"Unreportable"

CASE NO.: CA 38/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

RODNEY HAWAEB **Appellant No. 1**

SYDNEY SKRYWER **Appellant No. 2**

vs

THE STATE **Respondent**

***CORAM*:** **DAMASEB JP** *et* **PARKER J**

Heard on: 2012 February 17

Delivered on: 2012 February 29

APPEAL JUDGMENT

PARKER, J [1] Appellant 1 (accused 1 in the court below) and appellant 2 (accused 3 in the court below) and accused 2 (not a party in this appeal) were charged before the Khorixas Magistrates Court with one count of housebreaking with intent to steal and theft of a safe, containing N$23,301.30. They pleaded not guilty, and after their trial they were convicted of the offence. The case was transferred to the Regional Court in Otjiwarongo for sentencing in terms of s. 116 (1) of the Criminal Procedure Act, 1977 (Act 51 of 1977). The appellants were sentenced as follows:

Appellant 1: 10 years' imprisonment of which a period of four years was suspended for five years on certain conditions

Appellant 2: Eight years' imprisonment

[(Accused 2): A fine of N$15,000.00 or four years' imprisonment]

[2] The appellants now appeal against the sentence, and they are represented by Mr Wessels. The State (respondent) is represented by Mr Kumalo. Both counsel filed heads of argument, and we are grateful for their industry. We have consulted the authorities referred to us by counsel in the heads of argument, as well as the authority referred to us by Mr Wessels during the course of his oral submission.

[3] From the papers filed of record and submissions by both counsel we have the distinct feeling that both counsel are *ad idem* that in the circumstances of the case a custodial sentence is appropriate and reasonable. We are also of that view. That being the case, what is left is for the Court to determine whether the period of the sentences imposed is appropriate and reasonable. It is Mr Wessel's argument that considering the sentences imposed by this Court in similar cases the sentence imposed by the learned Regional Court magistrate in the instant case is harsh and unfair. Mr Kumalo did not argue vigorously contrariwise. When asked by the Court if there was any good reason why, in the respondent's view, the sentences are fair and reasonable, counsel's response was to refer the Court to cases where severer sentences have been imposed by this Court in similar cases. But he did not have any credible answer when the Court drew his attention to two recent and important cases; one decided by the Court and the other by the Supreme Court, where, although by far higher amounts of money were involved – and, indeed State funds – the sentences imposed in those two cases are by far less than the sentences

imposed by the learned Regional Court magistrate in the instant case. The High Court case is *S v Ganes* 2005 NR 472 (HC): 'a fraud case involving 13 charges with a potential prejudice to Telecom Namibia Limited (Telecom) in the amount of N$705,704.40 ... The crimes were committed between 22 March and 14 December 2000. Accused was a procurement manager at Telecom. When the crime was detected, accused was arrested and released on bail; he later absconded to South Africa. He resisted extradition to Namibia and opposed sequestration instituted against him in South Africa.' (See *Gerry Wilson Munyama v The State* Case No. SA 47/2011 (judgment delivered as recent as 9 December 2011) (Unreported) at para [9].) The effective custodial sentence in *Ganes* is, therefore, four years; and it must be noted that if the accused paid the fine, the custodial sentence will be two years.

[4] The Supreme Court case is *Gerry Wilson Munyama v The State* supra. There, the appellant was the Director-General of the NBC at the time he committed the offences. By means of a forged resolution of the NBC Board of Directors of 15 March 2005 which authorized him to open an account in the name of NBC at any banking institution of his choice, he approached Standard Bank during May 2005 and opened an account at that institution's Gustav Voigts Centre with exclusive signing powers bestowed on him alone. He deposited N$345,995.99 in the account being (1) a N$25,000.00 donation from FNB Foundation which was to be used to pay for the training of staff at the NBC. The rest of the money was raised from the proceeds of NBC shares which appellant was authorized to claim from Old Mutual Company. The accused withdrew all the moneys and closed the account in August 2005. The accused Munyama was convicted on two counts; that is, Count 1: fraud, and Count 2: forgery. The sentence imposed is as follows: in respect of Count 1 (fraud), 10 years' imprisonment of which a period of three years was suspended for five years on conditions, and in respect of Count 2 (forgery), three years'

imprisonment which was ordered to run concurrently with the sentence on Court 1. On a successful appeal, the Supreme Court substituted the 10 years' imprisonment with six years' imprisonment, of which a period of three years was suspended on the same conditions as those imposed by the trial Court.

[5] I dwell on the *Munyama* case for two significant reasons; first and fundamentally, the decision there is binding on this Court and it reviews many similar cases where this Court and the Supreme Court o\imposed sentences, and crucially it is of great assistance to the matter under consideration. I shall return to the *Munyama* case in due course.

