REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CA 61/2015

MANFRED PURIZA **APPELLANT**

versus

THE STATE **RESPONDENT**

Neutral citation: *Puriza v State* (CA 61/2015) [2016] NAHCMD 19 (12 February 2016)

Coram: LIEBENBERG, J *et* SHIVUTE, J

Heard: **4 December 2015**

Delivered: **12 February 2016**

Fly note: **Criminal Law – Theft – Appeal against conviction – Whether a security guard entrusted to safe guard the money had a legal duty to report the theft thereof committed in his presence – Counsel for Appellant arguing – No legal duty to report – Only a moral duty – Court – Position of a security guard can be equated to that of a police officer – Appellant had a legal duty to report by virtue of the nature of his employment – Omission on the appellant's part pointing to complicity in the theft – Appellant associating himself with theft and acting in common purpose with his co-accused – Appellant guilty of theft – Appeal against conviction dismissed.**

Criminal Procedure – Appeal against sentence – Appellant stealing from his employer a considerable amount of money – Appellant in position of trust – Appellant breaching the trust – Theft by employee viewed in serious light – Calling for a deterrent sentence – Sentence of 4 years' imprisonment appropriate – Court having no reason to interfere – *Court a quo* exercising its discretion judiciously – Appeal against sentence dismissed.

Summary: **Criminal Law – Theft – Appellant appealed against conviction and sentence. He was employed as a security guard entrusted to safe guard the money and transport it to various destinations. The money was stolen in his presence − Appellant claimed that he failed to report because he feared for his life and was not under a legal duty to report. There was no basis for his fears – The position of a security guard may be equated to that of a police officer in the circumstances. Appellant had a legal duty to report the theft by virtue of the nature of his employment. His failure to report points to complicity in the theft and he associated himself with theft. Appellant acted in common purpose with his co-accused. Appellant guilty of theft. His appeal against conviction is dismissed.**

Criminal Procedure – Appeal against sentence – Appellant first offender who stole from his employer – Was in position of trust and breached the trust – Theft by employer viewed in a serious light in our courts – The sentence of 4 years' imprisonment is appropriate in the circumstances – The court has no reason to interfere with the sentence – The court *a quo* has exercised its discretion judiciously – The appeal against sentence is dismissed.

ORDER

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1. The appeal against conviction and sentence is dismissed.

2. The appellant's bail is cancelled with immediate effect and he is to be taken into custody for committal in accordance with the law.

JUDGMENT

SHIVUTE J (LIEBENBERG J concurring):

[1] The appellant was jointly charged together with three others in the Regional Court Windhoek. He was found guilty of theft of N$190,000 after a protracted trial and sentenced to 4 (four) years' imprisonment. He was seemingly dissatisfied with the conviction and sentence. Hence his appeal against conviction and sentence.

[2] The grounds for conviction may be summarised as follows:

2.1 The learned magistrate erred in the law and/or on the facts to find in the circumstances that the only reasonable inference to be drawn was that the appellant actively participated in the theft of the money.

2.2 The learned magistrate erred in the law and on the facts to give insufficient weight to the following:

That when the appellant returned to Windhoek he cooperated with his superior and the investigating officer by telling them that accused 1 stole the money and that he made a confession.

2.3 The appellant failed to report immediately because he feared for his life. He only reported after he realised that accused 1 was not going to confess to the theft.

2.4 That accused 1 failed to plead guilty and only admitted that he associated himself with the bag of money through cross-examination.

2.5 That accused 1 was a single witness who was not credible and unreliable. The same goes to Ms Sidakwa who deviated from the statement she gave to the police in an attempt to assist accused 1.

2.6 The *court a quo* overlooked the fact that the appellant might have had the opportunity to alert authority about the theft, but he elected to remain silent in order to create the impression that he would not turn against accused 1.

2.7 That the appellant did not know which other employees working for the bank were involved in the commission of the offence.

3. That the learned magistrate erred by accepting accused 1 and other witnesses' versions as credible and convicting the appellant on that basis.

4. The court ignored the fact that the appellant did not know and had no contact with accused persons 3, 4 and 5 who were family members of accused 1.

5. The court failed to realise that the appellant's version could be reasonable possibly true and instead found it to be improbable and that it tantamount to lies.

