

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE NO.: CA 71/2016

In the matter between:

[ES]

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *ES v The State* (CA 71/2016) [2017] NAHCMD 174 (23 June 2017)

CORAM: NDAUENDAPO, J and SHIVUTE, J

Heard: 24 March 2017

Delivered: 23 June 2017

Flynote: Criminal Procedure – Appeal – Conviction on a charge of theft of N\$ 637 342.00 from employer – Court to apply caution when dealing with evidence of a single witness – However such caution should not trump common sense – State single witness’ evidence was reliable and more probable in the circumstances – Defence failed to put its

version to the State witness – Defence evidence did not add up – The learned magistrate did not misdirect himself nor did he err in law or on the facts.

Criminal Procedure – Appeal – Sentence of 10 years of which 2 years were conditionally suspended for 5 years – Trial court duly considered the personal circumstances of the appellant – Personal circumstances weighed against the seriousness of the offence and the interest of society – No misdirection on the part of the trial court.

Summary: The appellant was convicted of theft of N\$ 637 342.00 which belonged to his employer, Purity Manganese Mining Company (hereafter, the mine) and he was subsequently sentenced to ten years of which two years were conditionally suspended for five years. Mr. Erats, the Chief Executive Officer of the mine, instructed the appellant to renewing the licenses of trucks belonging to the mine. Mr. Erats and the appellant cashed a cheque of N\$ 637 342.00 in this regard. This amount has now disappeared and Mr. Erats had to reimburse the mine from his salary. During trial both appellant and Mr. Erats, who was the single witness of the State, presented the court with conflicting versions. The court however found in favour of the respondent. The appellant now appeals against the conviction and sentence.

Held; in the circumstances of the case and the evidence before the trial court, this court cannot fault the trial court for convicting the appellant.

Held; the sentence imposed, is not unreasonable nor it is shocking.

Held; the HIV status of a convicted criminal cannot on its own be reason for such convict not getting a custodial sentence.

ORDER

In the result:

1. The appeal against the conviction is dismissed.
2. The appeal against the sentence is dismissed.

APPEAL JUDGMENT

NDAUENDAPO, J (SHIVUTE, J concurring):

Introduction

[1] This is an appeal against the conviction and sentence of the appellant. On 29 April 2016, the appellant was convicted of theft of N\$ 637 342.00 from his employer, Purity Manganese Mining Company (hereafter the mine). On 10 June 2016, he was sentenced to ten years imprisonment of which two years were conditionally suspended for five years. Disgruntled by his conviction and sentence, the appellant now appeals against both the conviction and the sentence.

Issues to be decided

[2] This court, as the court of appeal has to determine, whether the appellant was correctly convicted and/ or sentenced in the *court a quo*.

Brief factual background

[3] It is common cause that in 2010, it was discovered that licenses of some of the trucks at the mine had to be renewed. Mr. Erats, the Chief Executive Officer of the mine instructed the appellant who was then a driver at the mine, to spearhead the renewal of these licenses. The appellant informed Mr. Erats that he was not cued up with the renewal of truck licenses and thus suggested getting consultants to facilitate the process. Mr. Erats agreed to this and directed that the appellant deal with the consultants and be in charge of the whole process. These trucks were then divided into two batches. The licenses for the first batch of trucks were then renewed. Mr. Erats and the appellant cashed a cheque of N\$ 637 342.00 for the renewal of the licenses in respect of the second batch of trucks. This amount in cash was then given to the appellant.

