



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

HC-MD-CRI-APP-CAL-2018/00073

In the matter between:

MAXWELL NDANINGINA
APPELLANT

v

THE
RESPONDENT

STATE

Neutral citation: *Ndaningina v S* (HC-MD-CRI-APP-CAL-2018/00073) [2019]
NAHCMD 126 (29 April 2019)

Coram: LIEBENBERG J and USIKU J

Heard: 5 April 2019

Delivered: 29 April 2019

Flynote: Criminal Procedure – Evidence of a single witness – Need for corroboration – Proof must be beyond reasonable doubt.

Summary: The appellant was jointly charged with a co-accused with a crime of theft. On the second count he was charged with a crime of possession of suspected stolen property. Appellant and co-accused pleaded not guilty to both charges but after a trial he was found guilty and convicted on a charge of theft whereafter he was sentenced to 24 months' imprisonment.

Aggrieved by his conviction and sentence the appellant lodged an appeal against conviction.

Held: That there was an acceptable explanation for the late filing of the appeal and prospects of success on appeal were shown. Condonation for the late filing of the appeal granted.

ORDER

- (1) Application for condonation is granted.
 - (2) The appeal against conviction is upheld.
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APPEAL JUDGMENT

USIKU J, (LIEBENBERG J concurring)

[1] This is an appeal against conviction from the Magistrate Court, Katutura, Windhoek. The appellant stood charged with the crime of theft on the first count and possession of suspected stolen property on the second count. He pleaded not guilty

to both charges but after a trial was found guilty and convicted on a charge of theft. Appellant was jointly charged with a co-accused.

[2] The appellant was subsequently sentenced to three years' imprisonment. He now appeals against his conviction.

[3] At the inception of the appeal Mr Kanyemba appearing on behalf of the respondent, raised a point in *limine*, that the appellant filed his Notice of Appeal out of time contrary to the provisions of the Magistrate's Court Rule 67 (1). The said rule provides that a Notice of Appeal must be drawn up and filed with the Clerk of Court within 14 days of the date of such conviction, sentence or order.

[4] Furthermore, that the appellant in his application for condonation for the late filing of his Notice of Appeal did not explain the delay except that it was caused by him waiting for his family who offered to assist him in securing funds to acquire legal representation on his behalf.

[5] Mr Siyomunji, appearing on behalf of the appellant, conceded that the notice of appeal was filed six months out of time. However, he requested the Court to condone the late filing of the Notice of Appeal due to the reasons that the appellant was a laymen, and had conducted his own defence during the trial in the *court a quo*. He was incarcerated after his conviction and sentence and could not expediently exercise his rights as a prisoner. Further that the appellant have reasonable prospects of success on appeal.

[6] The two distinctive requirements for condonation are:

(a) The adequacy of the explanation, and

(b) That the appellant would need to convince the court that he has prospects of success in his appeal against conviction.

[7] When considering the point raised in *limine* by the respondent, regard should be had to the fact that the appellant herein acted in person during the proceedings in

the trial court. Furthermore, that being a lay person the court of appeal should have some understanding of the appellant's circumstances and show some leniency as regard to the late filing of the Notice of Appeal. (*S v Ashimbanga*).¹

'In my view the matter should be approached with some leniency bearing in mind that the appellant is a lay person drawing up a notice of appeal while serving a custodial sentence.'

[8] I share the same view above and find it applicable in the instant case. The appellant herein applied for condonation for the late filing of his Notice of Appeal against his conviction, albeit late. It is my considered view that the reasons for the delay and the period between the date of sentence and the filing of the Notice of Appeal have been fully and sufficiently explained. The delay by the appellant therefore cannot be said to be unreasonable under the circumstances.

[9] Furthermore, whereas the issue of the delay is not the end of the matter, there is also a requirement that, in order to succeed in the condonation application, the appellant must satisfy the Court that he has prospects of success on appeal.