[6] It has been held authoritatively in many cases without number that punishment falls within the ambit of the discretion of the trial court and that the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection. Another test applied by an appellate court is whether the sentence is so manifestly excessive that it induces a sense of shock in the mind of the appellate court. And in deciding whether a sentence is manifestly excessive, the court ought to be guided mainly by the sentence sanctioned by statute, if applicable, or sentences imposed by this court in similar cases, of course, due regard being had to factual differences. (*S v Simon* 2007(2) NR 500 where authorities in Namibia and outside Namibia are cited with approval) It has also been said that a court ought to show 'a measure of mercy' which has been said to be the fourth factor (apart from the crime, the interests of society and personal circumstances of the accused) which ought to be taken into account when sentencing (*The State v Sylvia Condentia van Wyk and Seth Jacobus Louw* Case No. CC 7/2008 (Unreported) which relies on *S v Khumalo* 1993 (3) SA 697 (A)). Additionally, it was held by the high authority of Strydom JP (as he then

was) in *Immanuel Reynecke v The Sate* Case No. CA 63/1996 (Unreported) at p. 3 that a sentence 'cannot ignore' the circumstances of the crime. On the element of 'a measure of mercy', Mr Kumalo drew our attention to the following passage in *S v Strauss* 1990 NR 1971: 'The requirement of mercy does not mean that the courts must be too weak or must hesitate to impose a heavy sentence where it is justified by the circumstances.' We agree: all that *Strauss* is saying is that where the circumstances justify it, a heavy sentence may be imposed without mercy. That is fair, satisfactory and reasonable in our view.

[7] We have carefully considered the matter and in doing so we have considered the record of the proceedings of the lower court, including the judgment of the learned Regional Court magistrate and submission by counsel and we have consulted the authorities referred to us by counsel and those our own research did unearth. Keeping in our minds' eyes the principles and approaches in those cases, especially in *S v Simon* supra, *Gerry Wilson Munyama v The State* supra and *S v Ganes* supra, we come to the following reasonable and unavoidable conclusion. Looking at the circumstances of the crime in *Ganes* and *Munyama* (SC), including the crimes in the cases the Supreme Court refers to in para 8 thereof that preceded the *Ganes* case, on the one hand and the crime in the instant case on the other, we find that the learned Regional Court magistrate failed to be guided by the principle that in imposing a sentence the sentencing court ought to be guided mainly by sentences impose by this Court and, of course, the Supreme Court in similar cases (of course, due regard being had to factual differences and apart from statutory prescribed sentences). The misdirection, in our opinion, is a serious one. We can only assume that the *Ganes* case and the cases the Supreme Court refers to in para 8 of the *Munyama* case which preceded the *Ganes* case, as aforesaid, were not brought to the attention of the learned Regional Court magistrate.

[8] Keeping all this in our mental spectacles, we hold that the sentence imposed by the learned Regional Court magistrate is so excessive that it induces a sense of shock in our minds, entitling us to interfere with the sentence imposed by the lower court; as we do. However, we have no good reason to fault the learned magistrate for imposing different sentences on appellant 1 and appellant 2 and accused 2 on the basis that as a police official of NAMPOL at the time of the commission of the offence, appellant 2 carried greater blameworthiness. Mr Wessels appears to have conceded the point that the difference in the sentences imposed was reasonable and justified in the circumstances. However, as we understand counsel, he submits that the difference between the sentences was too wide. We respectfully agree. We think the difference is too wide to the extent that it is unfair and unsatisfactory. Having said that, we are of the view also that the fact that appellant 2 was a police official justifying the imposition of a severer sentence than that imposed on his co-accused should – like the proverbial double-edged sword – cut both ways. It should, therefore, in our showing of a measure of mercy, work in his favour. In this regard, we note that appellant 2 has already lost his job as a police official with NAMPOL and that is a severe punishment in itself on any pan of scale. Accordingly, a measure of mercy is justified in his case.

[9] For the aforegoing reasoning and conclusions, we conclude, as we have intimated previously, that this Court is entitled to alter the sentence imposed by the lower court; and it is our view that the sentences set out below meet the justice of the case. Whereupon, it is ordered:

1. The appeal (on sentence) succeeds.

2. The sentence imposed by the Regional Court is set aside and the following is put in its place:

   Appellant 1

   Three years' imprisonment

   Appellant 2

   Four years' imprisonment

3. The sentences in para 2 are backdated to 11 August 2010.

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PARKER J

I agree.

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DAMASEB JP

COUNSEL ON BEHALF OF THE APPELLANTS:

	Mr J Wessels
Instructed by:	Stern & Barnard

COUNSEL ON BEHALF OF THE RESPONDENT:

	Mr P S Kumalo
Instructed by:	The Office of the Prosecutor-General