[4] Everything that happened thereafter appears to be in dispute. Both the appellant and Mr. Erats, who was the State's single witness, had conflicting versions about what exactly happened to that money. In particular, whereas Mr. Erats maintained that his only instruction to the appellant was to use the N\$ 673 342.00 for the renewal of the licenses of the mine's trucks. On the other hand, the appellant persisted that he used the money in accordance with the instructions by Mr. Erats. According to the appellant, he was instructed to use the money as follows (the court breaks down these amounts according to the appellant's testimony in a tabulated form for reasons purely attributed to clarity):

Amount	Usage by the appellant (Apparently as per the instructions of Mr. Erats)
N\$ 100 000.00	Paid to consultants previous work (Jerome) [page 134 of the record]
N\$ 48 000.00	Paid to the consultants in respect of the 'roadworthiness' certificates [p.138]
N\$ 30 000.00	Taken by the appellant to Mr. Erats and a friend of his who were at Kalahari sands hotel [p.141]
N\$ 20 000.00	Paid to Mr. Jacque Platt on the instructions of Mr. Erats [p.141]
N\$ 20 000.00	Erats gave to the appellant for his sister in-law's funeral [p. 142]
N\$ 13 000.00	Paid to Camel Car Hire
N\$ 15 000.00	Paid Rhino Park Private Hospital [p.142]
N\$ 18 000.00	Paid to Okongwari Rehabilitation Centre [p. 144]
N\$ 85 000.00	Paid to Natis for the license discs[p. 140]
N\$ 349 000.00	Total amount accounted for by the appellant

[5] If one were to accept the appellant's version and breakdown of the amount, one cannot help but ask as did the counsel for the respondent, what happened to the rest of the N\$ 288 342.00 which remained unaccounted for?

Court a quo's judgment

[6] In his judgment the learned magistrate was satisfied, that the evidence of the appellant confirmed the evidence of Mr. Erats, insofar as it related to the fact that the appellant received N\$ 637 342.00 from Mr. Erats for the renewal of truck licenses. The magistrate also took into account the breakdown of the amounts as provided for by the appellant in his testimony and as set out in the table on para [3] above. The court further had regard to the fact that the case of the State as well as the defence are based on the evidence of single witnesses insofar as the use of the N\$ 637 342.00 was concerned. The court reasoned that, though it is tasked in law to exercise caution when it comes to the evidence of a single witness, common sense must prevail. Further, that the evidence of a single witness need not be perfect in every respect, but the court must be satisfied that the truth was told. Furthermore, the court recognized that there were disputes of fact between the evidence of the State and of the defence and thus not only considered the merits and demerits of each party's version, but considered the probabilities of each parties' version of what transpired.

[7] Regarding the N\$ 100 000.00 which the appellant testified was paid to the consultants, Mr. Erats under cross-examination indicated that he did not see a receipt to that effect, although he had knowledge of an invoice. The learned magistrate was alive to the fact that despite this evidence by the appellant and the blatant denial by Mr. Erats, the defence failed to produce proof of payment.

[8] The trial court also was also alive to the contradictions between the version put to Mr. Erats by defence counsel and what was actually testified by the defence witness. Counsel for the defence put it to Mr. Erats under cross examination that the appellant's sister (Ms. Beukes) contacted him (Mr. Erats) and he gave permission that N\$ 15 000.00 be used to pay for the appellant's hospital expenses. Whereas, Ms. Beukes in fact testified that only after the appellant had informed her that he had N\$ 15 000.00 at home

to pay for his hospital bill, did she approach Mr. Erats to find out if he knew of this money that the appellant had.

[9] The trial court found it highly improbable, that Mr. Erats would give the appellant N\$ 637 342.00 to renew truck licenses and then give the appellant permission to use this same money for his personal expenses. The court found it to be highly improbable that Mr. Erats would have neglected the renewal of the licenses of the trucks of the mine only to himself reimburse the mine the N\$ 637 342.00. The court also found it highly improbable that Mr. Erats would accuse the appellant of theft of N\$ 48 000.00 and N\$ 85 000.00 which were apparently used for roadworthiness certificates and license renewals, when that was the very reason that this N\$ 637 342.00 was handed to the appellant.

[10] The court also reasoned that it had to treat the evidence of the State's single witness with caution. It further reasoned that such caution should not trump common sense. The court also accepted that the evidence of a single witness, need not be perfect in every single respect, but the court must be satisfied that it is the truth.

