REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CRI-APP-CAL 2018/00020

In the matter between:

DANIEL GABRIEL **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Gabriel v S* (HC-MD-CRI-APP-CAL 2018/00020) [2018] NAHCMD 404 (7 December 2018)

Coram: NDAUENDAPO J *et* LIEBENBERG J
Heard: **12 November 2018**
Delivered: **07 December2018**

Flynote: Criminal Procedure – Appeal against sentence – Grounds of appeal – Court *a quo* failed to consider personal circumstances and overemphasised seriousness and prevalence of the offence – In addition court failed to take into account period appellant spent in custody – Court was alive to principles applicable to sentencing – We live in a dangerous society

which is becoming increasingly lawless – Duty of courts is to send out a message that it would protect the public by imposing long terms of imprisonment – Sentence imposed not 'startlingly inappropriate and inducing sense of shock' – Sentence consistent with sentences imposed in similar cases – Pre-trial incarceration – Usually leads to a reduction in sentence – Must be considered in relation to all other facts.

Summary: The appellant was convicted for housebreaking with intent to rob and robbery (with aggravating circumstances). He was sentenced to 12 years' imprisonment, of which 2 years' imprisonment were suspended for 5 years on condition of good behaviour. Dissatisfied, he noted an appeal on grounds that the court did not take into account his personal circumstances and that it overemphasised the seriousness and prevalence of the offence. Lastly, the sentence was startlingly inappropriate and induces a sense of shock.

Held, that, the court *a quo* was alive to the principles applicable to sentence, its application to the facts, and circumstances of the case. Furthermore, regard was had to the applicable objectives of punishment.

Held, further that, there is no merit in the appellant's assertion that the court below disregarded his personal circumstances, as these were considered and discussed.

Held, further that, we live in a society which is becoming increasingly lawless and where dangerous weapons are being used on innocent people falling prey to unscrupulous criminals. The duty of our courts is clear, to send out a message that it would protect the public in the only way possible for them, namely by imposing long terms of imprisonment.

Held, further that, the period of pre-trial incarceration was a fact the trial court took into consideration. Although this would usually lead to a reduction in sentence, it must be considered in relation to all the other facts. In this instance, the trial court sufficiently catered for a reduction in sentence by suspending part of the sentence.

ORDER

The appeal against sentence is dismissed.

JUDGMENT

LIEBENBERG J (NDAUENDAPO J concurring):

[1] The appellant appeared in the Swakopmund Regional Court on a charge of housebreaking with intent to rob and robbery (with aggravating circumstances), to which he pleaded guilty. He was convicted accordingly and sentenced to 12 years' imprisonment, of which 2 years' imprisonment suspended for 5 years on condition of good behaviour. The appeal lies against sentence only.

[2] In the Notice of Appeal filed by the appellant he enumerated numerous grounds according to which the court *a quo* erred. In summary, these are: By giving insufficient weight to the appellant's personal circumstances; that the seriousness and prevalence of the offence were over-emphasised; that appellant is a suitable candidate for reform and pleaded guilty. Also that the court failed to take into account the period the appellant spent in custody awaiting trial and lastly, that the sentence is shockingly inappropriate

[3] At the appeal hearing the appellant appeared in person while Ms *Jacobs* represented the respondent.

[4] From the magistrate's reasons on sentence it is evident that she was alive to the principles applicable to sentence, its application to the facts, and circumstances of the case. Regard was further had to the applicable

objectives of punishment and that it was required of the court to strike a balance between these (often) competing interests, though equal weight need not be given to each factor and that one may be emphasised at the expense of others.

[5] In dealing with the appellant's personal circumstances the court identified his youthfulness, he being a first offender who pleaded guilty and that he was remorseful for his wrongdoing. Regard was also had to the appellant having been employed at the time of committing the crime, and that he was in custody awaiting trial pending the finalisation of the matter.

[6] When considering the offence and the circumstances under which it was committed, the court was mindful of the fact that the complainant and her young children were asleep at home when pounced on by three men who had broken into her home for purposes of robbing her of her possessions. The perpetrators were armed with knives which they wielded while threatening to inflict grievous bodily harm to the complainant and her children. They were tied up and gagged where after they ransacked the house. Cash in the amount of N$20 000, one laptop with accessories, two cellphones and several pieces of jewellery, totalling N$164 000, were looted from the house. It was submitted that the complainant's property was recovered, a fact the court below had also taken into account.

