



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 4/2016

In the matter between:

**SIMON KAMBINDU**  
**APPELLANT**

And

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Kambindu v State* (CA 4-2016) [2016] NAHCMD 256 (9 September 2016)

**Coram:** SIBOLEKA J and USIKU J

**Heard:** 5 August 2016

**Delivered:** 9 September 2016

**Flynote:** Criminal Procedure – Appeal – Powers of Court of Appeal – Increase of sentence – Theft of motor vehicle – Sentence not competent – Sentence not conforming to minimum sentences provided for in terms of the Motor Vehicle Theft Amendment Act, 17 of 2004 – Sentence increased to 30 years imprisonment – Criminal Procedure Act 51 of 1977 s 304 (2) – Notice of appeal – Appellant failing to provide adequate reasons for late filling of notice

and failing to show that there are prospects of success on appeal –  
Condonation nevertheless granted to enable the court to hear argument on the  
merits – Sentence on 2<sup>nd</sup> count in compliance with the Motor Vehicle Theft  
Amendment Act 17 of 2004.

**Summary:** The appellant was convicted in the Regional Court sitting at  
Otjiwarongo on count 1: House breaking with intent to rob and robbery count  
3 Theft of motor vehicle. He was sentenced on the 26<sup>th</sup> September 2013 to a  
custodial sentence of 8 years imprisonment on the 1<sup>st</sup> count and to four years  
on the motor vehicle theft count. The sentences were ordered to run  
consecutively.

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### ORDER

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1. The appeal against conviction and sentence on count 1 is refused.
2. The appeal against conviction and sentence on count 3 is refused.
3. The sentence imposed on count 3 is set aside and substituted with the following.

Thirty (30) years imprisonment without an option of a fine. The sentence is  
antedated to 26 September 2013.

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### APPEAL JUDGMENT

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**USIKU J, (SIBOLEKA J CONCURRING)**

[1] The appellant was convicted of housebreaking with intent to rob and robbery as well as theft of a motor vehicle in the Regional Court at Otjiwarongo.

[2] The appellant was sentenced to 8 years imprisonment for the housebreaking with intent to rob and robbery, and 4 years imprisonment for theft of a motor vehicle. The sentence were ordered to run consecutively. The appellant now appeals against conviction and sentences. He appeared in person whilst Ms Moyo appeared for the respondent.

[3] It is important to note that the respondent had raised a point in *limine* that no good cause has been shown and that the appellant has no prospects of success on appeal. The respondent however went on to submit that due to the fact that the learned regional magistrate imposed an inappropriate sentence in relation to the Theft of Motor Vehicle conviction the court is imbued with the authority in terms of s 309 (3) of Act 51 of 1977 to intervene and correct such irregularity and should condone the late filing to consider the merits of the case in respect of both conviction and sentence.

[4] The appellant's grounds of appeal are stated as follows:

4.1 The learned magistrate erred in the law and or the facts in failing to find out that there is no evidence before Court that placed the appellant on the scene of crime.

4.2 That the *Court a quo* had seriously misdirected itself by concluding that the appellant was one of the assailants.

4.3 That the *Court a quo* erred in not rejecting the evidence of the photo plan or the alleged pointing out by the appellant.

4.4 That the learned magistrate erred in the law and/or on the facts alternatively misdirected herself in believing the story of accused 3 and 4.

4.5 The *Court a quo* erred in failing to make a negative inference of the failure of the investigating team to obtain a statement from the owner of the house where the briefcase was found inside the drain as his evidence could have corroborated the evidence of accused 3 or the appellant's evidence.

4.6 That the learned magistrate did not evaluate the evidence in totality and account for all probabilities, improbabilities and inconsistencies of the evidence of both parties.

[5] Ad sentence

The learned magistrate erred in the law and/or in the facts in failing to impose the same sentence for the same crimes.

[6] Though counsel for the respondent had argued in *limine* that the appellant did not comply with the Magistrates Court Rules 67(1). It is trite that the rules of court applies to both lay litigants, those represented by counsel and both must observe these rules.