6. The court misdirected itself by finding that the appellant had the opportunity to report, therefore, by failing to do so, the only possible conclusion to be drawn is that he was guilty of theft.

7. The learned magistrate erred by relying on the unsupported conclusion that accused 1 and the appellant acted in common cause to steal the money.

[3] As against sentence, the following grounds were advanced:

3.1 The learned magistrate erred in law and or on the facts by over emphasising the nature of the offence and the interest of society against the personal circumstances of the appellant.

3.2 The learned magistrate erred in law and/or on the facts to attach no, or alternatively, insufficient weight to the consideration that the appellant was a first offender who reported to his superior; the police and had made a confession that assisted in the arrest of the co-accused persons.

3.3 That the sentence imposed was inappropriate in the circumstances and it induced a sense of shock.

[4] The brief facts which are common cause are that the appellant and accused 1 were employed by a security company as drivers and security officers whereby they were entrusted to transport cash to various branches of commercial banks in Namibia by using an armoured vehicle. They were both armed with firearms to safe guard and protect the cash in transit. On 2 March 2004 they departed from

Windhoek to Grootfontein, Rundu and Katima Mulilo to deliver bags containing cash. Whilst they were in Windhoek the appellant was made aware by accused 1 that the money bag destined for Okahandja was in their vehicle and this is the bag in issue.

[5] On their way to Rundu an inquiry was made from their office through radio communication whether they had not taken the bag of money destined for Okahandja by mistake. The appellant was again specifically asked by witness Van Wyk about the same through his mobile phone, to which he denied any knowledge of the said bag.

[6] When they reached Katima Mulilo the manager of First National Bank searched their vehicle for the money bag in question in the presence of accused 1 and the appellant, but the appellant did not tell the manager that the money was hidden under the seat, despite the fact that he was aware of its whereabouts. After they delivered the money at First National Bank they went to one of the lodges in Katima Mulilo where the appellant saw the bag with the money, physically labelled N$190,000. From the lodge accused 1 and the appellant went to the house of Ms Viku Sidakwa, the second State witness, with the bag of money. The original bag that contained the money was burned in the presence of the appellant and the money was transferred into another bag provided by Ms Viku Sidakwa upon request. The money was left with Ms Viku Sidakwa for safekeeping. The following morning accused 1 and the appellant went to her place to collect the money they had left with her. On their way to Windhoek and whilst driving in the Divundu area, they met accused 4 and 5 who were contacted by accused 1, to come and collect the money. Appellant had admitted that at that time he was the driver.

[7] The appellant was dropped off at his residence by accused 1 when they arrived in Windhoek. On 4 March 2004 (the next day) accused 1 informed the appellant that he had taken the money bag to Karibib. When the appellant went with accused 1 to work the appellant was asked by his superior about the money, but he denied any knowledge of its whereabouts. On 5 March 2004 all the workers who had driven out on 2 March 2004 were subjected to a polygraph test. The appellant was no exception. Later on the same day the appellant approached Mr van der

Waldt, to whom he made admissions which resulted in the arrest of the co-accused persons. Out of the stolen money only N$102,690 was recovered.

[8] Counsel for appellant argued that the appellant did not report the theft immediately to his superiors because he was afraid of Mr Beukes, accused 1, as he could sense that Beukes was watching every move he was making and he made sure that he was always in the presence of the appellant when he was approached by other people. The appellant pretended that he was comfortable with the fact that Beukes stole the monies. The appellant was hoping that when he and Beukes return to Windhoek Beukes would be confronted about the missing money bag and the appellant was hoping that accused 1 would admit to the offence.

[9] Counsel further argued that if accused 1 sensed that the appellant was going to blow the whistle concerning the incident he might have killed him on the way from Katima Mulilo. In Windhoek accused 1 was still armed and the appellant was still in fear that accused 1 could harm him and his family. Again counsel argued that what made the appellant to be in fear for his life further was because when he asked accused 1 where the stolen bag was, accused 1 said to him that the bag was in the safe of the vehicle and that the appellant must be strong and must not tell anybody about it.

[10] It was again submitted that the appellant did not act in common purpose with accused 1 because when he realised that accused 1 was not going to come forth with the truth, the appellant decided to tell Mr van der Waldt, his supervisor, about the money, as well as a police officer and later on made a confession.

