CASE NO.: CA 12/2011

IN THE HIGH COURT OF NAMIBIA
HELD IN OSHAKATI

In the matter between:

ANTONIUS KAMENYE **1ST**
APPELLANT

ALEX ANANIAS **2ND APPELLANT**

and

THE STATE

CORAM: LIEBENBERG J *et* TOMMASI J

Heard on: 23 January 2012
Delivered on: 10 February 2012

APPEAL JUDGMENT

TOMMASI, J.: [1] The appellants appeared before the Oshakati regional court on a charge of housebreaking with intent to steal and theft of goods valued at N$67,356.40. They were convicted and

sentenced to 6 (six) years imprisonment of which 3 (three) years were suspended for a period of five years on the usual conditions. They are appealing against both conviction and sentence.

[2] Mr Shileka appeared for the respondent; Ms Mainga for the 1st appellant and the 2nd appellant appeared in person. The 1st appellant brought an application for condonation for the late filing of the additional/amended grounds of appeal. The only ground on which the application for condonation was opposed by the respondent, was that there are no reasonable prospects of success. Respondent conceded that it may be accepted by the Court that 2nd appellant's notice of appeal was noted within the time frame provided for in Rule 67(1)[1].

[3] The grounds contained in 1st appellant's notice of appeal in respect of the conviction may be summarised as follow:

> *(1) None of the State witnesses implicated him;*
> *(2) The State failed to call the owner of the gambling machine repair workshop and the gambling machine was not brought before the court;*
> *(3) The two State witnesses namely the owner and Samuel Shivute, contradicted one another in respect of the offloading of the gambling machine*

[4] The 1st appellant's additional grounds of appeal in respect of conviction are that the magistrate erred in law or in fact by:

> *(1) relying on the evidence of Samuel Shivute and not approaching such evidence with caution as he was a likely accomplice;.*
> *(2) relying on the doctrine of recent possession when there was no evidence on record suggesting that the first appellant was indeed found in possession of the jackpot machine and there*

[1]Magistrate's Court Rules

was a contradiction in the State's case regarding who offloaded the said machine;

(3) ignoring the fact that all the direct evidence links the second appellant as opposed to the first appellant i.e it was the second appellant who was found in possession of the cash box from the machine; It was the second appellant who negotiated the sale of the machine;

[4] not taking into account the testimony of Ester Ashipala when she indicated that the police included certain statements that were not made by her in an attempt to implicate the first appellant.

[5] failing to discharge the 1st appellant at the close of the State's Case.

(6) ignoring the fact that the 1st appellant was not found in possession of any of the other goods alleged to have been stolen from Namukuku Noshipe's Bar.

[5] The original grounds are essentially incorporated in the additional grounds and overlaps with the grounds raised by 2nd appellant.

[6] The only valid grounds to be gleaned from the notice of appeal of 2nd appellant who drafted his notice of appeal without the assistance of a legal practitioner are the following;

(1) That the magistrate failed to take into consideration conflicting evidence on the offloading of the gambling machine from the vehicle and that possession of the stolen machine was thus not proven;

[2] That the magistrate failed to call the owner of the place where the gambling machine was confiscated by the police; and

[3] That the magistrate failed to take into consideration that the witness Samuel Shivute implicated him as a result of past differences.

[7] The facts of the case are relatively uncomplicated. An employee of Onamukuku Noshipe bar/supermarket testified that during the early morning hours on 22 February 2005 unidentified

persons broke into the afore-mentioned supermarket/bar. Although she and her room-mates heard the sounds they were too scared to investigate. At around 6H00 she found the door which she had locked the previous night, wide open. She reported it to the police who requested her to compile a list of items stolen. The value of the items stolen was given as N$67,356.40. She testified that she saw three sets of footprints leading to a place where she observed tracks of a motor vehicle.