[7] The law requires that the appellant explain that he has prospects of success on appeal. In my view there are no proper grounds of appeal. However, that notwithstanding, the court shall proceed to hear the appeal.

[8] From the evidence on record it is common cause that the complainant could not identify his assailants. He only indicated that they were two, one short and another tall. The complainant explained in detail how the assailants had bound him and tied both his hands and feet as they demanded his keys to the safe. They took his valuables inclusive firearms and ammunition as well as his motor vehicle, a Cressida. The items were later on recovered and were identified by the complainant as his properties.

[9] Apart from the complainant there were other witnesses who testified. The Scene of Crime officer Doeseb testified that he took photographs at the Scene of Crime as well as where the vehicle was found abandoned. He also took photographs of properties recovered in the bushes, and at a house in the drain. Mr

Doeseb also took photographs of the weapons recovered under a bridge a distance of 68.8 km outside Otjiwarongo. These items were pointed out by the suspects though he could not say with certainty which one of them.

[10] Mr Albert Kangoma a police officer stationed at Otjiwarongo was involved in the triacing of the complainant's motor vehicle after the incident was reported at the police station. He spotted the vehicle in the DRC location, gave chase but the vehicle did not stop. It drove off whereafter it bumped against an anthill as its occupants fled into the darkness. After the vehicle came to a standstill, a search was done and a pistol was found on the seat. They could not follow foot prints as it was too dark. Anther pistol was recovered a few metres away.

[11] The vehicle was recovered and taken to the police station the next day. Mr Doeseb testified that it was the appellant who made the pointing out of the firearm under the bridge at the T-junction of Waterberg and Okakarara. Mr Nicodemus a police officer stationed at Osire was the investigating officer. He confirmed the arrest of accused 3 in the vicinity where the vehicle was abandoned. They found items such as cd player, Hifi, a computer as well as other properties in the bush. These items were positively identified by the complainant as his properties. He also testified that accused 3 led the police to a house where he told them that appellant and accused 2 were sleeping. Upon arrival at the house they did not find the appellant neither accused 2 at the time. It was accused 3 who pointed out other items hidden in the drain at the said house explaining that the items where brought there by the appellant.

[12] Chief Inspector Marie who at the time was stationed at Otjiwarongo police station testified than she was in charge of the pointing out as the weapon was recovered under the bridge a distance of 68.8 km from Otjiwarongo on the Okakarara main road. It was the appellant who make the pointing outs. She had explained the legal rights to the appellant before he made the pointing out. The appellant pointed out a rifle underneath the bridge. Photos of the rifle as found were taken and the rifle was later on handed to the complainant after having verified it with

its licence. The police could not have recovered the rifle at a distance of 68.8 km from Otjiwarongo without being led to that place.

[13] Witnesses Savenge and Obert corroborate each other on how accused 3 was arrested and how the two pistols were recovered near the place where the vehicle was abandoned after it bumped an anthill and came to a standstill.

[14] Accused 3 testified under oath and implicated the appellant. He also confirmed his warning statement which he had given to the police after his arrest. He testified that the appellant resided at the same place with him. That piece of evidence was confirmed by Mr Xoagub. Furthermore, accused 4 also testified that the appellant had admitted to the robbery and did the pointing out of the rifle under the bridge. Whereas the appellant had denied knowledge of any relationship to any of the co-accused, accused 3 persisted that the appellant was his brother and that they were residing at the same house at the time. The house referred to was the same house where accused 3 had pointed out some properties hidden in the drain after his arrest.

[15] Accused 4 testified how he had passed by the appellant's house after having been informed by accused 2 that the appellant had been shot by the police, but could not find appellant at home. He only met accused 3 whom he left with to a place where he wanted to get his jacket which had been left by the appellant. There is no dispute that there was an exchange of fire with the assailants of the complainant after the police had chased after the stolen vehicle. It could therefore not have been a mere coincidence about the appellant having allegedly been shot by police and accused 3 fingering him as a person who had brought the properties belonging to the complainant and hiding them in the drain shortly after the incident was reported to the police. The items were recovered shortly after accused 3 and 4 had provided information regarding who had brought the properties at the house.