[11] It was for the above reasons and after it weighed the probability of each version, that the court was convinced that the State had proven its case beyond a reasonable doubt and found the accused guilty of theft of N\$ 637 342.00 and subsequently sentenced him to ten years of which two were conditionally suspended.

Ad conviction: Grounds of appeal analyzed

The summarized grounds of appeal are as follows: The learned magistrate erred in law and or fact or misdirected himself when:

a) *Ground 1: He completely disregarded the version of the appellant and his witness whose testimony corroborated that of the appellant*

[12] It was argued on behalf of the appellant that the appellant testified during his examination in chief, that Mr. Erats gave him permission to use N\$ 15 000.00 to pay for his hospital bill. Furthermore, that even though Mr. Erats denied having given such permission, Ms. Beukes testified that the appellant informed her that he would pay the hospital bill as he had the money at home. It was further argued after the appellant told

her this, she made an appointment with Mr. Erats to find out from him if he knew of this money which the appellant had. Mr. Erats apparently then informed her that he was aware of the money and that the appellant deserved it. Furthermore, that 'The complainant, Mr. Eretz further informed the (sic) appellant that what happens in his company has nothing to do with her.' It was therefore submitted that, Mr. Erats was aware of the fact that the appellant used the N\$ 15 000.00 to pay for his hospital bill, the element of unlawfulness is negated thereby.

[13] It was argued on behalf of the respondent that only if the defence version was put to Mr. Erats could this ground of appeal stand. The only version which was put to Mr. Erats by the defence counsel was that he gave the appellant permission to use some of the money entrusted to him to, contribute towards funeral expenses of a relative, to pay his hospital bill of N\$ 15 000.00 and to pay consultants N\$ 100 000.00. All these versions were vehemently denied by Mr. Erats. Mr. Erats also denied the assertion that the appellant used the N\$ 637 342.00 in accordance with his instructions. The rest of the version of the appellant as outlined in para [4] above, was never put to Mr. Erats. In light of the above, it was thus submitted that, the magistrate cannot be faulted for rejecting the version of the appellant. Furthermore, that he cannot be said to have disregarded the versions of the appellant and Ms. Beukes, as this was discussed at length in the learned magistrate's judgment at pages 215-217.

[14] 'The court rightly referred to the rule and practice to put the defence case to State witnesses "to ensure that trials are conducted fairly; that witnesses have the opportunity to answer challenges to their evidence, and parties to the suit know that it may be necessary to call corroborating or other evidence relevant to the challenge that has been raised." In this regard the Learned Judge a quo referred to *S v Boesak*, 2001(1) SA 912 (CC), where it was said (at par. [27]): "a criminal trial is not a game of catch-as-catch-can". . . . the appellant's failure to specifically challenge it in cross examination or at any other stage of the trial before final argument, may be construed as an attempt to set up a forensic ambush for the Prosecution'¹

[15] The defence failed to put its version to Mr. Erats insofar as it relates to the use of the N\$ 637 342.00 as outlined by the appellant during the defence case, its failure to

¹ *Auala v S* (SA 42/2008) [2010] NASC 3 (27 April 2010) at para. 14.

adduce evidence that the N\$ 100 000.00 was in fact paid to the consultants and in light of the contradicting testimonies in respect of the N\$ 15 000.00, the trial court cannot be faulted for finding the version of the appellant to be highly unlikely. It is true that the State had to establish the guilt of the appellant beyond a reasonable doubt and the appellant need not be expected to assist the State in discharging its burden. However, the failure by the counsel for the defence to give Mr. Erats an opportunity to respond to the allegations of; a) his supposed discussion with Ms. Beukes concerning the N\$ 15 000.00 and b) his supposed instructions to the appellant, pertaining to the use of the N\$ 637 342.00 with the specificity with which it was presented to court during the defence case was fatal. This was a deliberate attempt by the defence, now the appellant, to set up a forensic ambush for the State, now the respondent.