[7] Turning to the offence and the circumstances under which it was committed, the court described the attack as 'brutal and barbaric' which was directed at the vulnerable of society. Whilst recognising that no physical injuries were inflicted on the victims, the court reasoned that the psychological harm caused to the victims will, in all likelihood, be permanent. Moreover where the complainant, whilst tied up, did not know whether her other children in the house were safe. Despite being in their own home where they were supposed to be safe, they came under attack whilst asleep. It was further noted that the offence where people are being attacked and robbed in these circumstances was on the increase and prevalent in the district, and that sufficient weight ought to be accorded to the interests of society. Mention was

made about an earlier protest where the community demonstrated their displeasure with the current situation.

[8] It is a well-settled rule of practice that the court of appeal should be slow to overturn the sentence of the trial court as punishment pre-eminently falls within the discretion of that court. The court hearing the appeal should be careful not to erode such discretion and should only interfere if satisfied that the trial court's discretion was not exercised judiciously and properly.[1] Another test as regards sentence is whether the sentence imposed is 'startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by a court of appeal'.[2]

[9] When applying the foresaid principles to the present facts, it is evident that the court *a quo* was guided by those principles applicable to sentence and that no misdirection was committed on the facts or the law. Neither was it complained of that the proceedings were irregular. It is mainly contended that the court failed to take account or gave insufficient weight to the appellant's personal circumstances, while at the same time over-emphasising the seriousness and prevalence of the crime and the interests of society.

[10] From a reading of the judgment on sentence, it is evident that there is no merit in the appellant's bold assertion that the court below completely disregarded his personal circumstances, as these were considered and weighed by the court. In deciding whether it was accorded sufficient weight, the appellant's personal circumstances are considered against the seriousness of the offence and the circumstances under which it was committed, as well as the interests of the society.

[11] The trial court was correct in its reasoning when finding that essentially two crimes were committed namely, housebreaking with the intent to rob, and robbery. The crimes were premeditated and planned as the appellant and his

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[1] *S v Ndikwetepo and Others,* 1993 NR 319 (SC).

[2] *S v Tjiho,* 1991 NR 361 (HC).

co-accused targeted houses where the alarms had not been activated. They had armed themselves were knives which shows that they were willing to use force and dangerous weapons to overcome any resistance they might encounter. They pounced on their prey at night in circumstances where they were least expected and wielded the knives at the victims while threatening to kill them. Though the tying up and muzzling of the complainant and her child did not cause them physical injury, the magistrate's reasoning that it would have left a lifelong scar psychologically, cannot be faulted. It would in my view be unrealistic to suggest that no psychological harm was done to the victims simply because there are no evidence to that effect. To quantify its duration and degree of intensity in respect of each person would obviously not be possible without appropriate evidence, but it does not mean that one should approach the question of sentence on the basis that there was no psychological harm done to the victims.[3] In my view, the psychological impact of the horrific ordeal they experienced is more likely to have a long-term effect on them as a family. This is indeed a factor the court was entitled to take into account and give significant weight thereto.

[12] At the time the offence was committed, the appellant was permanently employed from which it could be inferred that he had acted out of greed. That is amplified by the fact that only valuable items were taken that would sell with reasonable ease. The high value of the goods is another aggravating factor, though all were recovered; a fact the court took into consideration. In this context I associate myself with the remarks made in *S v Immanuel Paulus*[4] where Maritz J (as he then was) stated the following:

'…robbery is indeed a serious crime. The perpetrators prey on the innocent and industrious in society. Like parasites of society they forcibly satisfy their needs and greed by living off the hard-earned income and assets of others. Like cowards, they, more often than not, use dangerous weapons to threaten or assault their unarmed and unsuspecting victims into submission. All too frequently the result is fatal, especially when the victim resists or the robber fears later identification. Profiting by their violence and dishonesty at the expense of those who peacefully and

[3] *S v Mahomotsa,* 2002 (2) SACR 435 (SCA).
[4] CA No. 114/1998 (unreported) delivered on 28.03.2000.

honestly endeavour to improve their quality of life as contributing members of society, robbers strike at the heart of the work ethics that characterise an industrious society. Our society, therefore, has a peculiar interest that its courts should combat this crime by imposing sentences that do not only adequately address the retributive, preventative and rehabilitative objectives of punishment to be meted out to such criminals, but that will also convey to prospective robbers society's condemnation of the crime and its determination to protect itself in no uncertain terms'.

