

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CRI-APP-CAL- 2022/00033

FABIOLA GURIRAS

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Gurisas v S* (HC-MD-CRI-APP-CAL-2022/00033) [2022]
NAHCMD 472 (9 September 2022)

Coram: D. USIKU, J (JANUARY, J Concurring)

Heard: 2 August 2022

Delivered: 9 September 2022

Flynote: Criminal Procedure - Sentence - Theft by employee from Employer - Mitigating and aggravating circumstances discussed - Appellant a first offender who tendered a guilty plea - A sole provider for minor children - Being a sole caregiver no basis to treat appellant differently in sentencing unless it was established through

evidence that such directly impacted on her capability not to appreciate the wrongfulness of her actions.

Summary: The appellant pleaded guilty to a charge of theft involving cash in the amount of N\$31 497 in the Magistrate court held at Outjo. She was found guilty and convicted in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 as amended (the CPA) and subsequently sentenced to 4 years direct imprisonment. The appellant's appeal lies against sentence.

Held that the court *a quo* correctly considered the seriousness of the crime, its prevalence and the duty of the court to impose competent sentences taking into account all relevant factors.

Held further that the fact that the appellant stole from her employer thereby abusing the position of trust between an employee and employer relationship, was equally important or more important.

ORDER

The appeal against sentence is dismissed.

JUDGMENT

USIKU J (JANUARY, J Concurring)

[1] The appellant appeared in the Outjo Magistrate's Court on a single charge of theft involving an amount of N\$31 497. She pleaded guilty whereafter she was convicted and subsequently sentenced to 4 years imprisonment.

[2] Mr. Mwakondange appeared on behalf of the appellant instructed by the Directorate of Legal Aid whilst Mr. Ipinge appeared on behalf of the respondent.

[3] The appeal lies against sentence. In the notice of appeal the appellant raised the following grounds:

1. That the effective term of 4 years imprisonment is so severe that it induces a sense of shock in comparison to sentences imposed in similar cases in this jurisdiction;
2. That the learned magistrate had failed to show the appellant mercy in sentencing her, on the basis of the guilty plea which she has tendered and her personal circumstances, being an employed mother, with children to look after;
3. That the learned magistrate paid insufficient weight to the fact that the appellant is a primary care giver of two minors, a grandchild and her own child aged 16 years;
4. That the learned magistrate erred in law on the fact that he failed to adequately take into consideration that:
 - (a) The appellant is a first offender.
 - (b) The appellant pleaded guilty testified in mitigation thereby showing contrition.
 - (c) The appellant had already been in custody for two weeks – though time spend in custody is miss factor.
 - (d) The appellant is a primary care giver of minor children of her child of 16 years of age and a grandchild.
- (5) That the learned magistrate failed to take into consideration or take into consideration adequately of the fact that the only harm suffered by the complainant was only N\$26 797 as N\$4 700 of the N\$31 497 was recovered;
- (6) That the learned magistrate erred in law and/or on the facts by

overemphasising the seriousness of the offence and interests of society in the following respects:

- (a) That the value of the stolen money is substantial when in fact it was not;
 - (b) That if a fine maximum fine of N\$20 000 was imposed, it will have the net effect that it will not meet the value of the amount of cash involved.
- (7) That the learned magistrate erred in law and/or on the facts by failing to draw a delicate balance between the interests of the appellant and the interests of society in relation to the crime itself.
- (8) That the interest of society and the need for deterrence message sentence considered by the learned magistrate had been unduly emphasised heavily at the expense of the individual interest of the appellant.'

[4] This is an appeal against the sentence imposed by the learned magistrate. In deciding what an appropriate sentence should be, the magistrate correctly in our view, referred inter alia, to *S v Zinn*¹ in which it was stated that the personal circumstances of the accused person, the nature of the offence committed and the interest of society must be considered. The magistrate further went on to consider other factors which have to be balanced against the objectives of punishment, being deterrence, rehabilitation, retribution and reformation.

[5] The appellant tendered a plea of guilty to the charge preferred against her. Indeed a plea of guilty is usually regarded as an indication of remorse. That however must be considered in the circumstances of each and every case as there might be such overwhelming evidence against the appellant that she has no option than to plead guilty to the charges. The appellant is a first time offender, however, there is no rule of thumb that prohibits courts to impose custodial sentences even in the cases of first time offenders. It is an indispensable requirement of justice that sentences be consistent and that they be perceived as such. Counsel for the respondent referred this court to several authorities on that point. Due to the prevalence of the crime it has now become more or less the general norm to impose custodial sentences even in cases of first time offenders.

¹ *S v Zinn* 1969 (2) SA 537 A at 540 G.

[6] It is trite that when sentencing, not all relevant circumstances should be given equal weight and that almost inevitably one must carry more weight than the other.²

[7] From the reading of the record, it is apparent from the magistrate's reasons when he stressed the seriousness of the crime of theft, its prevalence as well as the fact that the appellant stole from her employer thereby abusing the trust bestowed to her by the employer. Justice requires that where an employee breached the trust that was placed in him or her, it is the duty of the court to punish that person upon conviction and it is desirable that a custodial sentence is to be imposed. We therefore find no misdirection when the court *a quo* imposed a custodial sentence on the appellant.

[8] It should however not be construed that other factors should be completely ignored. Cases of theft by an employee from his or her employer are currently on the increase. It is therefore necessary to send out a clear and unequivocal message in order to show the intolerance for dishonest employees.

[9] With regard to submissions by counsel for the appellant that the court *a quo* failed to consider the interests of the appellant's minor children. This court was referred to Article 30(1) of the African Charter on the Rights and Welfare of the child. The charter expressly deals with children of imprisoned mothers, whereas Namibia is a signatory to the charter. That should equally be considered together with Article 10 of the Namibian Constitution which provides for Equality and Freedom from Discrimination. Article 10(1) provides that all persons shall be equal before the law. The appellant being the mother of one minor child and a grandmother cannot therefore be treated differently, simply on that basis alone. With rights, come responsibilities as well.

[10] It is unfortunate that the appellant's dependants will have to endure hardship as a result of the appellant's criminal activities. However, those are inevitable consequences of crime and as such cannot be said to constitute a mitigating factor.

² *S v van Wyk* 1993 NR 426.

The appellant ought to have realised that when engaging herself in criminal activities, there would be consequences that are usually very severe.

[11] In the result the following order is made;
The appeal against sentence is dismissed.

D N USIKU
Judge

H. JANUARY
Judge

APPEARANCES

APPELLANT:

Mr. Mwatondange

Instructed by the directorate of Legal aid

RESPONDENT:

Mr. Ipinge

Of the Prosecutor General