REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 57/2012

JUSTINE MOYO **APPELLANT**

Versus

THE STATE **RESPONDENT**

Neutral citation: *Moyo v State* (CA 57/2012) [2013] NAHCMD 7 (17 January 2013)

Coram: SHIVUTE, J *et* SIBOLEKA, J

Heard: **23 November 2012**

Reasons released: **17 January 2013**

SHIVUTE J (SIBOLEKA J concurring):

[1] The appellant appeared in the magistrate's court Katima Mulilo on 21 November 2011, charged with the offence of house breaking with intent to steal and theft. He pleaded guilty to the charge and was convicted of the offence charged. He was sentenced on the same date to two (2) years' imprisonment.

[2] On 23 November 2012 we heard his appeal against conviction and sentence. We dismissed the appeal and indicated that reasons were to follow. These are the reasons:

[3] As stated earlier the appellant was convicted and sentenced on 21 November 2011. He lodged his notice of appeal on 8 May 2012. He filed an application for condonation for filing his notice of appeal late accompanied by a supporting affidavit also dated 8 May 2012.

[4] The Appellant's notice of appeal was lodged about six (6) months out of time. The appellant gave reasons for his failure to note his appeal within the prescribed time as follows:

After his conviction and sentence his intention was to lodge an appeal. He was advised to get a legal representative to lodge his appeal. Meanwhile his family was organizing to raise funds for the legal practitioner. The appellant was transferred from Katima Mulilo to Grootfontein and lost touch with his family in Zimbabwe and Zambia. As a layman, he did not possess the knowledge to file a notice of appeal.

[5] We gave due consideration to the explanation offered by the appellant and we had decided to hear the merits of the case.

[6] The appellant pleaded guilty to the charge and the court proceeded in terms of section 112 1 (b) of the Criminal Procedure Act, Act 51 of 1977, to determine whether the appellant was really tendering a plea of guilty. After the court satisfied itself it convicted the appellant. The appellant's plea was an unequivocal plea of guilty.

[7] However, the appellant in his grounds of appeal stated that the prosecutor told him that if he pleads guilty a lenient sentence would be imposed. Furthermore the court should have entered a plea of not guilty, because he pleaded guilty conditionally as he told the learned magistrate that he entered the house by opening with a key. These claims are not borne out by the evidence on record. On the contrary the appellant told the learned magistrate that he entered the house through the door that was locked. He forced it open using a spade. There appears to be the only grounds of appeal against conviction because the rest of the grounds concern alleged, irregularity omitted during the trial whilst there was in fact no trial. The appellant tendered a plea of guilty and I see no reason why the court should have entered a plea of not guilty. I am satisfied that the court did not misdirect itself by convicting the appellant on his own admission of guilt.

[8] As far as the sentence is concerned, the appellant claimed that he was misled by the prosecutor that if he pleads guilty a lenient sentence of 8 months imprisonment or a fine would be imposed by the court. He further stated that the

sentence imposed induces a sense of shock; is totally inappropriate and too severe. He argued that the learned magistrate failed in law or fact by not considering that the appellant is a first offender, with a family to support; that he is not a danger to the society and that the magistrate failed to elicit adequate personal factors and his financial position.

[9] It is apparent from the record that the trial magistrate when sentenced the appellant, she considered that the offence committed was very serious, that he is not a first offender. In arriving at the appropriate sentence the court had taken into account the personal circumstances of the appellant and the interest of the community and came to the conclusion that a custodial sentence is the only appropriate sentence that could deter the accused and would be offenders from committing this offence.

[10] It is trite law that the sentence which the trial court imposes on an accused person is in the discretion of such court. This is a judicial discretion which must be exercised in accordance with judicial principles.
S v Tjiho, 1991 NR 361 (HC) at 366A-B.
Although the appeal court has a right to interfere with the discretion of the court *a quo*, there is no reason for us to interfere with the sentence because we did not find it to be too severe; inappropriate or inducing a sense of shock. There is nothing showing that the trial magistrate misdirected herself or that she did not exercise her discretion properly and judiciously.

[11] The offence of housebreaking with intent to steal and theft is serious as the magistrate rightly pointed out; a custodial sentence was therefore called for. The accused is not a first offender we are satisfied that the sentence imposed is appropriate.

[12] It was for this reasons that the following order was made.

The appeal is dismissed.

N N Shivute

Judge

A SIBOLEKA

Judge

APPEARANCES

APPELLANT:	In Person c/o Grootfontein Prison
RESPONDENT:	Ms Ndlovu Of Office of the Prosecutor-General Windhoek.