[11] Counsel for the appellant argued that although Ms van Wyk testified that the appellant enquired about the reward to be offered to the person who would give information leading to the arrest of the suspect who stole the money, the appellant could not remember whether he made such an inquiry. Even if he had done so there was nothing strange making such inquiry.

[12] Concerning the evidence of Ms Sidakwa, counsel for the appellant argued that it was accused 1 who gave her the money and not appellant and that is the reason why the witness did not mention the appellant in her statement that she gave to the police apart from her mentioning that accused 1 went with an unknown man to her house and left the money with her. Counsel further criticised the witness' testimony that in her statement taken by the police she said accused 1 burned the money bag in which it initially was put, but through cross-examination she said 'they' burned the bag, meaning accused 1 and the appellant. Counsel for the appellant further argued that although appellant was at Ms Sidakwa's place he did not take part in the conversation. It was again counsel's argument that accused 1 is responsible for the theft of money and he arranged with his family members for the money to be taken to Karibib. The family members of accused 1 were unknown to the appellant. Counsel further contended that although the appellant's phone was used to call a young brother of accused 1 it was in fact accused 1 who made the call in order to try to implicate the appellant.

[13] Furthermore, counsel for the appellant argued that the appellant, by not reporting the theft to his supervisors, did not commit any offence as he was not under any legal duty to do so.

[14] It was a point of criticism levelled against the magistrate that the learned magistrate neglected to deal with the argument raised by counsel for the appellant that Ms Sidakwa contradicted herself by giving a different version in examination in chief as opposed to her initial police statement. The learned magistrate is further said to have failed to take into consideration that Ms Sidakwa was a friend to accused 1 and his wife.

[15] It was further counsel's criticism towards the learned magistrate that she did not pronounce in her judgment that the State had proved its case beyond a reasonable doubt against the accused as she simply stated that, in her view, the appellant wilfully participated in the crime as it is alleged. The learned magistrate was supposed to acquit the appellant even if she did not believe the version of the

appellant if there existed a reasonable possibility that his version in respect of the events might have been possibly be correct, so it was contended.

[16] Counsel argued that Ms Sidakwa's version was of such poor quality and it appears that the *court a quo* did not rely on it as the learned magistrate only indicated in her judgment that the appellant had ample opportunities to report the theft to his superiors. The magistrate failed to make a credibility finding and convicted the appellant on his own version of events.

[17] It was again counsel's argument that the evidence of accused 1 should be treated with caution especially when he implicated the appellant and it is of such poor quality. Counsel recounted that Accused 1 initially pleaded not guilty. However, he later conceded that he was guilty. The court has also failed to make a credibility finding in respect of accused 1, so counsel argued.

[18] Concerning the sentence, counsel argued that the magistrate overemphasised the crime committed and paid no or insufficient weight to the personal circumstances of the appellant namely, that the appellant was a first offender who played a minor role in the commission of this offence; that he did not benefit financially; that the appellant would lose his newly acquired employment as he is given a custodial sentence and that more than half of the money stolen was recovered.

[19] Furthermore counsel submitted that the appellant was supposed to be given an option of a fine or any other sentence.

[20] Counsel's further argument is that the court over-emphasised the aspect of retribution and deterrence and attached no or less weight to the aspect of reform. It is for the above reasons that counsel contended that the sentence imposed is inappropriate, excessive and induces a sense of shock.

[21] On the other hand, counsel for the respondent submitted that when the appellant was told by accused 1 whilst they were still in Windhoek that accused 1

had stolen the bag of money meant for Okahandja, he was obliged to report the matter to his employer or the police if he had no intention of associating himself with the crime. Counsel further argued that inference drawn from the appellant's own version is that he and accused 1 had planned to steal the money as they discussed the issue between them. This may be drawn from the appellant's version when he narrated the following:

> 'Just before we reached the service station Mathew (accused 1) told me that he took the bag he was always talking about. I asked him what bag? He said the bag of Standard Bank Okahandja.'

[22] Counsel again argued that although appellant tried to paint a picture that he did not believe that accused 1 took the money initially, he was supposed to stop doubting him as it became apparent that the money was indeed stolen when the appellant was contacted by the office by radio, and subsequently by phone, concerning the missing money bag.

