

**1998/08/31**

**Strydom, J.P. et Teek, J.**

**CRIMINAL PROCEDURE**

**Sentence - imprisonment of first offender, mother of very small baby, crime committed when husband left common home and not contributing to maintenance - offer to pay N\$1500-00 - parties reconciled again - Sentence changed to fine and appellant ordered to repay N\$1500-00**

CASE NO. CA113/97

IN THE HIGH COURT OF NAMIBIA

In the matter between

CHARLOTTE M VAN ROOYEN

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: STRYDOM, J.P. et TEEK, J.

Heard on: 1998.08.14

Delivered on: 1998.08.31

APPEAL JUDGMENT:

STRYDOM J.P.: The Appellant was charged in the Magistrate's Court with the crimes of fraud and theft. She pleaded guilty to both charges. On the first charge of fraud she was sentenced to 30 months imprisonment of which 15 months were suspended for 5 years on the usual conditions. On the second count the Appellant was sentenced to pay a fine of N\$ 100-00 or, in default of payment, to imprisonment of 50 days.

The Appellant now appealed against the sentence on the first count, namely that of fraud. Mr Dicks appeared for the Appellant and Mr Truter for the State.

From the evidence and documents placed before the Magistrate it seems that the Appellant stole a blank page out of a cheque book. She then completed the cheque and was able to withdraw N\$1500-00 from the bank. The circumstances of the Appellant at the time when she committed these crimes are set out in her address to the court-a-quo as well as a written document which was presumably handed into Court. The Appellant is 26 years old and is the mother of three children. At the time when the Appellant was sentenced these children were respectively 4 months, 3 years and 6 years old. The Appellant furthermore informed the Court that when she committed the crimes she had financial problems. She was at that time estranged from her husband and he was not contributing anything towards the upkeep of the three children. She stated that she had to provide for the children. This included paying rent for the house in which they lived, for day care of the children so that she could work and other incidental expenses.

The Appellant further informed the Court that she and her husband had, in the mean time, become reconciled and although she was still unemployed her husband was willing to assist her to repay the N\$1500-00. The State did not prove any previous convictions and it is clear that the Appellant is a first offender.

Although various grounds of appeal are set out in the notice of appeal I have come to the conclusion that the first ground of appeal should succeed namely that the sentence

of 30 months imprisonment of which half was suspended is disturbingly inappropriate in all the circumstances and that this Court is therefore entitled to interfere with the sentence imposed by the magistrate.

The learned magistrate is no doubt correct when he stated that the crimes committed by the Appellant were serious and were prevalent. For proof of this one need not look further than the many cases to which he has referred the Court. It is also correct that there is no general rule that first offenders should be kept out of jail and that women who commit serious crimes can always shield behind the fact that they have small children. Furthermore deterrence and reform of a particular criminal and other would be criminals are the ultimate and legitimate goal of sentencing. So too, as was pointed out by the learned magistrate, should presiding officers aim to achieve uniformity of sentencing where this is attainable. However the application of these principles does not take place in vacuo.

To what extent some of these principles do apply and the role they play in the consideration of what an appropriate sentence would be in a particular instance depends on the circumstances of each case and the particular individual whom the

- Court must punish.

Looking at the circumstances of the Appellant in the present instance one is struck by the fact that the crime was committed at a time when she had become estranged from her husband and had lost the financial support for her three young children. Because of the unwillingness of her husband to fulfil his duties the Appellant landed in

financial difficulty which caused her to commit the crimes of which she was convicted. This motive must be distinguished from those cases where a person steals or commits fraud to satisfy his or her own personal greed. Most of the cases to which we were referred are cases where accused persons abused their position of trust and, sometimes over extended periods of time, stole money from their employers. Surely the moral blameworthiness of a person, such as the Appellant in this case, must be less than that of the person who acts solely with the intention to feather his own nest. This does not mean that the Appellant is excused for what she has done. However our law reports abound with cases where the Courts, for purposes of sentencing, drew a distinction between precisely these two situations.

Taking this as a starting point one must now also have regard to the other circumstances present. These circumstances are that the Appellant is a first offender, that she is the mother of three very small children, the one still a baby and one other no more than a toddler. Furthermore the Appellant has become reconciled with her estranged husband and she and the children are again supported by him. This, to a great extent, removed the reason for possible further criminal activity by the Appellant. It does however not need a vivid imagination to realise the possible effect of long term imprisonment on a marriage which may be shaky and which has not had time to recover again.

On top of this the Appellant also offered, with the assistance of her husband, to repay the amount of NS1500-C0. In the latter regard I am also of the opinion that the learned magistrate was wrong to hold against the Appellant that she only made the

offer at her trial and did not start to repay the complainant during the two months which had elapsed since the commission of the crimes on 1 September 1997, and the 5th of November, 1997 when she was sentenced. In this regard the Appellant informed the Court that she was still unemployed. She could only make such offer with the assistance of her husband and this assistance clearly only came to light after Appellant's reconciliation with her husband some time between the two abovementioned dates.

Bearing in mind all the above circumstances and the fact that the amount involved is not big I am of the opinion that this was an instance where the Court should have imposed a sentence other than direct imprisonment. Again I want to state that I am not thereby saying that a person who defrauded or stole N\$ 1500-00 from another cannot or should not be sent to prison. What I am saying is that in the circumstances of this particular case and the circumstances of this particular accused a sentence of 30 months imprisonment of which 15 months were suspended is disturbingly inappropriate.

Mr Dicks again repeated the offer of the Appellant to repay the N\$ 1500-00 to the bank. He indicated that this could be done in instalments over a period of 6 months.

In the result the appeal succeeds and the sentence imposed by the magistrate is set aside and the following sentence is substituted:

N\$ 1000-00 or in default of payment 1 (one) year imprisonment, plus further imprisonment of 1 (one) year which is suspended for 4 (four) years on condition:

- (1) that she is not again convicted of fraud or theft committed during the period of suspension; and
- (2) that the amount of N\$1 500-00 is repaid to Bank Windhoek in six monthly instalments of N\$250-00 each, the first payment to be made on or before 7 September, 1998 and the other payments to be made on or before the 7th of each consecutive month until the amount of N\$ 1500-00 is repaid. Such payments to be made to the Clerk of the Magistrate's Court, Windhoek, for payment to Bank Windhoek.



**STRYDOM, J.P.**

I agree.



**TEEK, J.**

**ON BEHALF OF APPELLANT**

**ADV J DICK**

**Instructed by:**

**ON BEHALF OF RESPONDENT**

**ADV J TRUTER**

**Instructed by:**