CASE NO.: CA 105/2009

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

ANANIAS NANYEMBA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **LIEBENBERG J & TOMMASI J**

Heard on: 17/09/2010; 24/09/2010 &01/10/2010
Delivered on: 11 March 2011

APPEAL JUDGEMENT

TOMMASI J: [1] The appellant noted an appeal against both the conviction and sentence imposed in the Magistrate's Court for the district of Ondangwa. The appellant was convicted of housebreaking with intent to steal and theft and sentenced to four (4) years imprisonment of which one (1) year was suspended for 5 years on the normal conditions. The value of the items stolen was N$21 040.30.

[2] The appellant was represented by Ms Mainga who appeared *amicus curiae* and the respondent by Mr Shileka.

[3] The respondent raised the following points *in limine:*

(a) The appellant's grounds of appeal do not comply with the requirements of rule 67(1) of the Rules of the Magistrate's Court, since they are vague and general.

(b) There has been non compliance with Rule 67(3) of the Rules of the Magistrate's Court; and

(c) the record was not complete.

[4] The respondent abandoned the latter two points *in limine* after it transpired that the record was in fact complete; and the Magistrate complied with the provisions of Rule 67(3) of the Magistrate's Court Rules.

[5] The grounds of appeal in essence only deal with the appellant's dissatisfaction with his conviction and no grounds of appeal in respect of sentence are contained in the Notice of Appeal. As such, no appeal lies against sentence. Counsel for the appellant furthermore did not pursue the appeal in respect of the sentence. In view of the afore-mentioned there is no need for this Court to consider the appeal against sentence.

[6] The grounds as set out by the appellant are indeed general and vague. Ms Mainga conceded that most of the grounds are vague and general but contended that there are two grounds that were set out with reasonable particularity. These grounds are the following:

a) that the appellant was not informed of his right to legal representation and that this was a gross irregularity that infringes on the appellant's right to a fair trial. Counsel referred the court to *S v Kau and Others 1995 (NR) 1 SC* in support of this submission; and

b) that the appellant should have been convicted of possession of goods suspected to have been stolen instead of housebreaking with the intent to steal and theft.

[7] The above two grounds, taking into consideration that the appellant was not assisted by a legal practitioner, contains sufficient particularity and will therefore be considered by this Court.

[8] The record reflects that the appellant was not advised of his constitutional right to be represented by a legal practitioner of his choice or that he could apply to the Directorate of Legal Aid if his means are inadequate, to enable the Directorate to engage a legal practitioner to assist and represent him. The failure of the Magistrate to inform the appellant, who was unrepresented at the time, of his right to legal representation was an irregularity that infringes on the appellant's right to a fair trial. The respondent argued that this error does not vitiate the entire proceedings since the appellant suffered no prejudice. Whether this irregularity vitiated the proceedings need to be determined on the facts of this case.

[9] In *S v Kau and Others(supra)* Dumbutshena AJA with the concurrence of Mahomed CJ

and Chomba AJA stated the following:

> *'In Namibia the right to be defended by a lawyer of one's choice is a constitutional right. When the trial magistrate failed to inform the appellants of this right he deprived them of their constitutional right. Because the right is given to the people by the Constitution, it is the duty of judicial officers to inform those that appear before them of their right to representation. There, of course, will be exceptional cases. A lawyer who appears before a judicial officer is expected to know his right to legal representation. There are many such other people, educated and knowledgeable who need not be informed. If they do not know, they must be informed."* (my emphasis)

[10] In *S v Bruwer 1993 NR 219 (HC)* at Strydom JP, as he then was, stated at 223D:

> *'I am also mindful of the fact that reference in our Constitution to a fair trial forms part of the Bill of Rights and must therefore be given a wide and liberal interpretation. However, I fail to see how it can be said, even against this background, that a trial will be less fair if a person who knows that it is his right to be legally represented is not informed of that fact. Whether the fact that an accused was not informed of his right to be legally represented, resulted in a failure of justice is, as in most other instances where a failure of justice is alleged, a question of fact.*' (my emphasis)
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> (See also *S v FORBES AND OTHERS 2005 NR 384 (HC))*

[11] From the record it is apparent that the appellant was aware of his right to be represented. The complainant and the police, on the strength of information received, wanted to search the premises where

they found the appellant. The appellant refused them entry to the premises. He informed them that he was not the owner of the premises and that he would not allow a search of the premises. He promptly called his lawyer to speak to the concerned police officer. If the appellant knew that he could call upon his legal practitioner to seek advice in respect of his rights under these circumstances, then it cannot be said that he did not know of his right to be legally represented at the trial, or for that matter at any stage during the proceedings.

