts to theft?", the accused responded that she did not know. The wording of the follow-up question which commences with the words "In that light the state alleges that you had the intention to deprive Pick 'n Pay and/or George Swartz do you agree or disagree?" appears to be, or can be interpreted to be, a continuation of the explanation, in respect of which the accused is asked whether she agrees or disagrees with the explanation. In the context the

answer "I agree" does not amount to an admission. It is necessary to establish whether the accused "admits", not whether the accused "agrees". In the light of the preceding answers and explanations by the accused it is clear that the accused did not admit that she is guilty to the crime of theft. For example, she disagreed that it was her intention to deprive the owner of its money because she gave back the money.

The questions and answers establish, rather, that she is guilty of a contravention of section 8 of the General Law Amendment Ordinance, 1956 (Ord 12 of 1956), which provides as follows:

"8

1. Any person who, without a *bona fide* claim of right and without the consent of the owner or the person having the control thereof, removes any property from the control of the owner of such person with intent to use it for his own purposes without the consent of the owner or any other person competent to give such consent, whether or not he intends throughout to return the property to the owner or person from whose control he removes it, shall, unless it is proved that such person, at the time of the removal, had reasonable grounds for believing that the owner or such other person would have consented to such use if he had known about it, be guilty of an offence and on conviction liable to the penalties which may lawfully be imposed for theft.
2. Any person charged with theft may be found guilty of a contravention of subsection (1) if such be the facts proved."

[5] Although I find the sentence on the harsh side bearing in mind all the mitigating factors, I cannot say that the magistrate exercised her discretion wrongly in imposing a direct period of imprisonment.

[6] The result is that the following order is made:

1. The conviction of theft is set aside and substituted with a conviction of

c/section 8 of the General Law Amendment Ordinance, 1956 (Ord. 12 of 1956) (Unauthorised borrowing).

2 The sentence is confirmed, subject thereto that the words "attempted theft or theft" are substituted with the words "c/section 8 of the General Law Amendment Ordinance, 1956 (Ord. 12 of 1956) (Unauthorised borrowing)".

VAN NIEKERK, J

I concur.

SIMPSON, AJ