b) He relied on the testimony of the State's single witness and failed to approach the State's single witness' evidence with caution;

[16] It was argued on behalf of the appellant that Mr. Erats was a single witness and thus his testimony should have been treated with caution. He testified that he gave the appellant N\$ 637 342.00 of which N\$ 100 000.00 was paid to the consultants. Furthermore, that the State could have called four other witnesses, whose statements formed part of the Police docket. It was thus submitted that the court should therefore have drawn an adverse inference from this failure by the State.

[17] It was argued on behalf of the respondent that though Mr. Erats was not certain whether the consultants were paid as there was no receipt to prove such payment. However, he knew that there was an invoice to show what they charged. However, even if it was accepted that the appellant paid the consultants N\$ 100 000.00, Mr. Erats' testimony cannot be said to be unsatisfactory. In that, N\$ 637 342.00 was given by Mr. Erats to the appellant for the renewal of truck licenses. However, none of the second batch of the trucks had received these licenses. Mr. Erats also testified that he had to go back to Natis and pay again to obtain these licenses. This testimony by Mr. Erats was not challenged by the defence. It was further argued, that the version of Ms. Beukes, that she went to Mr. Erats to enquire from him regarding the N\$ 15 000.00 which the appellant had, was never put to Mr. Erats. Therefore, to now try to use her testimony as proof that

Mr. Erats was aware of how the appellant intended on using the N\$ 15 000.00 would be unjustified. It was argued on behalf of the respondent that, as *dominus litis*, the State had unfettered discretion how best it would prosecute a case. The question the State suggested this court should ask itself is, whether at the close of the State's case, corroboration was requisite? If the defence was of the view that those witnesses if called by the State would have testified in favour of the appellant, why then did the defence not call those witnesses as they did with Ms. Beukes?

[18] Section 208 of the Criminal Procedure Act,² provides that 'an accused may be convicted of any offence on the single evidence of any competent witness'. In *S v Noble*³ the court concluded that 'section 208 of the Criminal Procedure Act 51 of 1977, provides that a Court may convict an accused on the evidence of a single witness. However, when evaluating such evidence the Court is to exercise caution. Such witness should be credible and the evidence should be of such a nature that it constitutes proof of the guilt of the accused beyond reasonable doubt'.

[19] In this case, when counsel for the appellant put it to Mr. Erats in the trial court that the appellant paid the consultants N\$ 100 000.00, Mr Erats' response was that there was an invoice from the consultants, but that there was no receipt to prove such payment. The version of Ms. Beukes that she went to Mr. Erats to enquire from him regarding the money that the appellant had was never put to Mr. Erats. Therefore, to now try to use her testimony as proof that Mr. Erats was aware of how the appellant intended using the N\$ 15 000.00, would be unjustified. It is thus submitted that, the purpose for which the appellant was given the N\$ 637 342.00 was for the renewal of licenses of the trucks of the mine. However, upon inspection by a Natis officer, none of the trucks from the second batch had licenses. This evidence by Mr. Erats was not challenged. In light of the above, it was submitted that Mr. Erats' testimony cannot be said to be unsatisfactory. The court was cognizant of the fact that caution had to be exercised when dealing with the evidence of a single witness, however, common sense should prevail.

² Criminal Procedure Act, 51 of 1977.

³ *S v Noble* 2002 NR 67 (HC).

[20] The magistrate clearly was cognizant of the fact that it had to treat the evidence of a single witness with caution. However, he was satisfied that in light of the evidence before it, this was an appropriate case where the cautionary rule cannot and should not be used as guise to trump common sense.⁴ The court cannot be faulted in the approach it took considering the facts of this case. In the circumstances, it cannot be said the evidence of Mr. Erats was poor and unreliable. He was consistent in his version throughout and answered all the questions put to him.