[12] Despite the above, the appellant at no time requested the court to allow him time to obtain the services of a legal practitioner. The matter was postponed several times after the appellant was released on bail during which time the appellant could have obtained the services of a legal practitioner. The charge faced by the appellant was a simple one of housebreaking with intent to steal and theft. It cannot under these circumstances be said that there was a miscarriage of justice.

[13] Counsel for appellant argued that the appellant should have been convicted of being 'found in possession of suspected stolen property'. The issue to be determined is whether the facts before the court *a quo* supported a conviction of housebreaking with the intent to steal and theft or any competent verdict thereof.

[14] The complainant testified that she discovered during the early hours on 7 July 2007 that her place was broken into and items valued at N$21 040.30 were stolen. The items listed were cash, recharge vouchers, various food items, 9 pairs of shoes (one pair was made of springbok leather), clothing items (not specified), 15 tops , 5 trousers and 2 jackets (specified), 3 door locks; 14 bags, 1 cash register and one electronic cash till. These allegations were not disputed and it was therefore common cause that the offence of housebreaking with intent to steal and theft was committed. The appellant disputed that he was the person who committed the offence.

[15] When evaluating the evidence the court *a quo* accepted the evidence of the complainant that she saw the appellant wearing leather sandals; that the appellant was acting suspicious when confronted by the police at the house where the stolen goods were found and; accepted the testimony of a witness who testified that the appellant sold her shoes as credible. The court *a quo* found that the appellant was in possession of the two pairs of sandals and the recovered items and inferred from his failure to explain how he obtained these items and his recent possession of the stolen items that he was guilty of the offence of housebreaking with the intent to steal and theft.

[16] According to the complainant she received information about the whereabouts and identity of a person selling some of her belongings on Saturday, 8 July 2007. She reported this to the police and they went to the house pointed out to the complainant at around 20H00. They found the appellant at the premises, who refused the police officer entry to the premises, despite the fact that he was advised by the police officer that he was entitled to search the premises without a warrant. The appellant locked the door and called his legal representative who spoke to the police officer. The appellant did not dispute that he was found at the house where the stolen items were later recovered and that he refused entry to the house. His refusal was based on the fact that the police did not furnish him with a search warrant; and he did not want to consent, as the house did not belong to him.

[17] The appellant may have been well within his rights to have refused the police entry to the house without a search warrant, given the fact that he could not give lawful consent to search someone else's premises.. The fact that he refused consent to search the house cannot therefore be taken into consideration in determining the culpability of the appellant.

[18] The complainant testified that she recognised her sandals made of springbok leather which the appellant was wearing at the time. She indicated that it was a size 8 or size 9 shoes. The appellant cross-examined the complainant in respect of the sandals he was wearing but she was adamant that she saw him wearing the sandals at the time. The appellant did not address the issue of the sandals he was wearing, in his examination in chief; but in cross-examination confirmed that he was wearing open sandals. He

however denied that it belonged to the complainant. The complainant gave a clear description of the stolen items upon discovering the theft thereof and later identified the items recovered by ticking them meticulously off the list. It is unlikely that she would make a mistake in identifying her sandals. Given these facts, the court *a quo* correctly found that the complainant's evidence in respect hereof was reliable.

