

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CR No: 21/2019

In the matter between:

THE STATE

v

EDUARDO FABIAN ENGELBRECHT

ACCUSED

HIGH COURT MD REVIEW CASE NO 140/2019

Neutral citation: S v Engelbrecht (CR 21/2019) [2019] NAHCMD 62 (22 March 2019)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 22 March 2019

Flynote: Criminal review - Sentence - Previous convictions - Aggravating factor – Other factors also to be considered - Nature of previous convictions as well as seriousness of present crime - Circumstances of each particular case taken into account.

ORDER

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following: The accused is sentenced to a period of two years' imprisonment, wholly suspended for five years on condition that the accused is not convicted of the offence of housebreaking with intent to steal or theft, committed during the period of suspension.
3. The sentence is antedated to 13 December 2018.

JUDGMENT

LIEBENBERG J: (concurring SHIVUTE J)

[1] The accused appeared in the magistrate's court for the district of Luderitz on a charge of housebreaking with intent to steal and theft of one pillow valued at N\$70.00. He pleaded not guilty but after evidence was heard he was convicted as charged and sentenced to five years' imprisonment, wholly suspended on condition of good conduct. The conviction is in accordance with justice and will be confirmed.

[2] When the matter came before me on review I directed a query to the presiding magistrate questioning the relation between the offence committed and the accused's

blameworthiness, notwithstanding two previous convictions of theft proved against the accused. Unfortunately the magistrate misread the query addressed to him and in his reply defended the conviction, arguing that the State presented reliable evidence. It was further submitted that despite the low value of the property stolen, the offence is very serious. Regard was particularly had to the accused's previous convictions which, like the present offence, contained the element of dishonesty. The magistrate reasoned that a suspended sentence of five years' imprisonment would deter the accused from re-offending.

[3] From a reading of the records of previous convictions submitted by the State, it is evident that in respect of the second conviction and sentence, dated 25 October 2016, the court should not have accepted it as a second conviction because the two convictions were only one day apart i.e. 24 October 2016. This clearly suggests that the second offence was committed *before* the accused was sentenced on the first case. On each case the accused was sentenced to a fine of N\$500, alternatively two months' imprisonment.

[4] This court in the appeal matter of *Paulus v The State*¹ on the question of the weight to be accorded to previous convictions at sentencing, stated the following at par 7:

[7] It is settled law that previous convictions are invariably regarded as aggravating factors and the weight to be accorded thereto by the sentencer will largely depend on the nature and relevance thereof to the present offence; the number of previous convictions and the time laps in between. Though previous convictions would in appropriate cases lead to the imposition of a heavier sentence, such sentence should still be reasonable in relation to the seriousness of the offence under consideration and the circumstances under which it was committed (*S v Stuurman* 2005 NR 396 (HC); *S v Muggel* 1998 (2) SACR 414 (C) at 419d-f). Punishment should fit the crime and where it may be justifiable to impose escalating sentences on a repeat offender, there are boundaries to the extent to which sentences may be increased when dealing with petty crimes. It has also been said that the accused must be punished for the present crime committed and not for his previous convictions for which he had already been punished (*S v Baartman* 1997 (1) SACR 304 (E)).' (Emphasis provided)

¹ (CA 40/2015) [2015] NAHCMD 211 (11 September 2015).

[5] Though there can be little doubt that the offence of housebreaking with intent to steal and theft is serious, the court in this instance clearly over emphasised the nature and extent of the offence committed. After force was used to open a window of one of the guest rooms at a pub, the accused stole one continental pillow which was subsequently recovered. What is also evident from the sentence imposed is that considerable weight was given to the accused's previous convictions in aggravation of sentence.

[6] While sentence pre-eminently lies with the trial court, it is settled law that the court must exercise its discretion in accordance with judicial principles. When applying the principles set out in *S v Tjiho*² I am satisfied that the court *a quo* misdirected itself on the application of the law by according too much weight to the accused's criminal record, resulting in a distorted sentence which is startlingly inappropriate and induces a sense of shock. Though a deterrent sentence is called for, a sentence of five years' imprisonment – even when suspended *in toto* – is excessive and unjustified in the circumstances of the case. Accordingly, the sentence cannot be permitted to stand.

[7] In the result, it is ordered:

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following: The accused is sentenced to a period of two years' imprisonment, wholly suspended for five years on condition that the accused is not convicted of the offence of housebreaking with intent to steal or theft, committed during the period of suspension.
3. The sentence is antedated to 13 December 2018.

² 1991 NR 361 (HC) at 362A-B.

J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE