



SUMMARY

REPORTABLE

CASE NO.: CA 146/08

LAZARUS SODOM PENDA v THE STATE

PARKER, J *et* NDAUENDAPO, J

2009 February 23

Criminal procedure - Sentence – Appeal against – Circumstances in which appellate court may interfere with sentence imposed by trial court affirmed.

Criminal procedure - Sentence – Appeal against – Appellate court to be guided by sentences imposed by court in similar cases – In theft cases – Court ought to take into account economic status of victim of the theft in decided cases and instant case.

Criminal procedure - Sentence – Appeal against – In theft cases –
Accused having replaced the total amount stolen
constituting weighty mitigating factor.



REPORTABLE

CASE NO.: CA 146/08

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LAZARUS SODOM PENDA

APPELLANT

and

THE STATE

RESPONDENT

CORAM: PARKER, J et NDAUENDAPO, J

Heard on: 2009 February 23

Delivered on: 2009 February 23

JUDGMENT

PARKER, J:

[1] The appellant (accused No. 2 in the trial court) and his co-accused were convicted on a charge of theft under false pretences of N\$17,000.00 and were subsequently sentenced to thirty six (36) months imprisonment of which 12 months were suspended for five years on the following conditions:

- (a) that the accused is not convicted of any offence involving theft committed within the period of suspension; and
- (b) that each accused compensates the complainant, Moses Sheetekela, the sum of N\$8,500.00 through the clerk of court, Eenhana on or before 31 December 2008.

[2] The appellant now appeals against sentence; and he relies specifically and primarily on three grounds of appeal in paras 1.2, 1.3 and 1.5 of his Notice of Appeal. In this appeal, Ms Nambinga represents the appellant, and Ms Jacobs represents the respondent (the State).

[3] In *Teofelus Tilenge v The State* Case No.: CA 124/2007 (Unreported) at p.3, relying on the authorities, I observed thus:

It is so trite a rule of practice that the matter of sentencing is within the ambit of the discretion of the sentencing court that we need not cite any authorities. This Court, *qua* appellate court, can only interfere if the discretion was not exercised judicially, i.e. if the sentence is vitiated by an irregularity or misdirection, or the sentence is no manifestly excessive that it induces a sense of shock in the mind of the appellant court. In deciding whether a sentence is manifestly excessive, this Court ought to be guided 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.

[4] Keeping the principles enunciated in *Tilenge* in my mental spectacle, I proceed to consider the grounds of appeal. The first ground of appeal is basically that the sentence imposed is incongruous with sentences imposed by the Court in similar cases. In this regard, Ms Nambinga referred the Court to some cases, e.g., *S v Clay* 1996 NR 184 (HC) and *S v Strauss* 1990 NR 71 (HC). In *Clay* the amount involved was N\$5,090.23 and the sentence imposed by this Court on appeal was 14 months' imprisonment, of which a half of the period was suspended for four years. In *Strauss*, the amount involved was R (N\$) 188,637.00 and the sentence imposed by this Court was a fine of N\$10,000.00 or on default of payment one years' imprisonment, plus

five years' imprisonment of which three years were suspended on conditions.

[5] It is my view that in undertaking such exercise of comparison, one needs to take into account whether similar circumstances exist; that is to say, whether the circumstances in the instant case and the decided case are comparable; that is similar. For instance, did the money stolen belong to a big wealthy company or a rich individual; or was the victim a poor company or a poor individual. For instance in *Clay*, the victim of the crime was Model Supermarket, and in *Strauss*, it was Consolidated Diamond Mines (CDM) at Oranjemund. Ms Nambinga appeared to appreciate this factor.

[6] A big wealthy company or a rich individual may consider N\$17,000.00 as a small change, but for a rural clerk like the complainant, N\$17,000.00 *may be* his entire life-saving. Thus, in the eyes of this Court, to steal from an individual by false pretences his hard-earned money of N\$17,000.00 in Namibia, a developing country, is a very serious offence on any pan of scale: it is not an offence this Court should simply grin at. We have taken this factor into account in deciding whether the instant case and *Strauss* and *Clay*, for example, are similar, and having done so we have come to the conclusion that the circumstances are not similar.

[7] The second ground of appeal is that the learned magistrate erred in law or on the facts because the learned magistrate, according to the appellant, did not take into account mitigating circumstances, including the fact that the accused is the father of five children and he is the one taking care of the children. This is simply not true. In his reasons for sentencing the learned magistrate set out these personal circumstances of the appellant; and we have no good reason to conclude that the learned magistrate did not take these factors into account when considering sentence, particularly when he set out

what he considered to be mitigating factors and what he considered to be aggravating factors. It follows that this ground of appeal, too, has no merit. Indeed, to focus on the personal circumstances of the accused (or appellant) at the expense of the other aims of sentencing, e.g. the interests of the community, is to distort the object and process of sentencing and to produce, in all likelihood, a warped sentence. (See *S v Lister* 1993 (2) SACR 228 (A) at 233H-I.)

[8] The third and last ground is formulated in the following terms:

The learned Magistrate erred in law or on the facts in failing to take cognizance of the fact that the Appellant is a businessman with a good income generating business and thus earns a living, placing the Appellant in a position to pay a fine rather than to be imprisoned directly which action will merely lead to the deterioration of the appellant's business interest leading further to the Appellant and his children becoming a greater burden on Society.

What I have said previously about the second ground of appeal applies equally to this ground of appeal. Additionally, as I said in *S v Da Silva* Case No.: CC 15/2005 (Unreported) at p 15 -

In taking into consideration the interests of society, I must, in this regard, impose a sentence that aims at punishing the accused and at the same time serves to send a strong message that this sort of crime is abhorrent and, therefore, society expects it to be met with the full force of the law. (See *S v Skenjana* 1985 (3) SA 51 (A) at 55B-C); *R v Karg* 1961 (1) SA 231 (A) at 236 A-B; *S v Van Rooyen and another* 1992 NR 165 at 188E-F; *S v Holder* 1979 (2) SA 70 (A) (Head note).)

And in *The State v Naftalie Kondja* Case No. CC 04/2006 (Unreported) at p.4, relying on the authorities, I stated that in sentencing, the penal element, particularly in serious offences, must come to the fore and be properly

considered if punishment is to continue *to have meaning* in the criminal justice system. And, as I say, the crime for which the appellant was convicted is a serious offence. However, in the instant case, a strong and compelling factor that should count in favour of the appellant is that the appellant had refunded to the complainant the total amount of money he had stolen from the complainant; that is, N\$8,500.00, being a half of the amount involved, which is N\$17,000.00. Consequently, I think we must show a measure of mercy (*S v Khumalo* 1973 (3) SA 697 (A)) and exercise our discretion towards interfering with the sentence imposed by the trial court; for, I think a case has been made out for interfering with the sentence.

[10] Accordingly, the appeal against sentence is upheld, and the sentence is set aside and the following is put in its place:

24 months' imprisonment, antedated to 13 August 2008, of which 12 months are suspended for five years on the following conditions:

- (a) That accused is not convicted of any offence involving theft committed within the period of suspension.
- (b) That each accused (i.e. the appellant and his co-accused) compensates the complainant, Moses Sheetekela the sum of N\$8,500.00 through the clerk of court, Eenhana Magistrates' Court, on or before 31 December 2008.

Parker, J

I agree

Ndauendapo, J

ON BEHALF OF THE APPELLANT:

Instructed by:

Ms Nambinga
LorentzAngula Inc.

ON BEHALF OF THE RESPONDENT:

Instructed by:

Adv. H. J. Jacobs
Office of the
Attorney-General