



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
APPEAL JUDGMENT**

Case no: CA 36/2016

In the matter between:

**ANNA THOMAS**

**APPELLANT**

and

**THE  
RESPONDENT**

**STATE**

**Neutral citation:** Thomas v S (CA 36/2016) [2017] NAHCMD 31 (10 February 2017)

**Coram:** LIEBENBERG J and USIKU J

**Heard:** 12 September 2016

**Delivered:** 10 February 2017

**Flynote:** Appeal against conviction and sentence - competent verdicts- accused charged with housebreaking with intent to commit an offence unknown to the state- accused convicted of house breaking with intent to Assault and assault with the intention to cause grievous bodily harm on the

first count and assault to cause grievous bodily harm on the third count- competent verdict in terms of section 262 (2) of Act 51 of 1977- On appeal verdict changed to housebreaking with intent to assault- appeal dismissed.

**Summary:** The Appellant was convicted on count one of the offence of House breaking with intent to commit a crime unknown to the State, and on count three Assault with intent to do Grievous Bodily Harm. She now appeals against the conviction and the sentence on both counts. Appeal is dismissed.

---

### ORDER

---

- (a) The appeal against conviction on count one is upheld, in that the appellant is convicted of the offence of housebreaking with intent to assault.
  - (b) The appeal against sentence on count one is dismissed
  - (c) The appeal against conviction and sentence on count three is dismissed.
- 

### APPEAL JUDGMENT

---

**USIKU J, (LIEBENBERG J concurring)**

[1] The appellant was charged with the crime of housebreaking with intent to commit a crime unknown to the state on the first count. The charge on the second count was withdrawn. She was further charged with assault with intent to do grievous bodily harm on the third count.

[2] She pleaded not guilty and after the trial she was convicted as charged on count one and three, whereafter she was sentenced to pay a fine of N\$3000 or in default 15 months imprisonment.

[3] On the third count, the appellant was fined N\$3500 or in default 20 month's imprisonment.

[4] She now appeals against the conviction and sentence on both counts.

[5] Her grounds of appeal are as follows:

#### **Ad Conviction**

- (a) The learned magistrate failed to keep a proper record of the proceedings in the trial court and thus rendered a deficient record in which certain portions of evidence given in court was not reflected and/or recorded.
- (b) The learned magistrate failed to have regard to the evidence of the defence witnesses who corroborated the appellant's alibi.

#### **Ad Sentence**

- (a) The sentence imposed by the trial court are excessively harsh in that they constitute a duplication of convictions.

[6] The crux of the appeal is that the appellant was wrongfully convicted, because the record of the proceedings did not properly reflect what had transpired in the course of the proceedings therefore, it could not be relied upon.

[7] Counsel for the appellant cited the case of *S v Haibeb*<sup>1</sup> in which the High Court emphasised the importance of keeping a proper record of the proceedings where it was stated:

'The manner in which the record in this particular matter was kept is not satisfactory at all and reflects poorly on the state of recording of the proceedings in our magistrate's courts and the administration of justice in this country. Certain words minuted by the magistrate are not comprehensible at all which makes one wonder whether the magistrate

---

<sup>1</sup> *S v Haibeb* 1993 NR 457 (HC) at 465.

herself understood the evidence presented and the manner in which she applied her mind to it when one looks at the way she recorded it. This situation where magistrates are allowed to preside over cases and record evidence so inaccurately need to be brought to the attention of the authorities immediately, as it may lead to guilty persons being acquitted for that reason alone.'

[8] On the other hand counsel for the respondent contended that a proper record of the proceedings was kept and the appeal could be considered as held in *S v Chebedi*<sup>2</sup>:

'...However, the requirement is that the record must be adequate for proper consideration of the appeal, not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event verbatim record is impossible.'

[9] From the record of the proceedings it is evident that the magistrate had recorded the proceedings by long hand. This court's view is that the record of the proceeding though in long hand, is comprehensible and adequate for proper consideration of the appeal, as all the relevant evidence necessary to make a decision is before court.