[8] Samuel Shivute testified that he was approached by 2nd appellant to purchase a gambling machine. He first wanted to see the machine and to make sure it was in working order. They departed for Oshikuku and 1st appellant joined them at some point. They arrived at a certain house from where 1st and 2nd appellant collected the machine. He transported the gambling machine to Bush Bar which was also a workshop for repairs of gambling machines. Upon their arrival at the bar they were confronted by the police and the owner of the machine and 1st and 2nd appellant were arrested. The police then off-loaded the gambling machine from his vehicle.

[9] Vaino Hamutheno, the owner of the gambling machine testified that he received information from the owner of Bush Bar that a gambling machine will be sold at the bar. He alerted the police and they waited at the bar. Samuel Shivute arrived with both appellants who offloaded the machine. The police and the owner confronted

them. Samuel Shivute was identified as the purchaser and 1st and 2nd appellant were arrested. Mr Hamutheno identified the machine as his by unlocking it with keys in his possession and by the serial number which appeared thereon. The gambling machine, although damaged was in working order.

[10] Detective Warrant Officer Amwandangi testified that he found the money box of the gambling machine at the house of 2nd appellant. The sister-in-law of the 1st appellant, a State witness, denied that she gave a statement to the police to the effect that 1st appellant brought a gambling machine to her house. She testified that he brought a machine in a black bag to her house. 1st Appellant informed her that it was a sewing machine and this witness, although she testified that she did not see it, was convinced that it was a sewing machine.

[11] The two appellants denied that they met with Samuel Shivute and travelled with him to Oshikuku. They denied that they arrived with him in his vehicle at Bush Bar. Their version was that 1st appellant was a taxi driver and 2nd appellant was his customer. 1st appellant took 2nd appellant to Bush Bar and bought a litre of coke. 2nd appellant waited at Bush Bar for his relative. 1st appellant invited him to share the coke and they were arrested by the police whilst doing so.

[12] Ms Mainga, counsel for the 1st appellant conceded that the 5th ground was without merit and abandoned same. This concession was properly made. The application for discharge is interlocutory in nature and it "is *entirely a matter for the opinion of the judge; and his decision cannot be questioned on appeal"*. (S v *CAMPBELL AND OTHERS* 1991 (1) SACR 435 (Nm) on page 444 D-E).

[13] The main thrust of both appellants' grounds is that the magistrate misdirected himself in finding that the appellants were found in possession of the gambling machine.

[14] No direct evidence was led that the appellants broke into the bar/supermarket. The State relied on the doctrine of recent possession to seek a conviction on housebreaking with intent to steal and theft. The State had to prove beyond reasonable doubt that (1) the appellants were found in possession (2) of recently stolen goods and (3) that they failed to give an explanation which could reasonably be true. If the above was proven by the State beyond reasonable doubt then the court *a quo* was entitled to infer that the appellants had broken into the bar/supermarket and had stolen the goods listed by the witness.[2]

[15] It was common cause that the gambling machine, one of the items stolen from the shop, was recovered two days after the commission of the crime occurred. Ownership was not disputed and

[2] See S v Imene 2007 (2) NR 770 (HC) & S v Kapolo 1995 NR 129 (HC)

neither was the fact that it was returned to the owner after it was confiscated by the police. It was not required of State to produce the gambling machine in court or prove that the appellants were also found in possession of the other items which were stolen. It was sufficient for the State to prove that the property which was stolen from the supermarket/bar, in this instance the most valuable item, was found in possession of the appellants.

[16] Both appellants were of the view that the magistrate erred by accepting the evidence of Samuel Shivute albeit for different reasons. 1st appellant's counsel argued that the magistrate should not have relied on the evidence of this witness as he was a likely accomplice. 2nd appellant felt that the witness displayed a bias because they had a prior disagreement. The magistrate in his judgement stated the following:

> *"Although for all intents and purposes this witness qualifies on all fours to be an accomplice witness and the Court is supposed to apply the cautionary rule because this witness was about to buy stolen property under circumstances which show that he probably knew that this was stolen property and therefore had an interest to protect himself"*

It can safely be said that the magistrate was alive to the fact that he should treat this witness' evidence with caution.

