

BASIL DROTSKY v THE STATE

Case No.: CA 195/2004

2005/05/12

Maritz, J. *et* Hinrichsen, AJ.

SENTENCE

Sentence - approach on appeal - trial magistrate better steeped in atmosphere of trial; exposed to emotions and demeanour of witnesses and appellant and best acquainted with local circumstances such as prevalence of crime and legitimate expectations of community - trial magistrate better positioned than Court of Appeal to determine appropriate sentence - will be accorded significant degree of appreciation in exercise of sentencing discretion - circumstances on which Court of Appeal will interfere limited.

Sentence - housebreaking with intent to steal and theft - crime constitutes a particularly insidious form of theft - strike at feeling of safety and security persons are entitled to enjoy in their homes, invades privacy and results in misappropriation of goods often commercially irreplaceable and of great sentimental value - society has a particular interest that it should be discouraged by appropriate judicial response.

CASE NO. CA 195/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BASIL

DROTSKY

APPELLANT

versus

THE

STATE

RESPONDENT

CORAM: MARITZ, J *et* HINRICHSEN, AJ.

Heard on: 2005.05.12

Delivered on: 2005.05.12 (*Extempore*)

APPEAL JUDGMENT

MARITZ, J.: Charged with the crime of housebreaking with the intent to steal and theft, the appellant was convicted on his plea of guilty by the Magistrate for the district of Tsumeb. He subsequently admitted in the course of the section 112 (1) (b) enquiry that he had broken into the house of Linus Morkel on the 19th of November 2003. He did so by forcing open the door to the house and, once inside, stole a hi-fi CD player, a camera, a drill and a sleeping bag with a combined value of N\$9 800.00.

He admitted that he had known at the time that what he had been doing was wrong. Upon enquiry by the court, he explained that he had intended to sell the goods. The motive for this burglary - he therefore admitted - was to enrich himself. As none of the stolen items were recovered (according to what the prosecutor stated from the side bar) the Court was justified to infer that the appellant had sold the goods illicitly acquired by the commission of the crime. Thus, he unlawfully misappropriated that which the complainant had acquired as just reward for his industry and through his effort.

For this crime the appellant was sentenced to: "4 years imprisonment of which one and a half year is suspended for a

period of 5 years on condition that he is not convicted of housebreaking with the intent to steal and theft committed within the period of suspension". Aggrieved by this sentence, the appellant appealed against it. From the letter, which we accept was intended as a notice of appeal, it is apparent that the appellant wishes the sentence of imprisonment to be substituted for a sentence to payment of a fine with an alternative of imprisonment.

In support of this contention he advances a number of factors - such as, that his two children are staying with his mother who is 75 years of age and who is not healthy. He pointed out that after his father's death in the year 2003, his family had not been able to maintain payment of the electricity and water charges levied by the municipality and that both accounts have been falling in arrears. He also reasoned that he would be in a position to afford paying a fine by selling some of his cattle.

I pause here to mention that most of those mitigating factors advanced in the notice of appeal were not placed before the magistrate for consideration. They were therefore not

considered. In the absence of an application to adduce additional evidence upon good cause shown, an appeal of this nature falls to be considered within the four corners of the mitigating and aggravating factors which were placed before the magistrate. It would be wholly inappropriate for this court to overturn the sentence imposed by the magistrate on the basis of facts never placed before him.

In his reasons the magistrate maintains that the sentence is justified. He points out that the crime is a prevalent one and a serious one at that. It is, according to him, so regarded in all other magisterial jurisdictions in this country. He also points out that the value of the goods stolen was substantial and that none of the stolen goods was recovered.

The approach to be adopted on appeal against sentences imposed in lower courts have been stated and restated in different terms, but judicial consensus remains the same throughout: i.e. that steeped in the atmosphere of the trial and exposed to the emotions and demeanour of witnesses and accused alike, the trial magistrate is best positioned to impose an appropriate sentence. The trial magistrate is best

acquainted with local circumstances such as the prevalence of a particular crime and the community's legitimate interest in a fair and judicial response to the commission thereof.

A court sitting as a court on appeal against sentence will therefore accord the trial magistrate a significant degree of appreciation in the exercise of his sentencing discretion. It will not interfere with the sentence imposed on insignificant grounds or merely because it would have imposed a different sentence had it been the court of first instance. It will only do so if it is satisfied that the trial magistrate failed to exercise his or her sentencing discretion judicially or properly.

In support of this approach Ms Herunga, appearing on behalf of respondent, cited the case of *S v Tjiho*, 1991 NR 361 (HC) at 366 - but there are many others such as *S v Gaseb and Others*, 2001 (1) SACR 438 (NmS) at 465B-C; *S v Shikunga and Another*, 2000 (1) SA 616 (NmS) at 631G; *S v Van Wyk*, 1992 (1) SACR 147 (NmS) at 165D and the like.

The crime of housebreaking with intent to steal and theft is - as the magistrate has observed - a prevalent and serious one.

It is regarded by the law and society as a particularly insidious form of theft. It is said that a man's home is his castle. If there is one place where a person should feel safe and secure it is in his home. Housebreaking with intent to steal and theft strike at and destroy the sense of safety and security which the occupants are entitled to enjoy. It constitutes an unlawful invasion of the complainant's privacy and an illegal misappropriation of his or her possessions - sometimes commercially irreplaceable goods of great sentimental value.

For these reasons, society has a particular interest that the commission of this crime should be discouraged by an appropriate judicial response. Perpetrators should know that the norm is imprisonment without the option of a fine unless the circumstances of a particular case justify the imposition of a lesser sentence.

It must be considered as an aggravating factor that you chose to steal notwithstanding the fact that you had relatively good employment with a modest, albeit sufficient, income. We have considered all the mitigating factors mentioned by you in the court *a quo*. We have also considered your arguments today.

But, if we apply the judicial approach to sentence which we have referred to earlier in this judgment, we must conclude that there are no merits in the appeal.

It is indeed so that fines are imposed from time to time for crimes of this nature - as you have reasoned - but that is normally done in cases where the value of the stolen goods is substantially less than that which you have stolen; when the offender is of a much more youthful age than you; or in circumstances where the offence is committed to obtain something to eat by a person in desperate need and without any other form of income. These considerations do not apply to you.

You may be well advised, Mr Drotsky, to reflect on your misdeed whilst serving the remainder of your sentence. The court is aware that the deprivation of a person's liberty substantially diminishes the quality of his life. But you should use this opportunity to contemplate your future, to mould a determination to abstain from crime and to become an honest and contributing member of society once you leave prison. Make a fresh start and through hard work, strive to give your

children more than that which you have had - see to their education and set an example to them.

The Court must also sound a warning to you: if you are to continue on this path of crime, justice will again catch up with you and the consequences will be significantly more severe than those which you have suffered up to now. Learn from this experience and see it as an opportunity to rehabilitate yourself.

For these reasons I propose that the appeal be dismissed.

MARITZ, J.

I concur.

HINRICHSEN, AJ.

ON BEHALF OF APPELLANT

In

person

ON BEHALF OF RESPONDENT

Ms R

Herunga

Instructed by:

Office of the Prosecutor

General