"Special Interest"

CASE NO.: CA 35/2010

IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

BERNHARD NANGOLO **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 05 March 2012
Delivered on: 09 March 2012

APPEAL JUDGMENT

LIEBENBERG, J.: [1] Appellant, together with three other accused persons, all unrepresented, appeared in the Ondangwa Magistrate's Court on

a charge of housebreaking with intent to steal and theft. After evidence was led the appellant was convicted as charged whilst his co-accused were acquitted. Appellant was sentenced to four years' imprisonment of which one year is suspended on the usual conditions. The appeal lies against both the conviction and sentence.

[2] Ms *Horn* represents the appellant before us *amicus curiae* and her assistance to the Court is appreciated. Mr *Wamambo* appears for the respondent.

[3] As a result of a defective notice of appeal initially filed by the appellant, his counsel has decided to withdraw the appeal and instead, to file a new notice of appeal in which proper grounds on which the appeal is founded are set out. Simultaneously, condonation is sought for the late filing and non-compliance with the Magistrates' Court Rules (Rule 67 (1)). In a substantive application the appellant advances reasons for noting the appeal out of time; which, in the circumstances, I consider to be satisfactory. Respondent opposes the application only in as far as it concerns the prospects of success on appeal; which it contends, are none. In order to decide whether or not there are indeed no prospects of success on appeal, counsel was invited to argue the appeal on the merits in respect of the conviction and sentence.

[4] The appeal, as regards conviction, is based on the following grounds (summarised):

- That the trial court erred by finding that the appellant unlawfully and intentionally broke into and entered a building or structure with the intention of committing a crime;
- That the magistrate erred by failing to adduce or request fingerprint evidence on the locks and/or doors of the house where the break in took place, or from the retrieved stolen property.

As regards sentence the following grounds are raised:

- That the magistrate erred by not taking the appellant's personal circumstances into consideration, alternatively, giving insufficient weight thereto;
- The seriousness of the offence and the interests of society were over-emphasised; and lastly,
- The sentence induces a sense of shock and is so unreasonable that no reasonable court would have imposed it.

[5] On 22 December 2008 the complainant received a phone call from a colleague and house mate, Edward Mutilifa, to the effect that their house at Oshigambo, in the district of Ondangwa, had been burgled. Upon his arrival the complainant found that access was gained into the house and his room, by breaking the door locks. A fridge, home theatre system, a fan and an iron with a total value of N$9 170 were found to be missing from his room. The locks on the doors of four of the five rooms inside the house were damaged.

During January 2009 it was brought to the attention of the complainants by the police that most of the stolen property was recovered.

[6] Edward Mutilifa confirmed that he, during the December school holidays, returned to their home and found it to be broken into, whereafter he informed the complainant. Shortly thereafter he was called by the police and informed that items similar to what has been reported stolen, were found at a certain Nangolo's house. He accompanied the police there and found, wrapped in blanket(s), a fridge, a home theatre system, a hi-fi, two fans, a kettle and cassettes which he identified as items stolen from their house from different housemates. The house of Nangolo is situated approximately 700 metres away from the school premises where the complainants reside. Mr Mutilifa knew the appellant prior to this incident; also that he resided in the Nangolo homestead where the stolen items were found. This evidence was left unchallenged.

[7] Michael Ayonga's room was also broken into, from where a Samsung hi-fi, a fan and an electric cord, all valued at N$2 420 were stolen and which he subsequently recovered from the police. He also confirmed the evidence that appellant was living with Nangolo and that the house is closely situated to the school premises where they reside.

[8] Sergeant Johannes Shigwedha is the investigating officer and his investigation led him to the house where the appellant was residing with his mother, Frieda Paulus. Appellant, however, was not present at the time.

Sergeant Shigwedha interrogated a certain Kalungula, a young boy, whereafter he informed him and a lady present by the name of Merjam Nakambonde, that he wanted access to a store room on the premises. The store room was locked with a chain and padlock and when the key could not be found, it was broken and they entered. Inside, the items mentioned earlier, were recovered and after it was identified as the property of Mr Nanyemba, it was seized by the police. Subsequently thereto, on the 6th of January 2009, he received a report that the appellant had returned home; and when questioned about the recovered items found in his possession, appellant explained that it had been brought there by his former co-accused, no's 2 and 3, and that he was just keeping it for the second accused who came with it from Walvis Bay on 24 December 2008. The only involvement of accused no 4 was that he assisted the appellant carry the goods inside; whilst accused no's 2 and 3 disputed any involvement alleged by the appellant.