[19] The complainant testified that the appellant grabbed her by her collar. The police officer testified that the appellant tried to assault the complainant and he tried to restrain him. The appellant walked away and refused to stop when requested by the police officer to do so. The appellant's explanation as to why he left the house was that the police told him to leave. The appellant also testified that "I *left and told them to come later"* after he called his lawyer. The appellant did not run away but casually or *"truantly"* walked away. The complainant testified that the appellant ran away. There was no credible evidence to support the fact that the accused left "in *a huff*"as was found by the court *a quo.* The appellant who was, according to his own version, sleeping at the time, decided to leave the house. This is indeed strange but a host of reasons may be advanced for the appellant doing so other than that the one that he had something to hide. This fact, to my mind, does not support the inference drawn by the court *a quo.*

[20] The police officers broke the door to gain entry and found a box containing three bags of clothing listed as items stolen, in the house. The owner of the house testified that she left her place on 7 July 2007; locked the door and kept the key above the door for her young ward to use the house; and returned on 10 July 2007. She testified that she had been in a past relationship with the appellant although the appellant maintained that the relationship still existed. She denied having any knowledge of the items found in her house. The court *a quo,* treating her evidence with caution, still found her evidence to be satisfactory and stated that even without her evidence he would reach the same conclusion. The appellant was the only occupant of the house at the time. The owner was not present at the time and it was not disputed by the appellant that she was not at home at the time he arrived at her place. The appellant did not dispute that the stolen items were found in the house after he had left but denied having knowledge thereof i.e being in possession thereof.

[21] A further witness for the state testified that she was sold a size 5 pair of leather sandals by the appellant during July 2007. The appellant denied that he sold shoes to this witness. The court *a quo* found this witness to be confident and accepted her evidence. The appellant averred that the witness conspired with other witnesses to implicate him, but gave no reason why this witness would want to implicate him. This Court finds no reason to interfere with the credibility finding of the court *a quo* in respect of this witness.

[22] Although the court *a quo* did not directly make a credibility finding in respect of the appellant, it was clear that it rejected the appellant's version that he did not know that the stolen items were in the house and that he was not involved in the offence at all.

[23] This Court is satisfied that the court *a quo* correctly found that the appellant was in possession of two pairs of shoes forming part of the items stolen from the complainant. Given the appellant's denial, the Court has to consider all the proven facts to ascertain whether the State proved beyond reasonable doubt that the appellant was in possession of items recovered from the house.

[24] The sandals found to have been in possession of the appellant, were part of items that were proven to have been stolen. The appellant was the sole occupant of the premises during the period after the crime was committed and just before it was recovered. The only reasonable inference to be drawn from these facts is that the appellant had knowledge of the other items in the house and by being the only occupant at the relevant period, had exercised control over it. The court *a quo* therefore correctly inferred that the appellant was in possession of the sandals and the items recovered in the house.

[25] In order to arrive at a conviction of the offence of housebreaking with the intention to steal and theft, the court *a quo* applied the doctrine of recent possession.

[26] In *S VKAPOLO 1995 NR 129 (HC)* at 130D - F, Strydom JP (as he then was) stated the following:

> *"It is correct that where a person is found in possession of recently stolen goods and has failed to give an explanation which could reasonably be true, a court is entitled to infer that such person had stolen the article or that he is guilty of some other offence. (See*
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> *Hoffmann and Zeffert The SA Law of Evidence 4th ed at 605 - 6.) I also agree with the magistrate that there are instances where a lapse of 14 days or longer was still regarded as recent possession. The test to be applied in this regard was laid down in R v Mandele 1929 CPD 96 where the following was stated at 98, namely:*
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> *'…..is the article one which could easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief? '*
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> *This dictum was approved on many occasions and again by the South African Appeal Court in S v Skweyiya 1984 (4) SA 712 (A) at 715E. C*

[27] The period *in casu* was not even two full days after the commission of the offence. This, by any standard, was recent possession. The nature of the items however need also be considered. Although the items individually can be easily passed from hand to hand, it would be more difficult for three bags of clothing to exchange hands within such a short period, particularly given the value thereof. The springbok leather sandals were valued at N$300.00 and the shoes were sold for N$100.00 at an open market. The total value, according to the complainant's list of the three bags of clothes recovered was approximately N$7260.00. The quantity and the value of these items make it unlikely that it could, within such a short period of time, have left the hands of the person who broke into the shop of the complainant and stole the items. The appellant's possession was recent enough to draw the inference that he was the person who broke into and stole the complainants goods as listed and court *a quo* therefore correctly convicted the appellant of housebreaking with the intent to steal and theft.

[28] No proper grounds of appeal against sentence were advanced to be considered and the appeal against

sentence was not pursued by counsel for the appellant.

[29] In the result:

the appeal against conviction is dismissed.

TOMMASI J

I concur

LIEBENBERG J