[16] Looking at the evidence in its totality I am of the considered view that the trial court was perfectly correct to find the appellant guilty on counts 1 and 3. The convictions were entirely justified.

[17] In the instant case, the complainant was robbed by armed assailants, his motor vehicle was used to carry the goods that they removed from the complainant's home as they left him bound on both hands and legs. The complainant testified that he was hit with a firearm as he tried to defend himself. He was told that if he were to scream he would be shot at. He was then forced to lay on his stomach as they tied him up with two ropes. He sustained several injuries as a result of the attack on him by the assailants.

[18] Before the hearing of the appeal this Court gave notice to the appellant that it would consider to increase the sentence on the second count in view of the penalty provisions of the Motor Vehicle Amendment Act 17 of 2004. He was invited to address the Court in that regard. The appellant said he understood the warning. He said he was wrongly convicted for what he did not do.

[19] Counsel for the respondent argued that since the sentence imposed on the second count was not competent, the situation must be corrected.

[20] The Motor Vehicle Theft Act, 12 of 1992 s 15 provides as follows:

(1) Any person who is convicted of an offence under this Act shall, subject to the provisions of ss 2, (4) and (5), be liable \_

(c) in the case of an offence referred to in s 2(a), notwithstanding anything to the contrary in any law contained \_

(i) On a first conviction, to imprisonment for a period of not less than ten years without an option of a fine: Provided that, where for the purpose of or in connection with the commission of such an offence violence or threat of violence is used, the penalty on any conviction shall be \_

(aa)...

(bb) where such violence or threat of violence involves a firearm or other dangerous weapon, imprisonment for a period of not less than thirty years without the option of a fine \_

Section 15(2) provides as follows:

If a Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than prescribed in paragraph (c) (d) or (e) of subsections (1) it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

[21] Apart from the appellant's personal circumstances that he has a girlfriend and two children, it was also placed on record that he was maintaining his girlfriend and the kids of this sister in law because they are residing with him. That the appellant was employed at the time of the commission of these offences earning about N\$2000-00 per month. He had been incarcerated for eight months prior to being sentenced. There was no reference made to any substantial or compelling circumstances in favour of the appellant.

[22] It is trite law that a Court of Appeal can only interfere with the discretion of the trial Court regarding sentence on very limited grounds, *vis* when the trial Court has not exercised its discretion judiciously or properly. This occurs when the trial Court has misdirected itself on facts material to sentencing. This will also be inferred where the trial Court acted unreasonably and it can be said that the sentence induces a sense of shock or there exist a striking disparity between the sentence this court would have passed or if the sentence appealed against appear to this court to be so disturbingly or inappropriate as to warrant interference by this court. It is my view that the sentence of 4 years imprisonment is disturbingly inappropriate when regard is had to the manner in which the complainant was attacked and his motor vehicle was stolen from him. The appellant attacked the complainant whilst wielding a firearm and inflicted injuries on his person.

[23] I am of the view that the trial court did not exercise its discretion at all or had exercised it improperly or unreasonably to entitle this court to interfere with the sentence imposed on the second count.

[24] In the result, the following order is made:

1. The conviction on count 1 and 3 are confirmed.
2. The sentence on count 1 is confirmed.



3. The sentence imposed on count 3 is set aside and substituted with the following.

Thirty (30) years imprisonment without an option of a fine. The sentence is antedated to 26 September 2013.

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D N USIKU  
Judge

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A SIBOLEKA  
Judge

#### APPEARANCES

APPELLANT: Mr Simon Kambindu  
Windhoek Central Prison: Inmate

RESPONDENT: Ms Moyo  
Office of the Prosecutor-General, Windhoek

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