[17] The magistrate accepted the testimony of Samuel Shivute that he arrived at Bush Bar with the two appellants in his vehicle as this was corroborated by the owner of the gambling machine whom he

found to have been a credible witness. He further noted that Samuel Shivute had reason to protect himself as it was evident that this witness had a suspicion that it was a stolen machine. The magistrate discounted the fact that he would shift the blame on the appellants as he testified that only 2nd appellant negotiated the sale with him.

[18] The disagreement as alleged by 2nd appellant was not put to the witness and neither did 2nd appellant testify that it occurred. It was only during his address to the court *a quo* before conviction that it was raised for the first time. The magistrate correctly disregarded this.

[19] This Court is satisfied that the magistrate not only cautioned himself as to the inherent dangers of this witness' evidence but treated his evidence with circumspection where uncorroborated.

[20] A further ground raised by 2nd appellant was that the State failed to call the owner of the bar to testify as to who brought the gambling machine there. The magistrate in his statement in terms of rule 67(3)(b) indicated that the evidence before the court *a quo* was adequate. There is no evidence on record that the owner was present at the material time and, as correctly pointed out by the magistrate, the evidence before the court *a quo* adequately proved the fact that the appellants arrived at Bush Bar with Samuel Shivute.

[21] Both appellants submitted that the magistrate failed to take into consideration the contradiction between the evidence of Mr Hamutheno and Samuel Shivute in respect of who offloaded the machine from the vehicle. The magistrate accepted the evidence of Mr Hamutheno in respect hereof and it is not evident that he considered that this contradicted the testimony of Samuel Shivute. What is clear is that the magistrate relied on the evidence of Mr Hamutheno as he found him to be a credible witness. It is my considered view that this is not a material contradiction. Who offloaded the machine was not material to the determination of the key dispute. The disputed fact was whether they arrived at Bush Bar in the vehicle of Samuel Shivute with the gambling machine.

[22] 1st Appellant's grounds referred to the failure of the magistrate to consider the fact that the sister-in-law testified that the police recorded the wrong information when they took the statement of this witness. The manner in which the State dealt with this witness and the manner in which the statement was adduced into evidence may be criticised. The magistrate however correctly did not rely on this witness' evidence as it was irrelevant. The police did not testify before the magistrate in respect of where the gambling machine was stored and their conduct has no bearing on the facts of this case. The magistrate was not required to consider this fact.

[23] 1st Appellant's counsel submitted that the magistrate erred when he failed to take into consideration that all the evidence point to the fact that 2nd appellant was the perpetrator of the offence since he negotiated the sale and the coin box of the gambling machine was found in his room. The magistrate in his judgement did not rely on the evidence of Detective Amwandangi. Although it was not stated in his judgment the reason for disregarding this witness's evidence was clear. His evidence contradicted that of the owner who testified that the gambling machine was in working order when he recovered it and did not testify that the coin box was recovered at a later stage. His evidence did not prove that the coin box found was indeed a part of the gambling machine which belonged to Mr Hamuthenu. This ground in essence relate to the question whether the State proved that 1st appellant was "*found to have been in possession"* of the gambling machine and will be dealt with hereunder.

[24] This Court is not persuaded that the magistrate misdirected him on the facts when he accepted the evidence presented by the State i.e that: 2nd appellant approached Samuel Shivute to negotiate the sale of the gambling machine; 1st appellant joined them at some stage; that they travelled to Oshikuku; 2nd appellant took him to the house where 1st and 2nd appellant collected and loaded the gambling machine; and that they took the machine to the gambling machine repair workshop at Bush Bar in order to be sold to Samuel Shivute.

