

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CRI-APP-CAL-2019/00082

IN THE MATTER BETWEEN:

JOE COLLEN KETTI

APPELLANT

versus

THE STATE

RESPONDENT

Neutral citation: *Ketti v S* (HC-MD-CRI-APP-CAL-2019/00082 [2020] NAHCMD 213 (5 June 2020))

Coram: SHIVUTE, J et CLAASEN J

Heard: 8 May 2020

Delivered: 26 June 2020

Flynote: Criminal Procedure – Appeal – Sentence – 24 months' imprisonment – Appellant convicted of theft from employer – Goods valued at N\$40 548 – Court a quo duly considering – Personal circumstances of appellant – the offence – interest of

society – Purpose of sentencing and the fact that the appellant stole from his employer – The appellant in a position of trust who took advantage of trust bestowed upon him. Court a quo considering the triad of sentencing – striking a balance between competing interests and imposing 24 months’ imprisonment – Appeal court not satisfied that court a quo committed an irregularity or failed to exercise its discretion judiciously.

ORDER

The appeal against sentence is dismissed.

APPEAL JUDGMENT

SHIVUTE J (CLAASEN J concurring):

Introduction

[1] The appellant was convicted in the District Court sitting in Rehoboth on a charge of theft. He was sentenced to 24 months’ imprisonment after he pleaded guilty. He was aggrieved by the sentence, hence this appeal.

[2] Mr Andima, counsel for the appellant and Ms Esterhuizen, counsel for the respondent, signed a consent form in line with the Judge President’s Covid-19 Pandemic Guidelines for the matter to be determined on the evidence available on papers without the presence of the parties.

Facts upon which the appellant was convicted.

[3] The appellant pleaded guilty to theft of boxes of cigarettes valued at N\$40 548. He was convicted after the court invoked the provisions of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977. The appellant was employed as a driver by the

complainant. On 29 July 2019, he drove from Windhoek to Rehoboth to deliver stock to several shops. During the course of his duty, he stole 900 packs of cigarettes that were part of the stock he was delivering. He falsely reported to the police that the vehicle he was driving was broken into and boxes of cigarettes were stolen. His intention to steal the cigarettes was to sell them and raise money for himself. Upon receiving the report from the appellant, the police conducted an investigation. Their investigation revealed that the motor vehicle that was being driven by the appellant was not broken into. The police arrested the appellant and the cigarettes that were stolen were recovered from the place where the appellant had hidden them.

Grounds of appeal.

[4] The appellant's appeal is based on the following grounds:

(a) The appellant averred that the learned magistrate erred in fact or law by sentencing him to a direct term of imprisonment without suspending a portion of the sentence.

(b) It was also asserted that the court failed to adequately take into account the personal circumstances of the appellant; the value involved and the proportionality of such value in relation to the charge and the public interest.

(c) The appellant further contended that the court failed to attach weight to the mitigating factors and failed to take recognisance of the fact that the appellant was not legally represented.

Reasons by the Magistrate

[5] In sentencing the appellant, the magistrate took into account the triad of sentencing namely, personal circumstances of the offender, the seriousness of the offence and the interest of society. The court a quo also considered the objects and purpose of punishment. Furthermore, the court had regard to the fact that the accused stole from his employer, a fact viewed by our courts in a serious light and that calls for a deterrent sentence. Again, the learned magistrate stated that although the accused

pleaded for mercy, this did not mean that the court should impose a lighter sentence or hesitate to impose a deterrent sentence when circumstances dictated.

Test on appeal.

[6] If the appeal court finds that:

- (a) the trial court misdirected itself on the facts or on the law;
- (b) the trial court failed to take into account material facts or over-emphasised the importance of other facts;
- (c) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal,

then the sentencing court did not exercise its discretion judiciously and the appeal court can interfere.

(See *S v Tjiho* 1991 NR 361 at 366)

[7] Counsel for the appellant argued that the sentence imposed was inappropriate and it induces a sense of shock, because the appellant is a first offender who pleaded guilty to the charge and the goods stolen (to the value of N\$40 548) had been recovered.

[8] On the other hand, counsel for the respondent argued that although the appellant who is a first offender pleaded guilty to the charge, being an employee of the complainant from whom he stole, displayed a high level of dishonesty. The learned magistrate considered the breach of trust, manner of planning and craftiness of the appellant.

Applying the applicable law to the facts of the case

[9] It is trite law that punishment falls squarely within the discretion of the trial court. However, such discretion should be exercised judiciously.

[10] This court is called upon to determine whether the effective term of 24 months' imprisonment imposed by the court a quo induces a sense of shock and whether there has been a material misdirection that warrants the interference by this court.

[11] Although the appellant is a first offender who pleaded guilty, the court should not lose sight of the fact that he stole from his employer. The accused took advantage of the position of trust bestowed upon him and stole from his employer. Theft from an employer is viewed by our courts in a serious light. The fact that the goods were recovered was due to proper investigations by the police and it cannot be attributed to the appellant. If the police had bought the accused's story that the motor vehicle in which the cigarettes were taken was broken into, it is possible that the goods may not have been recovered.

[12] Having regard to the reasons given by the magistrate when sentencing, it is evident that the learned magistrate was mindful of all the relevant factors regarding sentencing. He considered the personal circumstances of the appellant, the offence and the interest of society. The learned magistrate weighed the mitigating factors against the aggravating factors and concluded that the mitigating factors had been outweighed by the other factors.

[13] With regard to the fact that the appellant was not legally represented, it is borne out by the evidence on record that the appellant was properly advised of his right to legal representation and he exercised his right to conduct his own defence. He was further advised of his rights to mitigation which he properly exercised.

Conclusion

[14] This court is not satisfied that the court a quo committed any material irregularity or that it had failed to exercise its discretion judiciously. It follows that the appeal is bound to be dismissed.

Order

[15] In the result, the following order is made:

The appeal against sentence is dismissed.

NN Shivute
Judge

CM Claasen
Judge

APPEARANCES:

APPELLANT:

Mr Thomas Andima
Van der Merwe-Greeff Andima Inc.
Windhoek

RESPONDENT:

Ms Karin Esterhuizen
Office of the Prosecutor-General
Windhoek