[23] Counsel continued to argue that the appellant accompanied accused 1 to the house of Ms Viku Sidakwa where the money was left for safe keeping. He witnessed Ms Sidakwa being given part of the stolen money. On the way back from Katima Mulilo at Divundu whilst the appellant was driving the vehicle, they stopped and gave the stolen money to accused 4 and 5. From the time he became aware of the theft of the money, to the time the money was handed over to accused persons 4 and 5, the appellant was in joint possession of the money with accused 1. Therefore, appellant and accused 1 acted in common purpose.

[24] With regard to the explanation given by the appellant, counsel argued that the explanation that the appellant failed to report the theft because he was afraid of accused 1 and secondly that he hoped that accused 1 would admit his guilt could not be reasonable in the circumstances, because the appellant was employed to safeguard the money that came into his possession during the scope and course of his employment.

[25] Concerning the appellant's alleged fear for his life and that of his family, counsel argued that the appellant in his plea explanation said that he did not report because he felt accused 1 was closely watching him. When he testified in examination-in-chief he told the court that he did not report the theft when he was contacted over the radio as he was not certain about the bag accused 1 had told him about. During cross-examination he said accused 1 did not threaten him in any manner, but he decided not to report because of the way he was looking at him. Counsel contended that the appellant's fear was baseless.

[26] Furthermore, counsel for the respondent argued that the appellant approached State witness Ms van Wyk and inquired about the reward that was on offer for disclosing the culprit and this might have prompted the appellant to disclose the information about the theft. Appellant feared that since the money was taken to Karibib he would not get his share.

[27] In connection with sentence counsel argued that the appellant and his co-accused persons stole out of greed as they never testified that they were underpaid. They compromised the position of their co-employees who were also suspects and subjected to polygraph tests. Furthermore, this theft threatened the very core of their employers' business. The appellant abused and betrayed the trust bestowed upon him and took advantage of his position to commit the theft. The appellant is not remorseful and he is still trivialising the offence committed. Counsel for the respondent prayed for the court not to interfere with the sentence as it is suitable, appropriate and adequate. The N$15,000 fine which the appellant is asking is extremely low. Counsel again argued that where there is no genuine remorse on the part of the accused the courts have imposed stiffer sentences.

[28] Having considered arguments from both counsel as well as authorities they referred us to and the reasons given by the learned magistrate for conviction and sentence, we are called upon to determine whether there was a misdirection on the part of the court *a quo* to convict the appellant and whether the sentence imposed is excessive, inappropriate or whether it induces a sense of shock or that the learned magistrate did not exercise her discretion judiciously.

[29] Counsel for the appellant correctly pointed out that the learned magistrate did not expressly make a credibility finding in respect of the versions of accused 1 and the 2nd state witness. However, the magistrate did not rely on the versions that were in dispute to arrive at her conclusion. Instead, she relied on issues that were common cause.

[30] I will now proceed to deal with the issue whether the appellant had a legal duty to report the theft and whether his failure to report was due to threats or fear for his life and that of his family.

[31] Accused 1 and the appellant, as counsel for the respondent correctly pointed out, were employed to safeguard the money. They owed loyalty to their employer who had placed them in a position of trust. Since the appellant's duty was to safeguard the money, he was under a legal duty by virtue of his employment, to report the theft of the very same money he was paid to safely transport and deliver. He could not turn a blind eye to the theft and claim he was not under legal obligation to report. The argument that he was not under a legal duty defeats the very purpose why he was employed as a security guard. His position as far as a legal duty is concerned may be equated to that of a police officer. It was the appellant's duty to report the theft at the earliest possible moment.

This is in line with decision of this Court in *S v De Villiers* 1992 NR 363 (HC) at 369 where O'Linn J said the following:

'It seems then that even in cases other than treason, a legal duty can be inferred from various circumstances and not only where a statute expressly places a duty on an official or quasi-official and failure to perform such duty can then be regarded as criminal.'

