SA 2/91

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ALCINO NOVAIS DA COSTA	**APPELLANT**
and	
THE STATE	**RESPONDENT**

CORAM: BERKER, C.J.; DUMBUTSHENA, A.J.A. et MAHOMED, A.J.A.

Delivered on: 1991.04.05

APPEAL JUDGMENT

DUMBUTSHENA, A.J.A.: The appellant was convicted by Strydom J., as he then was, of contravening section 2(1)(a) of A.G. Proclamation 42 of 1980, the controlled Game Products Proclamation. He was sentenced to five years imprisonment. Eighteen months of that sentence were suspended on the usual conditions. He now appeals to this Court against sentence only.

Briefly the facts of this case are as follows: The appellant resides at Okahandja where he carries on the business of an electrical contractor. He met one Muller in the course of his business when he was installing electricty in his house. They came to know each other for about 10 to 11 years. It was during this period that appellant saw some ivory in Muller's house, a fact that might have encouraged the appellant to offer an illegal ivory deal to Muller.

In 1989 appellant offered rhinoceros horns to Muller. Muller however did not have the money and declined the offer. Muller, however, used to deal illegally in ivory.

He was arrested and had two previous convictions. The police came to some understanding with him. They wanted him to assist them in apprehending people dealing in prohibited products such as ivory. Muller agreed.

Muller got in touch with the appellant. He told him he was looking for ivory. They met several times and each time they met Muller reported the meeting to the police.

The appellant asked Muller how much he paid for ivory. He was told the price was R195,00 per kilogramme. In the meantime the appellant was in touch with Gomes who had ivory. On 14 September 1989 the appellant informed Muller that the ivory would be in Okahandja during the week-end of 15 September. Muller and the appellant agreed on a meeting place. They agreed to meet in the morning at 3 o'clock on Okahandja/Gross Barmen road at the turn off to the airport. Muller arrived there first. The appellant arrived in his own car and changed into Muller's car. They drove to Muller's vacant plot where they were to meet the vehicle carrying the ivory. Shortly afterwards the police arrived and arrested the appellant, Gomes and three other men. They were admitted to bail. All of them, except the appellant, jumped bail.

Mr Witz, for the appellant, made a number of submissions in support of appellant's appeal. He attacked the whole of the judgment of the Court a quo. It is not necessary to deal with all the points raised by Mr Witz. A consideration of few of his salient submissions and contentions will, for the purposes of this appeal, suffice.

Mr Witz contended that the learned Judge a quo over-emphasized the seriousness of the offence and treated the retributive aspect of the sentence as the major component in assessing an appropriate sentence. He argued that in doing so the learned Judge lost sight of the actual role played by the appellant in the commission of the offence and thus failed to place sufficient weight on appellant's personal circumstances. Mr Witz urged the Court to come to the conclusion that in sentencing the appellant the learned Judge did not exercise his discretion judicially.

An examination of the learned Judge's judgment reveals that the Court considered every conceivable point raised by counsel in argument. It is for these reasons that an appellate court should examine the judgment appealed against with care.

It seems to me that the learned Judge approached the task of assessing sentence with scrupulous care. He considered all the salient factors revealed in evidence and in argument he said at the beginning of his judgment:

"At the end of the day the Court must decide what, in all the circumstances, would be an appropriate sentence. Where the offence is serious and the accused before the Court is a person dear to his community and that community is requesting the Court in so many words not to send the accused to prison, the task if the imposer of a sentence becomes even more unenviable than is usually the case.

The accused is a man of 48 years, he is married and has a little daughter of 9 years. Although the accused is of Portuguese descent and although the community at Okahandja is predominantly Afrikaans and German - speaking, he commanded respect and acceptance because of his personality and the role he has played in that community during the past two decades or more. Thus it appears from the evidence which was given before me by various members of that community".
(Unofficial English translation).

A careful reading of the judgment shows that the learned Judge considered in depth appellant's personal circumstances. He said in his judgment:

"To come to the question what would be an appropriate sentence in the present case. I attach particular importance to the personal circumstances of the accused and to what was

> testified on his behalf by members of the community of which he is part. I myself have no doubt that the accused is of good character and will in all probability not stand before this Court again. I am also fully aware of the influence which imprisonment will have in regard to precisely this accused, his family and his business. However, where the imposition of sentence is concerned one does not have regard only to the interests of the accused. Where serious offences, of which this is one, are concerned, principles such as prevention and deterrence come strongly to the fore. Even the principle of retribution in the sense that the offender is punished for his crime is present as a factor".

What emerges from the learned Judge's judgment is his sympathetic appreciation of the circumstances, the appellant, a man of good character, found himself in. In doing so the learned Judge did not lose sight of the fact that the appellant had committed a serious offence. He had arranged a deal between Muller and Gomes involving 972 tusks of ivory with a mass of 6 827,21 kilogrammes. In a case of this nature it would be improper to ignore the interest of the community in assessing sentence. However, the learned Judge put two principles of sentencing, that is, prevention and deterrence "strongly to the fore". He did not, contrary to what Mr Witz contended, over-emphasize the retributive aspect. He down played it.

