

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPLICATION FOR LEAVE TO APPEAL

CASE NO: CA 4/2016

In the matter between:

SIMON KAMBINDU
APPLICANT

vs

THE STATE

RESPONDENT

Neutral citation: *Kambindu v S* (CA 4/2016) [2017] NAHCMD 116 (19 April 2017)

Coram: SIBOLEKA J and USIKU J

Heard on: 20 March 2017

Delivered on: 19 April 2017

Flynote: Criminal law: Leave to appeal – test – the applicant must satisfy the court that he has reasonable prospects of success should the application be granted. Original sentence not in accord with the penalty provision on the theft of motor vehicle Act 12 of 1999 – prescribed penalty legally warranted – Application dismissed.

Summary: Masked robbers broke into a 70 years old victim's house while he was watching television. They assaulted, made him lay on his stomach. They tied his hands backwards and with another rope they bound his legs. They stole firearms, money, goods and a sedan vehicle whereon they loaded the stolen property and fled the scene.

Held: The application for leave to appeal is dismissed.

ORDER

The application for leave to appeal is dismissed.

JUDGMENT

SIBOLEKA J (USIKU J concurring):

[1] This is an application for leave to appeal. The grounds for the application are as follows:

- a. Their Lordships erred in the law and/or on the facts alternatively misdirected themselves (sic) in increase the sentence of the Applicant.
- b. Their Lordships erred in the law and/or on the facts in finding that the

Court a quo had not used its discretion properly.

- c. Their Lordships erred in the law and/or on the facts in failing to remind themselves that the stolen vehicle was returned to the lawful owner.
- d. Their Lordships erred in the law and/or on the facts in failing to remind themselves that the sentence of year's imprisonment was appropriate.
- e. Their Lordships has (sic) misdirected themselves in increasing the sentence of the Appellant.
- f. Their Lordships erred in the law and/or on the facts in interfering with the decision of the Court a quo.

[2] The test in applications of this nature is that the applicant must satisfy the court that there are reasonable prospects of success on appeal should the application be granted. This is not the case in this matter.

[3] The applicant was accused one who together with three others were arraigned in the Regional Court, Otjiwarongo on the following charges:

Count 1: Housebreaking with intent to rob and robbery;

Count 2: Housebreaking with intent to steal and theft;

Count 3: Theft of motor vehicle; and

Count 4: Reckless or negligent driving.

[4] They all pleaded not guilty to all the above charges and after the trial the applicant was convicted on counts one and three. He was sentenced to eight years on count one and to four years on count three respectively. He appealed to this court against both conviction and sentence. His appeal was dismissed.

[5] During the proceedings of the dismissed appeal, this court acting in terms

of section 309(3) of the Criminal Procedure Act 51 of 1977 as amended; did on 27 June 2016 warn the applicant of the imminent increase of the sentence that was imposed on him in the Regional Magistrate Court. This warning was made in view of the fact that the sentence of four years that was imposed on him on count three was incompetent. The reason being that it was not in accord with the penalty provision set out in section 15(1)(i)(bb) of the Motor Vehicle Theft Act 12 of 1999.

[6] The applicant answered to say he understood the warning but he knew nothing about the case, meaning he was incorrectly convicted, while the guilty ones were set free.

[7] For the sake of clarity I will quote the penalty provision verbatim. Section 15(1) (i) (bb) reads as follows:

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

(i) On a first conviction, to ... imprisonment 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_*

(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*”. (My own emphasis)

[8] The trial court did not record or refer to any substantial or compelling circumstances in order to justify the startlingly lenient and incompetent sentence of four years as required by section 15(2) of the said Motor Vehicle Theft Act. It was for the above reasons that this court dismissed the applicant’s appeal against sentence. The sentence of four years was appropriately substituted with that of thirty (30) years imprisonment as provided for in the above penalty

provision. This sentence was antedated to 26 September 2013.

[9] On the appeal against conviction, the following is on record: The facts of the matter are briefly that a 70 year old male victim was watching television in the evening when two masked robbers broke into his house. One of them pointed a firearm at him. They started assaulting him. He was made to lay on his stomach. They tied his feet and bound both his hands at the back with another rope. His face was towards the floor. They stole firearms, a small safe, money and other property as well as his sedan vehicle on which they loaded the property and fled the scene.

[10] There is evidence under oath by the applicant's brother, accused three during the trial, that on the day of the incident the applicant told him he was going for a tournament at the farm with accused two. That same night between 02h00 and 03h00 he saw the applicant hiding goods in the drain of their residence. These were later retrieved by the police after it surfaced that they were stolen at the complainant's farm. The stolen vehicle was spotted resulting in a chase and firing of warning shots by the police. It was already dark, the robbers fled and left the vehicle after it hit an anthill. The applicant showed the police where he hid the complainant's firearms under the bridge.

[11] It was for this credible connection of the applicant to the two counts of housebreaking with intent to rob and robbery and the theft of a motor vehicle that this court also dismissed his appeal against conviction.

[12] It is crystal clear from the above that a firearm was used during the burglary and robbery at the complainant's residence. It is on this aspect that this court found the trial Court to have misdirected itself for failing to evoke the penalty provision set out in section 15(1)(i)(bb) of the Act.

[13] It therefore follows in my considered view that the applicant has no

prospects of success on appeal.

[9] In the result the application for leave to appeal is dismissed.

A M SIBOLEKA
Judge

D N USIKU
Judge

APPEARANCES

APPLICANT : In Person
Windhoek Central Prison

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