

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 90/2012

In the matter between:

**THE STATE**

and

**TIMOTEUS SLANER**

**(HIGH COURT MAIN DIVISION REVIEW REF NO 1648/2012)**

**Neutral citation:** *S v Slaner* (CR 90-2012) [2012] NAHCMD 58 (12 November 2012)

**Coram:** VAN NIEKERK, J and UEITELE, J

**Delivered:** 12 November 2012

**Flynote:** Criminal procedure – Sentence – Accused a juvenile aged 17 years at time of commission of crime – Accused spent 16 months in custody awaiting trial – Accused convicted of housebreaking with intent to steal and theft – Accused a first offender - Sentenced to three years imprisonment of which one year is suspended for five years on condition of good behavior – Sentence creates sense of shock in light of accused's youthful age and time spent in custody awaiting trial – Sentence

set aside and replaced with nine months imprisonment of which three months imprisonment are suspended for three years on condition of good behavior.

**Summary:** The accused was convicted in the magistrate's court on a charge of housebreaking with intent to steal and theft and sentenced to three years imprisonment of which one year is suspended for five years on condition of good behaviour. On review the concern arose whether the sentence is not too harsh bearing in mind (i) that the accused was 17 years old at the time he committed the offence; and (ii) that the accused spent 16 months in custody awaiting trial.

The magistrate misdirected himself on the facts. He also exaggerated the extent of the crime committed, and therefore its seriousness.

Although there is no rule of law which precludes a court from sentencing a youth to a term of imprisonment, a youthful offender who is a first offender, should as far as possible be kept from prison. In the present matter the offence committed was quite serious and the list of stolen items (consisting of 35 items valued at N\$6 600) does indicate some greediness on the part of the accused. The circumstances of this case do warrant a custodial sentence, but not as long as the magistrate imposed. While the magistrate took the accused's youthfulness into account, he gave it too little weight. The length of the sentence imposed in this case on a youth who committed the crime while still a juvenile creates a sense of shock especially when one takes into consideration that he spent 16 months in custody awaiting trial. The sentence was set aside and replaced with a sentence of nine months imprisonment of which three months are suspended for 3 three years on condition of good behaviour.

---

**ORDER**

- 
1. The conviction is confirmed.
  2. The sentence is set aside and replaced with the following sentence:

“9 (nine) months imprisonment of which 3 (three) months are suspended for 3 (three) years on condition that the accused is not convicted of housebreaking with intent to steal and theft, or of theft, committed within the period of suspension.”

3. The sentence is backdated to 3 April 2012.

---

### REVIEW JUDGMENT

---

VAN NIEKERK, J ( UEITELE, J concurring):

[1] The accused was convicted in the magistrate’s court on a charge of housebreaking with intent to steal and theft and sentenced to three years imprisonment of which one year is suspended for five years on condition of good behaviour. A query was sent to the trial magistrate on the sentence that was imposed. However, the reply by the clerk of the particular court indicates that the magistrate is no longer in the service of the magistracy.

[2] The query raises the concern whether the sentence is not too harsh bearing in mind (i) that the accused was 17 years old at the time he committed the offence; and (ii) that the accused spent 16 months in custody awaiting trial.

[3] During the trial the learned magistrate provided short *ex tempore* reasons for sentence. He took into account that the offence committed is quite serious and prevalent and that, generally, housebreaking and theft involves premeditation, planning and careful timing. The magistrate had regard to the fact that the particular crime undermines the virtues of honest, hard work and correctly emphasized the deterrent purpose of sentence for such crimes, especially in the particular town, stating that the courts must not be seen to encourage a situation where some work honestly for their possession by day while others 'just harvest' at night.

[4] I have no quarrel with the sentiments expressed. However, the magistrate misdirected himself in his judgment on sentence. For example, the magistrate referred to the list of stolen items in this case and stated that the accused 'literally emptied' the complainant's house. The list consists of about 35 items, which includes mainly items of clothing, as well as a dvd player, a DSTV decoder, a compact disc, two dvd's and two travel bags. The total value is N\$6600. Whilst the value is not insignificant, it can certainly not be said that the complainant's house was 'emptied'. In the first place this statement is based on speculation, as there is no evidence on the size and contents of the complainant's house. Secondly, it seems inherently improbable that the listed items were the only possessions in the complainant's house. It seems to me that the learned magistrate exaggerated the extent of the crime committed, and therefore its seriousness.

[5] He took into account that the accused is a first offender and pleaded guilty, thereby showing some remorse and contrition. He further took into account the accused's age both at the time of the commission of the offence and at the time of sentencing, which was then and stated that the accused's action 'might have been due to youthful ignorance'. Nevertheless, he reminded himself, at age 17 'one will be knowing what is wrong and right, good or bad.'

[6] In a recent judgment this Court had occasion to express the view that, although there is no rule of law which precludes a court from sentencing a youth to a

term of imprisonment, a youthful offender who is a first offender, should as far as possible be kept from prison. (See *S v Skrywer* (CA 36-2011) [2012] NAHCMD at para. [6] where reference is also made to *Ainackey Shikesho v The State* Case No. CA 111/2008 (Unreported); *State v Timi Issack* Case No. 2880/92 (Unreported); *S v Salome van der Berg* 2003 NR 69 (HC); *S v Erickson* 2007 (1) NR 164.) In the present matter the offence committed was quite serious and the list of stolen items does indicate some greediness on the part of the accused. The circumstances of this case do warrant a custodial sentence, but not as long as the magistrate imposed. While the magistrate took the accused's youthfulness into account, it seems to me that he gave it too little weight. The length of the sentence imposed in this case on a youth who committed the crime while still a juvenile creates a sense of shock especially when one takes into consideration that he spent 16 months in custody awaiting trial.

[7] In the result the following order is made:

1. The conviction is confirmed.
2. The sentence is set aside and replaced with the following sentence:

“9 (nine) months imprisonment of which 3 (three) months are suspended for 3 (three) years on condition that the accused is not convicted of housebreaking with intent to steal and theft, or of theft, committed within the period of suspension.”

3. The sentence is backdated to 3 April 2012.

-----  
K van Niekerk

6  
6  
6  
6  
6

Judge

-----

S F I Ueitele

Judge