[32] With regard to the issue whether the appellant had feared for his life and that of his family members, both the appellant and accused 1 were armed with firearms. There is no evidence that accused 1 threatened to kill or harm the appellant or his family. In fact accused 1 did not threaten the appellant at all. The allegation that accused 1 told the appellant to be strong and not to tell anybody was not a threat but

a sort of encouragement not to report the commission of the crime. Therefore the appellant's fears were unfounded and unreasonable in the circumstances.

[33] The appellant had ample time to report the matter to authorities as soon as possible. As rightly argued by counsel for the respondent, these opportunities presented themselves when the appellant and accused 1 were on the way to Katima Mulilo and back, as well as in Windhoek. The appellant denied twice any knowledge of the bag containing the money when the employees at the head office tried to locate the money. The appellant had the opportunity to expose accused 1 when they dropped off the money in Grootfontein. He went inside the bank to deliver the money bag whilst accused 1 was in the vehicle. He also had the opportunity to report accused 1 at First National Bank Katima Mulilo when the manager was searching the vehicle. By then the appellant was aware that the money was hidden behind the seat. The appellant went with the manager into the bank to deliver the money after the bank manager had searched the armoured vehicle. Furthermore, the appellant also had the opportunity to report the theft at the time when he was dropped off at his house and when he went back to work, before the polygraph test was conducted. As the appellant pointed out that he did not do well in the polygraph test, it appears to me that he was only prompted to report the matter when he realised that he did not fare well during the test.

[34] Counsel for the appellant argued that the magistrate did not expressly make credibility findings in respect of the versions of accused 1 and 2nd state witness Ms Sidakwa. However, as observed above, the magistrate did not rely on the versions of accused 1 and the appellant that were in dispute but she relied on matters that were of common course. Therefore, the fact that she did not expressly make a credibility finding did not vitiate the proceedings and it had no bearing on her findings.

[35] Concerning the criticism that the magistrate did not make any pronouncement that the 'State had proved its case beyond a reasonable doubt' in respect of the appellant, the court may not necessarily expressly mention the specific words. The fact that they were not specifically mentioned does not mean that the court was not

satisfied as to the discharge of the burden of proof required. This court should pay attention to substance rather than to form. The mere pronouncement that the State has proved its case beyond reasonable doubt does not mean that the State has in fact done so. Whether it has satisfied the burden has to be borne out by the evidence presented. It is clear that the court a quo was satisfied that the guilt of the appellant was proved beyond reasonable doubt. Hence the conviction of the appellant.

[36] By failing to report the theft as soon as possible in the circumstances where he was under a legal obligation to do so, the appellant associated himself with the commission of the offence and he in fact acted in common purpose with his co-accused persons.

See *S v De Villiers (supra)* where O'Linn J said the following at 369:

> 'In view of the fact that theft is a continuous offence, silence when there is a duty to speak, may also point to complicity in the theft, even if another person was the main perpetrator.'

[37] For the foregoing reasons, I am satisfied that the appellant was correctly convicted and it is not necessary for this court to interfere with the conviction.

[38] With regard to sentence, the appellant stole from his employer who had the responsibility to safely transport money to various banks. The appellant was entrusted with the safekeeping of the money but he instead breached such trust. Theft from an employer is viewed in a serious light by our courts and it deserves a deterrent sentence, not only to the offender but would-be offenders as well. Sentence falls squarely within the discretion of the trial court and this court can only interfere with that discretion if the court *a quo* fails to exercise its discretion judiciously or properly.

[39] The court *a quo* carefully considered the personal circumstances of the appellant, the crime committed and arrived at the conclusion that the imposition of a fine was not appropriate under the circumstances. While it is true that a court should

endeavour to strike a balance between the objects of sentencing, it often happens that one object may be emphasised at the expense of the other. It is my considered opinion that the sentence imposed is appropriate in the circumstances as the appellant was in a position of trust and he has abused that trust. The magistrate did exercise her discretion judiciously. As such it is not necessary for this court to interfere with the sentence.

[40] In the result the following order is made:

1. The appeal against conviction and sentence is dismissed.

2. The appellant's bail is cancelled with immediate effect and he is to be taken into custody for committal in accordance with the law.

N N Shivute

Judge

J C Liebenberg

Judge

APPEARANCES

RESPONDENT	:	Mr Marondedze Office of the Prosecutor-General
APPELLANT	:	Mr Wessels Stern & Barnard