CASE NO.: CR16 /2012

IN THE HIGH COURT OF NAMIBIA

NORTHERN LOCAL DIVISION

HELD IN OSHAKATI

In the matter between:

THE STATE

versus

ROLF JOHNSON

(HIGH COURT REVIEW CASE NO.:13/2012)

CORAM: Liebenberg J *et* Tommasi J

DELIVERED ON: 30 May 2012

REVIEW JUDGMENT

TOMMASI J [1] This matter was sent for review from the district court of Eenhana. The accused was convicted of having contravened section 29(5)

of Immigration Control Act, 7 of 1993 and sentenced to a fine of N$6000.00 or 20 (twenty) months imprisonment.

[2] The accused pleaded guilty and after questioning the accused in terms of section 112(1)(b) the accused was convicted. The conviction is in order but the Court requested the magistrate to provide reasons for the sentence imposed. Scant evidence was placed before the magistrate by the accused in mitigation and the sentence appears to be harsh in comparison with other sentences imposed by the same magistrate for more serious immigration offences.

[3] The magistrate responded to the issues raised as follow:

> *"there is no duty to solicite from the accused more and relevant best evidence he wishes to give in mitigation, but the court has the duty to explain the right to give evidence in mitigation";* and
>
> *"I am unable to say precisely what the reasons for the approach in this case in comparison with case 920/2011; 910/2011 and 911/2011 because the case record of the referred cases are not attached, however it our trite law that each case has to be decided on its own merit. The crime fact, the aggravating factors might not be the same. (sic)"*

[4] The accused overstayed after the expiry of his entry visa for a period of 32 days. After conviction the magistrate explained his rights to mitigate before sentence "*as per annexure*". It appears from the record that the accused opted to address the court and he placed the following before the magistrate: "*I am unemployed, my contract expired, I pray for a court fine.*"

[5] The explanation to mitigate as *per* the annexure does not make any sense. It must however be accepted that what appears on the annexure was read verbatim to the accused. The annexure reads as follow:

> *"You are informed that before the court passes the sentence, you have now a right to address the court on the matter of sentence. You may now bring to the attention of the court mitigating factors. Mitigating factor which if brought to the knowledge of the court could have passed in the absence thereof (sic)"* [my emphasis]

The accused would have been in no position to fully understand the purpose of the enquiry from the aforesaid explanation.[1]

[6] Duty of a magistrate during sentencing proceedings:. Section 112(3)of the Criminal Procedure Act, 51 of 1977 provide as follow:

> *"Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence."* [my emphasis]

These provisions clearly empower the magistrate to pose questions to an accused in order to arrive at an appropriate sentence. The magistrate *in casu* erroneously believes that no duty rests on the presiding officer to solicit any information from the unrepresented accused once his rights to mitigate has been explained to him.

[7] Although the first duty to place mitigating facts before the court rests on the accused, it remains the ultimate responsibility of the presiding officer

[1] See N C Steytler in The Undefended Accused, page 184

to ensure that substantial justice is done. In *S v Namaseb*[2] it was held that the presiding officer has, in imposing sentence, a duty to question the accused, if the latter is not legally represented, thoroughly, insightfully and objectively in connection with possible mitigating factors. In instances where the accused do not provide any facts or place insufficient facts before the court upon which the court may rely in arriving at an appropriate sentence, then the court is not only empowered to question such an accused but has a duty to do so, provided that such questioning is fair to the accused. [3] In *S v Limbare*[4] the Court held that this should be done even where the accused was represented and insufficient facts in mitigation were placed before the court by the legal representative.

[8] When the accused informed the magistrate that he can pay a fine and that he was unemployed, no effort was made by the magistrate to clarify how, if the accused was unemployed, he would be able to pay a fine; what amount he would be able to pay from his own income; whether he has means to obtain funds; and whether or not he has any dependants. These facts would have placed the magistrate in a position to determine, along with other factors,[5] whether a fine would be an appropriate sentence and if so what the amount should be. The lack of information before imposing such a hefty fine is tantamount to sentencing the accused to effective

[2]1991 (1) SACR 223 (SWA)
[3]Also see S v NAKASAL 1984 (1) SA 392 (SWA)
[4]2006 (2) NR 505 (HC)
[5] See S v VEKUEMININA AND OTHERS 1992 NR 255 (HC)

imprisonment. If the aim was to sentence the accused to effective imprisonment then the magistrate should have done so instead of imposing a fine with no idea whether he would be able to pay it or not. The manner in which this was done creates the impression that the sentence was imposed in an arbitrary manner.