[9] Appellant testified in his defence and was adamant that he was merely the keeper of the goods which were brought there by his co-accused and that he had not known it to be stolen. He also called Ms Nakambonde as a witness, but her evidence does not add value to his version and merely confirms the evidence of Sergeant Shigwedha pertaining to the finding of the stolen goods in the store room. She had no knowledge as to how the goods came into the store room. Upon her questioning the appellant about the goods, he gave the same explanation about him keeping it for his friends.

[10] Second accused testified in his defence and denied any involvement on his or third accused's part in the commission of the offence. He went on to say that during the investigation the appellant informed Sergeant Shigwdha that they (second and third accused) were not involved. This was also confirmed by Sergeant Shigwedha during his testimony.

[11] The trial court in the end convicted only the appellant and in its *ex tempore* judgment did not furnish any reasons for doing so. In response to the grounds raised in the notice of appeal against conviction, the learned magistrate states that the appellant's defence is inconceivable, his explanation not being reasonably true; and that the court relied on the doctrine of recent possession to conclude that the appellant committed the offence. In the magistrate's view, the conviction is supported by the evidence.

[12] Ms *Horn,* on behalf of the appellant, submitted in the light of the Court's *dictum* enunciated in *S v Van den Berg*[1]*,* that the magistrate's application of the 'doctrine of recent possession' to the present facts, is unconstitutional as it places a burden on the appellant to prove his innocence. The Court in the *Van den Berg* case *inter alia* decided the constitutionality of s 35A of Proclamation 17 of 1939 which placed the burden of proof on an accused, charged under the said Proclamation. The relevant part reads *"…the burden of proving that he is or was the holder of such licence ……, or that such article or substance is not a rough or uncut diamond, as the case may be shall lie upon the person charged".* The Court in the end found the provision in violation of subart (a) of art 22 of the constitution *"… in that it* ***negates*** *the*

[1] 1995 NR 23 (HC)

essential *content of the presumption of innocence contained in art 11 (1)(d).”* I am in respectful agreement with the conclusions reached in the *Van den Berg* case *(supra)*, however, in my view, it does not find application to the appeal under consideration and does not support the appellant’s argument advanced in that regard.

[13] It was further contended that although the appellant was found in possession of stolen property, the trial court misdirected itself by relying on the doctrine of recent possession when convicting the appellant of the offence of housebreaking with intent to steal and theft, as it did. The magistrate in his response to the grounds set out in the notice of appeal states that in the absence of the appellant giving an explanation which could reasonably be true, the court was entitled to infer (from the evidence) that he had committed the offence and finds support for his contention in the case of *S v Kapolo*[2] where the following is said at 130C-F about the doctrine of recent possession:

> “It is correct that where a person is found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, a court is entitled to infer that such person had stolen the article or that he is guilty of some other offence. (See: Hoffmann and Zeffertt *The SA Law of Evidence* 4th ed at 605-6.) I also agree with the magistrate that there are instances where a lapse of 14 days or longer was still regarded as recent possession. The test to be applied in this regard was laid down in *R v Mandele* 1929 CPD 96 where the following was stated at 98, namely:

[2] 1995 NR 129 (HC)

> . . . 'is the article one which could easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief?'
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> This dictum was approved on many occasions and again by the South African Appeal Court in *R v Skweyiya* 1984 (4) SA 712 (A) at 715E."

[14] The learned authors Hoffmann and Zeffert in their authoritative work *The South African Law of Evidence, Fourth Ed* at 605 – 606 say:

> "When an accused is proved to have been found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, the court is entitled to infer that he stole them, or, in a proper case, that he is guilty of some other offence such as housebreaking, or receiving stolen property knowing it to be stolen."