[21] In addition, this is a new ground of appeal, which was not contained in the notice of appeal and it should not even be considered.⁵ The argument that counsel for the State could have called more witnesses and the trial should draw an adverse inference from that failure, will not be regarded by this court. This should have been included in the appellant's notice of appeal, but he failed to do so and now wishes to introduce same through his heads of argument.

Ground 3: Alternatively, that he failed to have regard to the fact that the testimony of the State's single witness was poor and unreliable, that no reasonable court would have relied on it to convict;

[22] It was argued on behalf of the appellant, that Mr. Erats appeared arrogant, annoyed and sarcastic in the trial court and this should have been taken into account when the trial court was making its determination.

[23] It was submitted on behalf of the respondent, that the fact that the trial court did not specifically comment on the demeanor of the witness, is not to say that the magistrate was not greatly influenced by the intangible atmosphere of the case that he himself had tried.

[24] The trial court is in the best position to make a finding on the demeanor of the witness and the court of appeal must attach weight, though not excessive, to the trial court's finding.⁶ It is clear from the court's judgment that although it did not deal with the

⁴ *Mwanyekele v State* (CA 15/2013) [2013] NAHCMD 301 (25 October 2013) and *S v HN* 2010 (2) NR 429 at para 56.

⁵ *Gregory v State* (CA 142/2007) [2013] NAHCMD 46 (25 February 2013).

⁶ P J Schwikkard and S E Van Der Merwe *Principles of Evidence* 3 ed (2010) at 536.

demeanor of the State witness specifically, it was satisfied that he told the truth. After a reading of the trial court's judgment and the evidence by the State witness, this court cannot agree with the submission by counsel for the appellant, that the State's single witness' evidence was poor and unreliable. What little of the defence version put to him, Mr. Erats answered truthfully and his evidence remained consistent throughout.

Ground 4: He failed to appreciate that the appellant's version could reasonably possibly be true and failed to assess the evidence in its totality

[25] It was submitted on behalf of the appellant that the State failed to discharge its burden beyond a reasonable doubt. The State merely called a witness who made allegations that the appellant stole money belonging to the mine. Furthermore, that the version of the appellant is reasonably possibly true as the State has not proven anything to the contrary. It was submitted that the defence proved through its witness that Mr. Erats was aware of the fact that the N\$ 15 000.00 was going to be used for the appellant's hospital bill. Furthermore, both the appellant and Mr. Erast testified that they went to the bank to obtain cash to obtain truck licenses. Furthermore, Mr. Erats testified that the consultant charged them N\$ 100 000.00. It was argued on behalf of the appellant, that it was clear that they were duly paid, as they would have approached the mine had payment not been effected.

[26] It was submitted on behalf of the respondent that the appellant never challenged the allegation by Mr. Erast that some or all of the trucks in the second batch had not received licenses. It was also argued that the discussion that Ms. Beukes had with Mr. Erats was never put to Mr. Erats to answer to. Furthermore, the contradictory versions of Ms. Beukes and the appellant as to when and why Ms. Beukes approached Mr. Erats, regarding the N\$ 15 000.00, cannot be ignored. It was never put to Mr. Erats nor was it ever his testimony that the cheque for N\$ 637 342.00 was cashed to pay the consultants N\$ 100 000.00. He denied that the consultants were paid N\$ 100 000.00 as there was no receipt to prove same. Why is it, that the appellant having N\$ 15 000.00 was shocking to his sister (Ms. Beukes). Counsel for the appellant also argued, that the appellant's break down of how he used the N\$ 637 342.00 as per Mr. Erats' instructions as seen in para [4] above, does not explain and leaves unaccounted for a total of N\$ 288 342.00.

