

IN THE HIGH COURT OF NAMIBIA

THE STATE

and

JOHANNES BASSON

Accused No. 1

GERT VAN SCHALKWYK

Accused No. 2

HIGH COURT REF NO. 1771/07

CORAM: HOFF, J. *et* HINRICHSEN A.J.

Delivered on: 2007.12.13

REVIEW JUDGMENT

HINRICHSEN A.J.

[1] In this review matter all four accused were charged with the offence of housebreaking with intent to steal and theft.

[2] The incident on which these charges are based took place at Karasburg at about 2 a.m. on the morning of August 18th, 2007 into the building of Shoprite through its roof followed by an entry into the shop itself.

[3] The stolen items consisted of beef cans in a carton valued at N\$1,040,89, one black safe valued at N\$135,99, keys having no value and cigarettes valued at N\$184,90.

[4] The ages of the accused at the time of trial were as follows:

Accused No. 1 – 38 years

Accused No. 2 – simply described as a minor in terms of the charge sheet;

Accused No. 3 – also a minor. The hand-written charge sheet in regard to accused No. 3 and 4 were not transcribed into type. The hand-writing relating to the age of Accused No. 3 is illegible. However a letter by the Regional School Councillor one M M Smit addressed to the Prosecutor at Karasburg dated 14th September 2007 gives a clear indication of his date of birth of as being 03.02.1990 making him 17 years of age.

[5] Initially Accused No. 4 was joined in the proceedings. Although accused No. 4 was implicated in the evidence that followed it is not clear what happened to him. He may have been tried separately. However this is irrelevant for present purposes.

[6] The trial proceeded against Accused No. 1 and 2. After at the close of the State's case Accused No. 3 was found not guilty and discharged.

[7] The focus in this matter immediately centres around the age of Accused No. 2. On page 21 of the transcribed record Accused No. 2 states that he is 14 years of age and this is confirmed by his guardian one Gert Kaiser aged 56 who is a paraplegic receiving a disability pension. However, in terms of the recommendation again by the Regional School Councillor for the Karas region M M Smit, addressed to the Prosecutor of the Karasburg

Court and like the recommendation relating to Accused No. 3 is dated 14th September 2007 the date of birth of Accused No. 2 is stated as being 24.09.1995 thus making him 12 years of age. This is confirmed by a letter of one M M Konjore of the Karasburg Primary School addressed to M Smith and dated 11.09.2007 where it simply states "Gert van Schalkwyk – 12 years."

[8] This Court finds that as regards the age of Accused No. 2 he shall enjoy the benefit of the doubt and for purposes of this judgment at least he will at all relevant times be treated as being 12 years of age.

[9] In the nature of a point in limine, the youthfulness of Accused No. 2 may not render him criminally liable. The law in this regard applies age classification in terms whereof children between 7 and 14 years. There is a rebuttable presumption which weakens towards the border of 14 years, that such child is criminally unaccountable. At 12 years of age Accused No. 2 is further away from the border age of 14 than if he were in fact 14 which does not seem to be the case. The authors Jonathan Burchell and John Milton have in their work Principles of Criminal Law (Second Edition) page 231 summarised the test for criminal capacity of the age group 7 to 14 years and state that this involves:

"a two stage enquiry:

did the child possess criminal capacity and if so, did the child possess the *mens rea* required for a conviction of the crime for which the child is charged. The preliminary investigation into capacity precedes the enquiry into fault (or

mens rea) whether the fault required is intention or negligence."

[10] Applying this test to Accused No. 2 it may well be that the presumption that he is criminally unaccountable has been rebutted.

[11] At the sentencing stage the Magistrate in his reasons for sentence, referred to Accused No. 2 having appeared in his Court on two previous occasions in the past. On both these occasions charges against him were withdrawn on the understanding that he was very young and that his father was an invalid and unable to provide for him. In fact, the father, his guardian Gert Kaiser supported the screening recommendation of the social worker namely that he be sent to a prison school and as he put it, "not permanently but enough to change him. I would really appreciate it."

[12] As regards the rebutting of presumption of criminal non-capacity, C R Snyman in Criminal Law (Fourth Edition) page 179 states as follows:-

"The closer a child approaches the age of 14 years the weaker is the presumption that he lacks criminal capacity."

Snyman relies in support on the case of *The State v Nhamo* 1956 1PH H 28 (SR). The screening results and the evidence of Accused No. 2 strongly indicate that the presumption of innocence may have been rebutted in his case. However, there is one further issue to be dealt with and that relates to what Burchell and Milton refer to as "the presumption of coercion."

"the capacity of a child to act in accordance with his or her understanding of right and wrong may be influenced by the presence or instructions of an older person. If a young child, whether under or over 14, commits a crime in the presence of an older person whom he would be expected to obey, this may cause the child to be *doli incapax* or, it might render the child's conduct not unlawful by reason of the coercion involved. "

The authors rely on extensive case law quoted under footnote 23 on page 233.

[13] The Magistrate rightly referred to this issue. He dealt with it in a caring manner.

[14] The crime was committed at least in the presence of a 38 year old Accused No. 1. Although Accused No. 2 and Accused No. 3 in the course of the State's case gave evidence to the effect that both they and one Kiddy have actually invited Accused No. 1 to join in the commission of the crime, thereby covering up for Accused No. 1, the older person, the Magistrate did not accept this evidence. He states in his reasons for sentence –

“ Accused 1 is aged 38. He is not a first offender. He had in the past been convicted of petty thefts. He now committed a very

serious offence. The offence of housebreaking is itself viewed by the courts in bad light in the sense that it involves approaching a premise. In this case well knowing that it is guarded. It takes a daring person to then break the premise. In the present case accused persons broke through the roof . It is inconceivable that the strategy was devised by accused 2 and 3 who was convicted separately.

The likelihood is that accused 1 devised the plan. While inside accused persons stole some valuables. The court is well aware of the fairly nominal value stolen. What puts accused's conduct in bad light is that he used young and gullible people in form of accused 2 & 3. These young people are vulnerable in that they come from very poor families particularly accused 2.

His farther is disables and an invalid. Accused 1 then took advantage to use accused 2 in such an illegal scheme. By so doing he exposed accused 1 to so many perils. Accused 2 is only aged 14 he could have fallen off the roof to his death, he could have been shot by the security guard and many such other perils associated with crime.

During the trial accused initially denied any knowledge of the offence. Instead accused 2 & 3 took up all the blame and completely exonerated accused 1. In the view of this court accused 1 had influenced the two with a promise that the court would treat them leniently as they are juveniles. The court would still treat the two differently for that same reason. Accused 1 would however receive no mercy from this court."

[15] Unfortunately while correctly dealing with the issue of the much older co-accused committing the crime in the presence of minors he mis-directed himself in applying the law.

[16] The application of the law on this issue renders Accused No. 2 doli incapax.

[17] The judgment of this Court is therefore as follows:-

The conviction and sentence against Accused No. 2 are set aside.

The Court orders the immediate release of Accused No. 2 from detention.

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HINRICHSSEN, A.J

I agree

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HOFF, J