[9] Consistency/Uniformity: This Court raised the issue of disparate sentences imposed by the magistrate. The magistrate correctly responded that each case must be determined on its own merits. This however does not mean that the magistrate should ignore decided cases which should serve as a guideline in the exercise of her discretion. Is *S v Jeremani*[6] the district court imposed a fine of N$6000.00 or two years imprisonment on an accused for overstaying for 603 days. On review the sentence was considered to be shockingly inappropriate and substituted with a fine of N$4000.00 or 16 months imprisonment of which N$2000.00 or 8 months were suspended. In the aforementioned judgment Silungwe AJ agreed with what was stated in this regard in The *State v Paul Makonde*[7] where Mainga J, as he then was, stated the following:

> "*While I agree with the learned magistrate that the offence is serious, I find the fine disturbingly high. It is nearly the maximum allowed by the Act. It is obvious that the accused suffered from lack of money, which is the reason he committed the offence. To impose such a large fine, which he appears unlikely to pay, is in my view tantamount to sending him to jail directly. The Act provides that a person who contravenes s 29(5) may be dealt with as a prohibited immigrant. This means that he may be removed from Namibia under Part VI of the Act and presumably the relevant authorities will take the*

[6] *2009 (1) NR 149 (HC)*
[7] *Case No I 123/2005 (unreported)*

necessary steps to do so. Namibian prisons are overcrowded and a considerable burden on the fiscus. In my view it would serve the interests of the community to give the accused a partially suspended sentence to clear the way for him to be dealt with under Part VI of the Act. In the unlikely event that he receives a visitor's permit in future, he would be wise to obey its time period, lest the suspended sentence be brought into operation.'

The sentence imposed herein, like the aforementioned cases, is equally shockingly inappropriate. No consideration was given to suspend a part thereof.

[10] This Court received a number of cases including this matter from the same court on automatic review. All these matters were finalized during the same period; presided over by the same magistrate; and involved accused who pleaded guilty to immigration offences. It was noted that a striking disparity existed between the other matters and the one at hand. In one of the matters the accused was convicted of having contravened section 6(1) of the Immigration Act, 7 of 1993 and was sentenced to N$3000.00 or 12 months imprisonment. In terms of section 10 (3) a contravention of this section would render an accused on conviction liable to a fine not exceeding N$20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment. The offence the accused was convicted of, carries a penalty of a fine not exceeding N$12 000 or imprisonment for a period not exceeding three years or both such fine and such imprisonment. Judging from the different maximum penalties that may be imposed for the

first mentioned offence, the legislator clearly considered that offence more serious than the latter.

[11] The differences in the circumstances of the accused in these two cases alone cannot account for the fact that the same magistrate, in the same court dealt more leniently with the offender who committed a more serious offence. The decision to impose a fine of N$6000.00 or 20 months imprisonment under the circumstances prevailing herein cannot rationally be justified. The learned author SS Terblanch in *Guide to Sentencing in South Africa* on page 124 states as follow:

> *"Consistency in sentencing essentially has two components:*
> (1) *It requires that similar sentences should be imposed when similarly placed offenders commit similar crimes.*
> (2) *It requires that perpetrators of more serious crimes be sentenced more severely than those of less serious crimes (and vice versa) or; in other words that the most blameworthy offender receives the severest sentence (and vice versa).*
>
> *Consistency does not require that exactly the same sentence be imposed in similar cases. It requires only basic consistency, which means that there should not be any wide divergence in the sentence imposed in similar cases. This should appeal to any reasonable person's sense of fairness and justice."*

The same author on page 122, referring to *S v Makwanyane 1995 (2) SACR 1*, states that:

> *"these dicta are important for at least two reasons. The first is that they clearly demonstrate that consistency is the principle which is in accordance with justice and fairness and, secondly, that arbitrariness (inconsistency) violates the right to equality."*

The place of consistency in the sentencing process was formulated by Liebenberg AJ, as he then was, in *The State v Janine A Snyders*[8] as follow:

[8]CC45/2007, an unreported case delivered on 28 February 2008 at paragraph [18]

> *"In short this means that each case has to be considered on its own facts and, in regard to sentence, effect must be given therein to the particular personal circumstances of the accused. These circumstances obviously, will differ from one case to the next. These circumstances must again be weighed up against other factors, also relevant when determining sentence. Having done all this, the Court must look at sentences imposed by the Courts in similar and related cases and must not simply sentence in a vacuum"*[9]

[12] The sentence imposed by the magistrate cannot rationally be explained given the failure to solicit sufficient information from the accused and is shockingly inappropriate. The magistrate clearly had no regard for the decided cases providing guidelines when applying her discretion and moreover failed to apply a measure of consistency in the cases which appeared before her.

[13] The failure of the magistrate to properly use her discretion when sentencing the accused constitutes a grave misdirection which warrants this Court's interference with the sentence.

[14] The accused in this matter was sentenced on 29 December 2011. He failed to pay the fine and is currently serving the alternative sentence of twenty months imprisonment. He served five months thereof to date hereof. The accused, aged 46 years, is a first offender. It is evident that the accused does not have the financial resources to pay a fine given the fact that he was unemployed. The offence committed by the accused is prevalent in the district but the Court must have regard to the fact that the accused

[9] Also see (HC) S v AUALA (No 2) 2008 (1) NR 240 (HC)

overstayed for a short period. Bearing in mind all the available facts at hand in this particular case, the period already served by the accused would suffice as an appropriate sentence.

[15] Given the above the following order is made:

1. The conviction is confirmed;
2. The sentence is set aside and substituted with the following sentence: Five months imprisonment.
3. The sentence is ante-dated to 29 December 2011.
4. The accused is to be released forthwith.

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Tommasi J

I concur

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Liebenberg J