[27] In the circumstances, this court agrees with the submissions by counsel for the respondent. This court is convinced that considering all the evidence before the trial court, there is no doubt that the appellant received N\$ 637 342.00 from Mr. Erats. This court is satisfied, that the purpose for the appellant receiving this money was to renew licenses of the second batch of the trucks belonging to the mine. It is clear from Mr. Erats' testimony and that of the appellant that the appellant dealt with the consultants who were hired to facilitate the renewing of these licenses. It is also clear from Mr. Erats' testimony and that of the appellant that the appellant not only communicated with the consultants, but was entrusted with the sum of money to effect payments in respect of the renewing of these licenses. It is further clear from the unchallenged testimony of Mr. Erats that upon inspection by a Natis officer, it was discovered that the trucks in the second batch did not have licenses and Mr. Erats had to go back to Natis to pay again to acquire licenses for these trucks. Interestingly enough, it was not put to Mr. Erats that this N\$ 637 342.00 was used according to his instructions as tabulated in para [4]above.

[28] Regarding the N\$ 100 000.00, the appellant argued that that was the amount charged by the consultants and even adduced an invoice to this effect. I must be quick to point out here that, the existence of an invoice does not necessarily prove payment. Even if it were accepted that this payment was in fact made, considering that the trucks never received the licenses, what happened to the rest of the money?

[29] In light of the above, this court is not satisfied that N\$ 637 342.00 which the appellant was given, could just disappear without his knowledge. There is also no evidence justifying why, the licenses which were apparently paid for and taken to the mine were not on the trucks. There was no evidence countering the allegation by Mr. Erats that he had to go back to Natis and pay again to get licenses for the trucks. There is no explanation why, the defence counsel put it to Mr. Erats that Ms. Beukes went to Mr. Erats to get assistance from him for the payment of the appellant's hospital bill of N\$ 15 000.00, when Ms. Beukes in fact testified, that she went to Erats not to get assistance, but to enquire about the N\$ 15 000.00 which the appellant had. If indeed, the consultants were paid the N\$ 100 000.00 for services previously rendered, why was there no receipt to that effect? Finally, how does one reconcile the fact that the money is nowhere to be found,

yet there are no licenses to account for its disappearance? Furthermore, why is it, that the appellant's account of how he used the money only explained a portion of that amount, where is the rest of the amount?

[30] This court is not satisfied that the trial court can be faulted for finding the accused guilty of theft of N\$ 637 342.00. The State proved its case beyond a reasonable doubt. Its single witness was clear in his testimony and his evidence was satisfactory. Furthermore, although generally a court is expected to apply caution when dealing with the evidence of a single witness, this court is satisfied that in the totality of the evidence and the probabilities in this case, the trial court was correct to conclude that the cautionary rule cannot be used to trump common sense.

Ground 5: Complainant's alleged criminal intent

[31] This is yet again a new ground of appeal, that the appellant wished to introduce through his heads of argument and this court will not entertain this ground.

Ad sentence

Submissions on behalf of the appellant

[32] It was submitted on behalf of the appellant that the sentence imposed was shockingly inappropriate and excessive. Furthermore, that no reasonable court would have imposed such a sentence in the given circumstances of this case. Furthermore, that the magistrate failed to take into account the appellant's personal circumstances and thereby failed to balance the personal circumstances of the accused, the seriousness of the offence and the interest of society.

Submissions on behalf of the respondent

[33] It was argued on behalf of the respondent that there is no merit in the appeal against the sentence. Further, that in every appeal against sentence, the court of appeal should be guided by the principal that sentencing is pre-eminently a matter for the discretion of the trial court. The court of appeal may thus only interfere with it if the discretion was not exercised judicially. It was submitted that the trial court weighed the personal circumstances of the appellant against the seriousness of the offence.

Reasoning of the trial court

[34] In sentencing, the trial court alluded to the fact that it had a duty to balance the personal circumstances of the appellant, the seriousness of the offence committed and the interest of society. It reasoned that the requirement to balance these three factors does not mean that equal weight should be attached to each, but that the weight attached to each will depend on the circumstances of each case. The court also had regard to the aims of punishment, which are, retribution, prevention, reformation and deterrence. The court was also alive to the mitigating and aggravating circumstances in the case.