He said in his judgment: "Even the principle of retribution in the sense that the offender is punished for his crime is present as a factor". In this regard the learned Judge was in good company. In S v Khumalo & Others, 1984 (3) SA 327 AD at 330 D - I, Nicholas J.A. had this to say:

> "In the assessment of an appropriate sentence, regard must be had inter alia to the main purposes of punishment mentioned by Davis AJA in R v Swanepoel, 1945 AD 444 at 455, namely deterrent, preventive, reformative and retributive (see S v Whitehead, 1970 (4) SA 424 (A) at 436 E-F; S v Rabie, 1975 (4) SA 855 (A) at 862).
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> Deterrence has been described as the "essential", "all important", "paramount" and "universally admitted" object of punishment. See R v Swanepoel, (supra at 455). The other objects are accessory. The aspect of retribution is considered in modern times to be of lesser importance - see R v Karg, 1961 (1) SA 231 (A) per Schreiner JA at 236A-B:
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> 'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction".

In my view the learned Judge did not misdirect himself in any of the ways referred to by Mr Witz. He took into account all factors favourable to the appellant and balanced them against the enormity of the crime and the interests of the community. He said he would have failed in his duty were he not to send the appellant to prison. Considering the seriousness of the offence a sentence of imprisonment would seem to be the more appropriate sentence than a maximum sentence of a fine of R6 000. The appellant is a well to do business man. A fine of R6 000 would not leave a dent on the R20 000 which the appellant said he had in his savings. It must be remembered that both the Legislature and the Courts view the offence committed by the appellant in a serious light. Although the Courts have tended to place more weight on the personal circumstances of the accused they have, however, in certain cases placed less weight on personal circumstances when society at large is the victim of the crime; the offence is prevalent; the offence is premeditated and the offence is difficult to detect. And as stated above both the Legislature and the Courts view the offence in a serious light. See S v Christodoulou & Others, 1979(3) SA 523 (AD) at 525.

I agree with Mrs Ströh, for the respondent, that the learned Judge did not disregard the wider implications of the crime committed, the interests of the under community and the personal circumstances of the appellant. The learned Judge was of the view that offences such as the instant one should be dealt with firmly in the national

interest in order to protect the ivory trade, trophy hunting and wild life resouces.

The question to be answered by this Court is: "Is a sentence of imprisonment for serious offences the only appropriate sentence? There are of course other punishments which are as effective as a sentence of imprisonment.

The English note in S v Holder, 1979(2) SA 70 at 71E - F summarises the desirable approach to the imposition of sentences. It reads as follows:

> "The approach that imprisonment ought not to be lightly imposed, especially if the objects of punishment can be met by another form of punishment, eg a fine with or without suspended imprisonment, is a healthy approach. In the application of this approach the under-emphasising of either the particular person (the accused), or the crime or society must, however, not only be guarded against, but also the over-emphasising of one of these three elements. An appropriate sentence, according to the demands of the time, must be strived for, and an appropriate sentence will always be a sentence which is based on a balanced consideration of the three elements. In the application of this approach a Court of appeal is also still bound by what has repeatedly been said in the Appellate

Division, namely that on appeal the sentence will be interfered with only if there was a misdirection or if the sentence is found to be too heavy" or strikingly inappropriate as the sentence of imprisonment seems to be in the instant case. See S v Whitehead & Another, 1971(4) SA 613 (A.D.) at 622H.

Having regard to the personal circumstances of this particular appellant, it is my view that the sentence of imprisonment imposed by the Court a quo was grossly inappropriate and induces a sense of shock. See S v Letsoko and Others, 1964(4) S.A. 768 (A.D.) at 777 G-H; R.

This Court can interfere with the sentence on the ground that it is grossly inappropriate and that it induces a sense of shock for the reasons stated above. The objects of punishment in this particular case can be met by another or other forms of punishment. For instance the imposition of a wholly suspended sentence of imprisonment suspended on the usual grounds and on the further ground that the appellant renders community service imposed in terms of section 297(1)(a)(i) (cc) of the Criminal Procedure Act of 1977 as amended. That sentence must be conjoined with the maximum fine provided for in terms of Proclamation 42 of 1980.

When dealing with an accused with antecedents such as those of the appellant, an order to render community service has a distinct advantage. It keeps an accused person, in the instant case the appellant, out of prison.

It is my view that whenever possible first offenders should be kept out of prison. See S v Gwarada, 1981(2) S 531 (ZAD) at 533.

If the appellant renders community service at Okahandja members of that community to whom he is a dear person will have the satisfaction of seeing him working out his punishment. For a person held so high by members of his community being seen to work out his punishment will induce in him a sense of shame and deep remorse. In such circumstances a person in the position of the appellant will tend to say: "I won't do it again".

If he is sent to prison and serves his full term minus remission he may not be able, when he rejoins society, to resuscitate his business. Community service should enable him to continue conducting the affairs of his business albeit on a reduced scale.

The learned Judge said in his judgment: "I myself have no doubt that the accused is of good character and will in all probability not stand before this Court again". The ten members of his community who testified to his good character were of the same view and pleaded on his behalf that he should not be send to prison. In my view the community as well as the appellant will benefit from an order of community service.

The Court a quo did not consider imposing an order of community service. In my view an accused who prays the

Court in its discretion to impose an order of community service in terms of section 297(1)(a)(i)(cc) of the Criminal Procedure Act should lay the foundation for such service by providing prima facie evidence or information on the availability in that area of organisations or institutions or persons willing and able to supervise and control him or her during the performance of the service. The Court should be given the opportunity to examine and to investigate communities and institutions in Okahandja which will benefit from appellant's experiences and skills in the electrical field. The number of hours of service should, in my opinion, reflect the serious nature of the offence committed by the appellant.

In the result the sentence is set aside. The case is remitted to the High Court for the imposition of a sentence by the trial Judge which is in conformity with this Court's directions.

DUMBUTSHENA, A.J.A.

I agree

BERKER, C.J.

I agree

MAHOMED, A.J.A.