It is common cause that on the facts *in casu*, the commission of the offence of housebreaking with intent to steal and theft has duly been established by the State and during which the property of the two complainants were stolen from their home during December 2008. The exact date of the burglary however, is unknown, but it was discovered on the morning of 23 December. Contrary to the appellant's report to Sergeant Shigwedha that his co-accused brought the items in question to his place on the 24th of December, he testified that it was already on the 19th, whereafter he departed for the north where he stayed for ten days. During his absence the stolen property was discovered at the appellant's residence where he had stored it under lock and key. Having

rejected the appellant's explanation as false beyond reasonable doubt, the trial court was satisfied that it could infer from the proven facts that it was the accused that committed the offence, and convicted him accordingly.

[15] In *S v Parrow*[3] at 604B-E Holmes, JA stated the following regarding the doctrine of recent possession:

> "I pause here to refer briefly to the so-called doctrine of recent possession of stolen property. In so far as here relevant, it usually takes this form: On proof of possession by the accused of recently stolen property, the Court may (not must) convict him of theft in the absence of an innocent explanation which might reasonably be true. This is an epigrammatic way of saying that the Court should think its way through the totality of the facts of each case, and must acquit the accused unless it can infer, as the only reasonable inference, that he stole the property. (Whether the further inference can be drawn that he broke into the premises [in] a charge such as the present one, will depend on the circumstances). The *onus* of proof remains on the State throughout. Hence, even if, after the closing of the cases for the State and the defence, it is inferentially probable that the accused stole the property, he must be acquitted unless the only reasonable inference is that he did so; for the law demands proof beyond reasonable doubt. I agree with the statement in *South African Criminal Law and Procedure* vol. 2, by Hunt, at p. 611, that
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> > 'the "doctrine" (if it can be given such an elevated name) of recent possession is simply a common-sense observation on the proof of facts by inference'."

[3] 1973 (1) SA 603 (AD)

See also *S v Nashapi*[4] at 807 para [8].

[16] The trial court rejected as false the appellant's explanation as to how he came into possession of the stolen property and, in the absence of a reasonable explanation, inferred that he had committed the offence. I am unable to find that the learned magistrate in his assessment of the evidence committed any misdirection, and in the absence of a credible explanation by the appellant explaining his possession of *all* the stolen property shortly thereafter, the only reasonable inference to draw from the proved facts is that it was indeed the appellant who stole the said property. In *S v Skweyiya*[5] at 715C-E the Court said:

> "It is the requirement that the goods must have been recently stolen. The nature of the stolen article is an important element in the determination of what is recent. (*R v Mandele* 1929 CPD 96 at 98; *R v Morgan* 1961 (2) SA 377 (T) at 378B-D) If the article stolen is of the type which is usually and can easily and rapidly be disposed of, anything beyond a relatively short period will usually not be recent. The Court has accordingly to ask itself –
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> > '… is the article one which could easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief.'"

[16] In the present case it is not a single article that was stolen and found in possession of the appellant, but several household appliances, making up the

[4] 2009 (2) NR 803 (HC)
[5] 1984 (4) SA 712 (A)

totality of goods stolen from the respective complainants. Although the exact date in December on which the burglary took place is not known, it seems fair to say that it was after school had closed and the teachers went on holiday. On the appellant's own evidence, he came in possession of the goods still in December. Given the nature of the items such as a fridge, which in my view does not easily pass from one hand to another; and more specifically, the totality of the goods stolen at one time; and the implausibility of the appellant's explanation, I am convinced beyond reasonable doubt, that on the proven facts, a connection can be made between the possession of the stolen goods by the appellant and the commission of the offence of housebreaking with intent to steal and theft.

[17] Furthermore, in order to have stolen the property from different rooms inside the house, the premises having been secured, it only seems logical, in the absence of credible evidence showing otherwise, to infer that it must have been the appellant who – either alone or assisted by someone – broke into the complainants' house and thereafter carried the loot to the house where the appellant was residing. It is significant to note that this particular house is closely situated (approximately 700 m) from the complainants' residence. There the appellant carried the goods into a store room and covered it with a blanket, without informing any of the other occupants of the house about it. Instead, he locked the store room and left for about ten days with the key which was usually kept inside the house.