[25] What remains to be determined is whether these facts support a finding that the appellants were found to have been in possession of the gambling machine. In *S v ADAMS 1986 (4) SA 882 (A) CORBETT JA* at *page 890 G – J & 891 A* – states the following:

> *In general the concept of "possession" ("besit"), when found in a penal statute, comprises two elements, a physical element (corpus) and a mental element (animus). Corpus consists either in direct physical control over the article in question or mediate control through another. The element of animus may be broadly described as the intention to have corpus, ie to control, but the intrinsic quality of such animus may vary, depending upon the type of possession intended by the statute. At common-law a distinction is drawn between civil possession (possessio civilis) and natural possession (possessio naturalis). Under the former the animus possidendi consists of the intention on the part of the possessor of keeping the article for himself as if he were the owner. Under the latter the animus need merely consist of the intention of the possessor to control the article for his own purpose or benefit, and not as owner. In penal statutes, however, the term "possession" would seldom, if ever, be construed as possessio civilis and this may, therefore, be left out of account. In the case of certain such statutes it has been held that "possession" connotes corpus and an animus akin to that required for possessio naturalis. In others the Courts have interpreted "possession" to comprehend corpus plus the animus to control, either for the possessor's own purpose or benefit, or on behalf of another (this latter alternative being equivalent to what is often termed "custody" or detentio) or as meaning "witting physical detention, custody or control" (see S v Brick 1973 (2) SA 571 (A) at 580C).”* [my emphasis]

[26] The facts found to have been proven by the State justified the conclusion reached by the magistrate that the 2nd appellant had control over the gambling machine and that such control was for his benefit.

[22] Counsel for the 1st appellant argued that these facts do not support a finding that he, together with 2nd appellant was found to have been in possession of the gambling machine. In S v MAJA AND

OTHERS 1998 (2) SACR 673 (T) at p676 G-H, STAFFORD J stated the following:

> *"While it is clear that more than one person can possess a single object such as a firearm - S v Mtshemla and Others 1994 (1) SACR 518 (A) at 523e - it is clear that there must be evidence, either direct or circumstantial, to justify a finding that there is such possession - see S v Nkosi (supra) at 286i-287b."*

[27] 1st Appellant travelled with 2nd appellant and Samuel Shivute to Oshikuku; helped 2nd appellant carry the gambling machine from a house in Oshikuku; and was present in the vehicle when they arrived at Bush Bar. 1st appellant however was not present when 2nd appellant negotiated the sale and at no time was the sale agreement discussed with him. The magistrate however held the view that his failure to dispute his presence in the vehicle during cross-examination of the owner and Samuel Shivute raised the expectation that he would explain his presence in the vehicle. 1st appellant was represented at the trial by a legal practitioner and there was a duty on his counsel to put it to the two state witnesses that 1st appellant did not accompany Samuel Shivute to Oshikuku and did not arrive with him at Bush Bar.[3] 1st appellant however testified that he was not present in the vehicle at all. The magistrate thus inferred from his failure to account for his presence in the vehicle that he together with 2nd appellant had jointly been found to have been in possession of the machine.

[3]S v Boesak 2001 (1) SA 912 (CC) (2001 (1) SACR 1; 2001 (1) BCLR 36) endorsed in S v AUALA 2010 (1) NR 175 (SC)

[28] This Court is satisfied that the magistrate, having rejected the evidence of both appellants, correctly concluded that both the appellants were found to have been in possession and that no reasonable explanation was tendered. The magistrate furthermore correctly applied the doctrine of recent possession given the fact that the appellants were found in possession of a fairly large item which was part of items stolen from a shop/supermarket only two days before it was found in the possession of the appellants.

[29] The 1st appellant appealed against sentence on the grounds that the magistrate did not take into consideration that the gambling machine was recovered and that he failed to take into account the best interest of the children. 2nd appellant submitted that the sentence imposed was harsh under the circumstances.

[30] It is trite law that the Court of appeal would not easily interfere with the sentence imposed by the trial court unless there was an irregularity in the proceedings or a material misdirection by the trial court or if the sentence is shockingly disproportionate to any sentence that the Court of appeal would have imposed. [4]

[31] The magistrate dealt with the fact that the gambling machine was recovered in his reasons for sentence but did not consider this to be a mitigating factor. The reason advanced was the fact that the machine was recovered by the ingenuity of the police and the

[4]See S v Tjiho 1991 NR 361 (HC)

complainant. The magistrate in his reasoning cannot be faulted. The sentencing court has to determine the degree of moral guilt of an accused. The facts surrounding the recovery of the machine cannot under the circumstances be said to have lessened the degree of blameworthiness of the appellants. Had the appellants out of their own volition returned the stolen items, it could have been an indication of their contrition and it would have mitigated the impact of the crime they had committed. The magistrate therefore correctly dealt with this aspect.