[10] In the Notice of Appeal the appellant raised the following grounds:

Ad Conviction

- (1) That the learned magistrate erred in law and/or fact by not considering that the appellant was searched by the police and that he was not found in possession of the stolen property.
- (2) That the learned magistrate erred in law and/or fact by not considering that a certain Amadhila lileka is the one who was found in possession of two batteries as well as four stolen solar panels.
- (3) That the learned magistrate erred in law and/or fact by not considering that no money was found in possession of the appellant.

¹ 2014 (1) NR 242 (HC) at paragraphs 4-5.

- (4) That the learned magistrate erred in law and/or fact by disregarding the version of the appellant.
- (5) That the learned magistrate erred in law and/or fact by concluding that the state had proven its case beyond reasonable doubts.

[11] The issue therefore this Court has to decide is whether the trial court failed to apply the cautionary rule to the evidence of the investigating officer who was a single witness. Secondly whether or not the Court erred in accepting his evidence which was not corroborated by any other evidence and, ultimately, whether it erred in convicting the appellant on a charge of theft based on such evidence.

[12] Briefly the evidence led by the State is as follows:

The investigating officer Fillemon Nuuyoma testified that on the 28th July 2016 he received information about two male persons selling two solar panels in a silver bakkie. He drove to Lucia street in Greenwell Matongo and found the appellant and his co-accused standing next to a Toyota vehicle. He approached the appellant and his co-accused and requested to search their car. Upon search nothing was found in their car. He went on to search another car belonging to one Amadhila lileka where he found two batteries and four solar panels on the back seat.

[13] When he questioned Amadhila lileka about the batteries and solar panels, the latter pointed to the appellant and co-accused as the sellers. Upon further search the appellant was not found with any money. However N\$3800 was found on the appellant's co-accused. In the meantime a text message came through the co-accused's cell phone inquiring whether the panels had been sold. The appellant was arrested and charged.

[14] In substantiating his heads of arguments, counsel for the appellant repeated the grounds of appeal in that the trial court erred in convicting him as the state had not proved beyond reasonable doubt that he stole the two batteries and four solar panels. He contended that nothing was found on the appellant upon search.

[15] It is not in dispute that, on the date of the alleged arrest the appellant was in the company of his co-accused and that a search was conducted on them by the investigating officer.

[16] Appellant denied to have stolen the four panels and the two batteries. The appellant's counsel submitted further that for a conviction to follow upon the evidence of a single witness such evidence must be corroborated. It is common cause that the state did not call Amadhila lileka who claimed to have bought the four solar panels and the two batteries from the appellant and co-accused.

[17] The fundamental principle of our law is that in criminal trials, the prosecution has a duty to prove the guilt of an accused beyond reasonable doubt (*S v Van den Berg*).²

[18] It is further common cause that the first state witness, Mr Keeya from the security company who identified the stolen batteries and solar panels, could not link the appellant to the commission of the crime. The investigating officer in this case, was a single witness as far as the commission of the offence is concerned. Thus the trial court had to treat his evidence with caution.

[19] In convicting the appellant the trial court relied on the evidence of a single witness, which was not corroborated by any other credible evidence. The appellants' version was reasonably possibly true given the fact that neither the stolen properties were found in his vehicle upon search. He was also not found with any money on his person when a search was conducted. Thus, there was no evidence before the court *a quo* linking the appellant with the offences charged except for the hearsay evidence of Amadhila lileka.

[20] It is trite that no *onus* rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless satisfied, not only that the explanation is improbable, but also that beyond any reasonable doubt, it is false. If

² 1996 (1) SACR 19 (Nm).

there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal (*S v Shaanika*).³

[21] I find that the trial court misdirected itself when it accepted the uncorroborated evidence of a single witness.

[22] Having regard to the above mentioned reasons, I make the following orders.

- (1) Application for condonation is granted.
- (2) The appeal against conviction is upheld.

D N USIKU
Judge

J C LIEBENBERG
Judge

APPEARANCES:

³ 1999 NR 247 (HC) at 252G.

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RESPONDENT: Mr Kanyemba
Office of the Prosecutor-General