[13] In this day and age it seems no longer sufficient for innocent people to barricade themselves behind bars in their homes in order to protect themselves and their property against scavenging criminals who operate under cover of darkness. The appellant and co-perpetrators were not deterred by the fact that, in all likelihood, the occupants of the house were present and asleep and, having armed themselves with weapons, would readily overcome any resistance encountered. We live in a society which is becoming increasingly lawless and where dangerous weapons are being used on innocent people falling prey to unscrupulous criminals. The duty of our courts is clear, to send out a message that it would protect the public in the only way possible for them, namely by imposing long terms of imprisonment. That would effectively remove such criminals from our society and, hopefully, would serve as deterrent to other likeminded criminals that it is not worth taking the risk.

[14] In view thereof, it is not uncommon to find lengthy sentences of imprisonment being imposed on accused who make themselves guilty of robbery. Moreover, where the commission of the offence, as in the present instance, is preceded by the unlawful breaking into the complainant's home, while aggravating circumstances are present.

[15] The trial court in essence took all these factors into account and weighed it against the appellant's interests before coming to the conclusion that a lengthy custodial sentence is inevitable. Regard was in particular had to the appellant being a first offender; that he pleaded guilty and was in pre-trial incarceration for 19 months. Though these factors usually weigh heavily in favour of the offender, in each instance it still has to be considered against the

interests of society and the aggravating circumstances present. Despite those facts mentioned favourable to the appellant, this is an instance where the appellant's personal circumstances are substantially outweighed by the seriousness of the offence and the interests of society. We are furthermore unable to find any misdirection by the trial court in its evaluation of those factors relevant to sentence, and the weight accorded to each. Where the appeal hinges on grounds that the court misdirected itself in that regard, the allegations are without merit.

[16] What remains to be decided is whether the sentence imposed is startlingly inappropriate to the extent that it induces a sense of shock.

[17] There can be no doubt that, as far as it concerns the objectives of punishment, prevention, deterrence and retribution must come to the fore and that rehabilitation becomes a lesser consideration. This objective would mainly be achieved by the imposition of a lengthy custodial sentence. It then begs the question, what sentence would, in the present circumstances, be an appropriate sentence?

[18] In *S v Ndikwetepo and Others* (*supra*) the Supreme Court endorsed the dictum stated in *S v Ndhlovu and Another*[5] where the court said that 'In deciding whether a sentence is manifestly excessive, this Court must be guided mainly by the sentences sanctioned or imposed by this Court in similar cases, due allowance being made, of course, for factual differences'. The circumstances in one of the counts in *Ndikwetepo* is similar to the present in that the occupants were surprised in their home and forced into submission by the five appellants who wielded a firearm, sticks and pangas. After tying their hands, their home was ransacked. Though the one victim sustained a fractured arm, the assaults perpetrated were not of serious nature. The sentences imposed on charges of robbery with aggravating circumstances ranged between 12 and 18 years' imprisonment, depending on the personal circumstances of the appellants. I pause to observe that sentences of

[5] 1971 (1) SA 27 (RA).

comparable severity have been imposed in similar cases and has now become the norm in this jurisdiction.

[19] Turning to the present instance and viewed against the background of the manner in which the offence was committed, we are unable to find that the sentence of 12 years' imprisonment imposed is so manifestly excessive that it induces a sense of shock. In the light thereof, we are satisfied that the trial court, in sentencing the appellant, exercised its discretion properly and judiciously and there is no basis in law for this court to interfere with the sentence meted out.

[20] Lastly, in respect of the appellant's pre-trial incarceration, this would usually lead to a reduction in sentence. Though this should not be viewed in isolation but in relation to all the other facts, the court *a quo*, in our view, sufficiently catered for a reduction in the sentence by suspending two years thereof. This ground is equally found to be without merit.

[21] In the result, the appeal against sentence is dismissed.

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JC LIEBENBERG

JUDGE

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GN NDAUENDAPO

JUDGE

APPEARANCES:

APPELLANT	In person.
RESPONDENT	S L Jacobs Of the Office of the Prosecutor-General, Windhoek.