[32] The second ground deserves closer scrutiny. The magistrate indeed considered the fact that the accused was a family man and that he was the breadwinner as well as other mitigating circumstances. After considering other factors however he concluded that a custodial sentence is warranted. The magistrate can hardly be faulted in his thorough consideration of all factors. The grievance, as I understand it, was the magistrate failed to take into account the welfare of the children when he decided that a custodial sentence was appropriate.

[33] Counsel for the appellant in her heads of argument cited a South African authority S v M 2011 (7) BCLR 651, a case which I have been unable to find, in support of her argument that a sentencing court should take into account that children's interest are paramount. The same view was held in S v M (CENTRE FOR CHILD LAW AS

AMICUS CURIAE) 2007 (2) SACR 539 (CC) (2008 (3) SA 232; 2007 (12) BCLR 1312) where that Court deliberated on the constitutional rights of the child and the implications thereof when a court considers an appropriate sentence.

[34] Although both the South African and Namibian constitution accord children certain rights and protection, the provisions are differently worded. It is unfortunate that counsel did not present full argument on this point and neither do the evidence presented in this case support this ground. Counsel should bear in mind that the Court is guided and assisted by legal practitioners to present comprehensive argument before Court particularly if they wish to persuade the Court to rely on persuasive authority of other jurisdictions[5].

[35] 1st appellant was legally represented during the sentencing. The duty to submit all the relevant information in mitigation rests on the accused. Apart from indicating to the court *a quo* that the appellant had 8 children, limited information was placed before the magistrate on the welfare of the children. A welfare report would have assisted the magistrate to fully understand what the impact of custodial sentence would have been on the welfare of the children. Legal representatives should assist the courts by investigating all relevant considerations in mitigation of sentence. The appellant can

[5]Also See part 8 of para 37 of the Consoldidated Practice Directives issued on 2 March 2009 by the Judge President

hardly complain if not all the relevant information was placed before the court *a quo* that proper consideration was not given the welfare of the children. This ground cannot therefore be entertained.

[36] 2nd appellant submitted that the sentence imposed was harsh. This Court's approach to crimes of this nature has been made clear and there is no need to restate same.[6] Housebreaking with intent to steal and theft is viewed as a serious offence. It, despite a robust approach by our courts, remains prevalent. This Court has sanctioned deterrent sentences to be imposed. The fact that three years imprisonment was suspended is indicative that deterrence was not the only consideration when the magistrate imposed the sentence. This Court is not persuaded that the magistrate did not exercise his discretion judiciously or that the sentence is disturbingly inappropriate.

[37] This Court considered the 1st appellant's appeal on both his original notice which was filed in time as well as the additional grounds despite the fact that same was filed out of time. The Court accepted the explanation given by 1st appellant for the late filing of additional grounds therefore the Court entertained the additional grounds.

[38] In the premises the following order is made:

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[6]See S v Drotsky 2005 NR 487 (HC)

1. The application for condonation for the late filing of 1st appellant’s additional grounds of appeal is granted
2. 1st appellant’s appeal against conviction and sentence is dismissed;
3. 2nd appellants appeal against conviction and sentence is dismissed.

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TOMMASI, J

I concur

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LIEBENBERG, J

ON BEHALF OF THE 1ST APPELLANT **Ms. Mainga**

Instructed by: **Inonge Mainga attorneys**

ON BEHALF OF THE 2ND APPELLANT **In person**

ON BEHALF OF THE RESPONDENT **Adv. Shileka**

Instructed by: **Prosecutor-General's Office**