[18] The arrest of appellant's co-accused came as a result of him implicating them as the persons who had brought the stolen property to his place, but which they to the police disputed from the outset. From the evidence of Sergeant Shigwedha as well as accused no 2, it is clear that the appellant, whilst in custody before commencement of the trial, tried to exonerate his co-accused by saying that they did not participate in the commission of the offence. However, when asked to put it in writing, he refused. Now if they were the sole cause for his arrest and detention on a serious charge, why would he try to convince the investigating officer of their innocence – which he did? Appellant's incriminating allegations against his co-accused were not only disputed by accused no 2 on oath, but neither is it supported by the evidence, nor the probabilities. He contradicted himself on the dates on which the property were brought there and if his version were to be correct, then there is no reason why he had accepted the (stolen) property and kept it under lock and key, and then disappeared to the north immediately thereafter. In the circumstances one would have expected from the appellant firstly, to inform those persons staying at the house about the property stored in the store room and that the owners would come to fetch it later as they planned on selling it. It is common cause that no one – besides the police – made enquiries about the property during the appellant's absence. The involvement of his co-accused is clearly a fabrication of evidence which the trial court was entitled, and in my view, correctly so, rejected as false. The guilt of the appellant, on the proven facts and through inferential reasoning, was proved beyond reasonable doubt and there is no basis on which this Court could interfere with the conviction.

[19] The second ground of appeal concerns the alleged failure of the magistrate to “adduce” or “request” fingerprint evidence, and is equally without merit. Ms *Horn* submitted that the magistrate at least should have enquired whether such evidence was available, which it failed to do. It seems inconceivable that the State would omit to lead real evidence, such as fingerprint evidence, against an accused person for no good reason, and in this instance there is nothing in the State’s case suggesting that members of the Scene of Crime Unit visited the crime scene, or lifted fingerprints from the scene. In the absence of such evidence, I fail to see how the presiding magistrate could have erred by failing to make enquiries in that regard from the prosecution, and how his alleged failure to do so, prejudiced the appellant in any way.

[20] I now turn to consider the appeal against sentence and the grounds on which it is based.

[21] Appellant in mitigation informed the court that he has seven children between the ages of seventeen and eight years from different mothers which he fends for; including his own mother. He is unemployed *“and [does] odd jobs in the homestead”.* He is without savings or assets of value, which raises the question as to how he supports his dependants financially without the necessary means? He is also of ill health in that he suffers from tuberculosis. He is forty-two years of age and a first offender. In sentencing the court dealt with the appellant’s personal circumstances; also that the property was

recovered, but came to the conclusion that in view of the seriousness and prevalence of the offence and because the appellant acted out of greed, that a custodial sentence was called for.

[22] There is no merit in the contention that the court in sentencing did not give any consideration to the personal circumstances of the appellant. This is obvious from the reasons given by the court when delivering its *ex tempore* judgment. Is it however possible that insufficient weight was given to the interests of the appellant and that the seriousness of the offence and the interests of society were over-emphasised at the expense of the appellant? I do not think so. The offence of housebreaking with intent to steal and theft has always been viewed by the courts in a serious light, for which heavy sentences are imposed to serve as a general deterrence to others. Persons making themselves guilty of this offence simply disregard the rights of others by unlawfully entering their homes and invade their privacy; whilst at the same time and with the utmost disrespect, help themselves to the hard earned property of others; people who are equally struggling to make a decent living from the little means they have without seeking salvation by committing crime against fellow human beings. Innocent and vulnerable people in society can rightly demand protection from the courts against people such as the appellant; and the magistrate was entitled to take into account the prevalence of the offence committed within that court's jurisdiction.

[23] I am not persuaded that the magistrate misdirected himself in any manner when sentencing the appellant; neither do I consider the sentence to

be shockingly inappropriate, one that a reasonable court would not impose. Consequently, there are no prospects of success on appeal against conviction or sentence; hence, the application for condonation is dismissed.

[23] For the foregoing reasons, the matter is struck from the roll.

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LIEBENBERG, J

I concur.

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TOMMASI, J

ON BEHALF OF THE APPELLANT	**Ms W Horn**
Instructed by:	***Amicus curiae*** **LorentzAngula Inc**
ON BEHALF OF THE RESPONDENT	**Mr N M Wamambo**
Instructed by:	**Office of the Prosecutor-General**