[35] The court reasoned that the appellant was convicted of a serious offence. He stole N\$ 637 342.00 from his employer and thereby broke the trust that his employer had in him. That where crimes are prevalent and serious, the deterrent aim of punishment receives more emphasis. The court also had regard to the fact that the appellant was 42 years old and married with two minor children. That he was gainfully employed and was earning N\$ 4500 per month at the time. The court also took into account the fact that his wife was also gainfully employed earning N\$ 2100 per month and that the appellant was a first offender. The court further had regard to the aggravating and mitigating factors in the circumstances of the case. The court considered breach of trust, manner of planning and craftiness of the appellant and the fact that he showed no remorse during trial and persistently tried to pin everything on Mr. Erats. The court also took into account that the appellant was HIV positive, however, the court reasoned that there is no general rule that 'ill health automatically relieves a criminal from being in prison'. It was thus satisfied that a fine would not be an appropriate sentence in the circumstances of this case.

This court's analysis

[36] 'It is a settled rule of practice that punishment falls within the discretion of the Court of trial. As long as that discretion is judicially, properly or reasonably exercised, an appellate Court ought not to interfere with the sentence imposed. The discretion may be said not to

have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection'.⁷

[37] It is tried law that the court of appeal will have regard to the triad as set out and discussed in *S v Tjiho*.⁸ The court of appeal will only interfere with the sentence of the trial court where '(i) the trial court misdirected itself on the fact or on the law; (ii) an irregularity which was material occurred during the sentencing proceedings; (iii) the trial court failed to take into account material facts or overemphasized the importance of other facts; (iv) 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'.⁹

[38] This court is not satisfied that the trial court failed to exercise its discretion judicially. The court was mindful of the appellant's age, that he is a first offender, that he is a father of two minor children and is married. The court also had regard to the fact that the appellant was gainfully employed. It is therefore incorrect for the appellant to now argue, that his personal circumstances were not taken into account. It is clear that the court also did not simply offer lip service when it considered these personal circumstances, but it considered the effect of the appellant's imprisonment on his family. The court found theft from employers to be a serious offence and reasoned that deterrence should play a significant role in its sentence. Needless to say, the possibility of getting a custodial sentence and this possibly having negative effects on your family, is an inevitable reality of being convicted of an offence.

[39] The court also considered, whether the appellant's illness, should have relieved him of going to prison for that reason alone and answered this in the negative. To offer lenient sentences to persons infected with HIV for that reason alone, would amount to discrimination, on the ground of status against those convicted of having committed serious offences and who are not infected with the virus. Such an approach would be detrimental not only to the administration of justice, but to the interest of society. It would certainly create incentive for those so infected to commit heinous crimes only to raise the

⁷ *S v Ndikwetepo & Others* 1993 NR 319 (SC).

⁸ *S v Tjiho* 1991 NR 361 (HC).

⁹ *S v Tjiho* 1991 NR 361 (HC) at 366 A-B.

white flag of their HIV status. There was no evidence that due to the virus, the appellant was so sick that having him go to goal would be unjustified or unreasonable. It goes without saying that today people with HIV live reasonably healthy and long lives, provided they take the required medication and these can be given to him in prison.

[40] After a careful analysis of the personal circumstances of the appellant, the seriousness of the offence and the interest of society, the court was satisfied this was such a case where the sentence should 'mark the gravity of the offence, to emphasise the disapproval of the society and to serve as a warning to others'.

Conclusion

[41] This court is therefore satisfied that in the circumstances of this case, the trial court exercised its discretion judicially.

[42] In the result, the appeal against the conviction and sentence is dismissed.

GN NDAUENDAPO

JUDGE

NN SHIVUTE

JUDGE

APPEARANCES

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