[10] The state led the evidence of the complainant and two other witnesses namely Vistorine Namwandi and Ignatius Neumbo. The evidence of the complainant was that she was assaulted by the appellant after the latter had broken into her room on the night of the 16 May 2016 at about 23h40 as she laid with her boyfriend one Penda. She further testified that after she was assaulted, she was attended to by a doctor and a medical report was compiled which was presented before court during the trial and forms part of the evidence.

[11] Ms Namwandi testified that she took photos of the complainant after the assault on the latter on the 19 May 2016 on/or about 02h00 am. She also took pictures of the broken window of the complainant's room.

---

<sup>2</sup> S v Chebedi 2005 SACR 415.

[12] Mr Ignatuis a police officer at the Otavi police station confirmed to have received photos from the complainant who informed him that she was assaulted. He then compiled a photo plan. He arrested the accused.

[13] The medical report reflects that the complainant appeared to be in shock, and had injuries on the left eye, as well as a small cut wound on the left cheek. Her nose was swollen as well as her face. This evidence was not disputed by the appellant. In fact the appellant only denied to have assaulted the complainant, claiming to have been at a boxing event on the night of the alleged incident. The two state witnesses, that being Vistorine Namwandi and Ignatius Neumbo corroborated the complainant's evidence with regard to the assault. The photos depicting the injuries sustained by the complainant clearly show the extent of injuries the complainant had sustained as well as the photos of a broken window where the appellant had gained entry to the room. It would therefore not be correct to say that the charges against the appellant were not proven beyond reasonable doubt.

[15] The appellant was convicted in the court a quo with the offence of housebreaking with intent to commit a crime unknown to the state. Section 262 (2) of the Criminal Procedure Act 51 of 1977, provides: "If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown but the offence of housebreaking with intent to commit a specific offence, the accused may be found guilty of the offence so proved."

[16] Thus section 262 (2) provides for a competent verdict that may be imposed on a charge of housebreaking with intent to commit an offence unknown to the state, where the accused's intent when entering, becomes known during the trial, or is admitted by the accused. He or she may then only be convicted of housebreaking with the intent proven.

[17] In the instant case it was established that Penda was the father of the appellant's two children. The complainant was in her room, with Penda, though denied by him. It could be inferred from these facts that the appellant's intention was

to assault the complainant who was with Penda, the father of her two children. The appellant's intent was to assault the complainant. Penda's version that he was not present in the complainant's room could not be reasonably possibly true and the trial court correctly dismissed it as a lie. The evidence of the defence witnesses that they were together with the appellant and that as such the latter could not have committed the offence as each witness seemed to have been with the appellant at the same place without making reference to the time specifically, should be rejected. The appellant's version was a mere denial of the charges which was found to be false beyond a reasonable doubt. I have no doubt in my mind that the state proved the guilt of the appellant beyond reasonable doubt.

[18] With regard to sentence imposed by the court a quo, it is trite that the court of appeal can only interfere with the discretion of the trial court regarding sentence on very limited ground. In *S v Pillay*<sup>3</sup> it was said:

'The essential inquiry in an appeal against sentence, however, is not whether the sentence was wrong or right, but whether the court in imposing it exercised its discretion properly. A mere misdirection is not by itself sufficient to entitle the appeal court to interfere with the sentence. It must be of such a nature, degree, or seriousness that it shows directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably.'

[19] This Court is of the view that the trial court had exercised its discretion properly and reasonably under the circumstances.

[20] In the circumstances I make the following order:

- (a) The appeal against conviction on count one is upheld, in that the appellant is convicted of the offence of housebreaking with intent to assault.
  
- (b) The appeal against sentence on count one is dismissed.

---

<sup>3</sup> *S v Pillay* 1977 2 SA 531 at 535 D-G- U.

(c) The appeal against conviction and sentence on count three is dismissed.

-----  
DN USIKU  
Judge

-----  
J C LIEBENBERG  
Judge

**APPEARANCES**

**APPELLANT:                    Ms L P Shipila**

**Directorate of legal Aid, Windhoek**

**RESPONDENT:**

**Mr S Nduna**

**Of the Office of the Prosecutor-General, Windhoek**