

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case No.: CA 14/2016

In the matter between:

JOSHUA JOSEPH

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Joseph v The State* (CA14/2016) [2016] NAHCNLD 96
(28 November 2016)

Coram: TOMMASI, J and JANUARY, J

Heard: 22 August 2016

Delivered: 28 November 2016

Flynote: Criminal Procedure – Sentence – Magistrates' duties – Should provide reasons for sentence.

Summary: The accused was a first offender and 24 years old and convicted of housebreaking with intention to steal and theft. He was convicted of stealing a safe valued at N\$1200 and cash in the sum of N\$95. Both the cash and safe recovered.

When sentencing an unrepresented accused the magistrate should assist the unrepresented accused to place his personal circumstances fully before the court and record whether he/she took the personal circumstances and the mitigating factors into consideration and what weight he accorded it.

The appeal is upheld, the sentence set aside and substituted with a reduced sentence of 1year's imprisonment.

ORDER

1. Condonation is granted for the late noting of the appeal;
2. The appeal against sentence succeeds and the sentence imposed by the District Court is hereby set aside and substituted with the following sentence; - the accused is sentenced to 1 year's imprisonment.
3. The sentence is ante-dated to 28 October 2015.

JUDGMENT

TOMMASI, J (JANUARY, J concurring):

[1] The appellant was convicted of housebreaking with the intent to steal and theft. He was sentenced to 24 months' imprisonment on 28 October 2015. The original notice of appeal was withdrawn and a new notice filed together with an application for condonation.

[2] The appellant stated in his affidavit *inter alia* that: he has been trying to secure legal counsel to assist him with the appeal as he is a lay person; he does not understand court procedures; he did not attend any formal schooling and he is unable to read or write properly; he had to rely on his fellow inmates to write his original appeal which was filed 1 month and 11 days after he was sentenced; and his application for legal aid was declined.

[3] The court appointed Ms Amupolo, *amicus curiae*. She withdrew the original notice of appeal and filed a new notice of appeal. In terms of this notice the appellant is appealing against the sentence imposed.

[4] The respondent, represented by Mr Matota, submitted that there are no reasonable prospects of success and this court ought not to grant condonation herein. The explanation by the appellant is reasonable and so is the delay. What remains is for this court to determine whether there are reasonable grounds of success.

[5] The appellant, in his affidavit referred this court to the heads of argument in support of his contention that he has reasonable prospects of success. Having perused the grounds of appeal together with the heads of argument this court is satisfied that the appellant has reasonable prospects to succeed on some of the grounds discussed hereunder. The court accordingly grants the appellant condonation for the late filing of his notice of appeal.

[6] The grounds raised by the appellant is that the magistrate:

- (a) did not come to the aid of the unrepresented accused during mitigation and did not assist the accused by questioning him in order to illicit information favourable to the accused;
- (b) erred in fact and in law by not taking the personal circumstances of the appellant into consideration;
- (c) erred on a ground of fact and or law by overemphasising the seriousness of the offence at the expense of the accused's personal circumstances as well as the circumstances of the particular case, more specifically that the complainant owed the appellant money;
- (d) erred on a ground of fact and or law by not taking into account that the complainant did not suffer any monetary loss as the money and safe were recovered;
- (e) passed a sentence which is shocking and inappropriate in the circumstances and that no other court would have imposed the same sentence; and

(f) failed to look at other forms of punishment besides a custodial sentence.

[7] The appellant was charged with having stolen a “safe box” (safe) valued at N\$1200 and cash in the sum of N\$95. The accused pleaded guilty. He was questioned in terms of section 112 (1)(b) and he admitted that he broke into the room and that he took the safe and the money he found inside it i.e. N\$95. He raised a claim of right i.e. that the complainant owed him for work he did for him and a plea of not guilty was recorded. The magistrate after hearing the testimony of the complainant and the appellant, concluded that the complainant did not owe the appellant any money. His claim of right was rejected and he was convicted of theft.

[8] No previous convictions were proven and the charge sheet reflects that the appellant was 24 years old when he was arrested. The appellant opted to address the court and stated the following in mitigation: “I’m (asking) the court to give me a suspended sentence. I just wanted to inform the court that I still have a lot of needs to fulfil like bail because he could not afford it. The only thing is that I’m asking the court to give me a suspended sentence, I having siblings that I’m looking after. That is all.” The appellant pleaded guilty 8 days after his arrest.

[9] The magistrate gave the following reasons for sentence: “The crime you have committed is very rife in this district and members of this society and their properties are no longer safe because people like you who steal their hard earned properties. This court has a duty to restore order in society and one of the ways of doing that is through punishing those who do not want to abide to the rule of law and good morals of society. The punishment that fits the crime is custodial sentence of 24 months imprisonment.” The learned magistrate gave no additional reasons in response to the new notice of appeal.

[10] Mr Matota, counsel for the respondent submitted in his heads of argument that punishment falls within the discretion of the trial court and that as long as that discretion is judiciously, properly or reasonably exercised, an appellate court ought not to interfere with the sentence imposed. This succinctly and correctly expresses the approach the appellate court ought to

adopt. Ms Amupolo submitted however that the magistrate did not apply that discretion judiciously.

[11] The personal information of the appellant is very scant. It is not known inter alia whether or not the appellant was married, whether or not he has any children; or whether or not he was employed. It is vital for the sentencing court to take into consideration the personal circumstances of the accused. In order for the court to do so it must have sufficient information to do so. It is the court's duty when sentencing an unrepresented accused to elicit information of the personal circumstances of an accused through thorough and objective questioning of the accused. (See *S v Namseb* 1991 (1) SACR 223 (SWA)).

[12] The only personal information placed before the learned magistrate was that the appellant was taking care of his siblings. The appellant is a first offender and 24 years old. No mention was made by the learned magistrate of the personal circumstances and mitigating factors in his reasons. The learned magistrate opted not to give additional reasons for ruling that custodial sentence is the only appropriate sentence. This is really unfortunate particularly in view of fact that it is not apparent from the record whether the learned magistrate took the personal circumstances and mitigating factors into consideration when sentencing the appellant. In *S v Kasita* 2007 (1) NR 190 (HC) the court held that a magistrate should provide reasons for the sentence and should state whether the mitigating factors which have been presented were taken into account. Rule 67 3(b) of the Magistrate's Court Rules makes provision for a magistrate to provide reasons but sadly this opportunity was not utilised.

[13] Custodial sentences for the offence of housebreaking with the intent to steal and theft have become the norm given the prevalence of this offence regardless whether or not the appellant is a first offender. The sentencing court however has a discretion to look at each case and determine whether custodial sentence is appropriate. A proper application of this discretion is to consider each factor and determine the weight to be accorded thereto. From a reading of the reasons it appears that the learned magistrate had regard to

the prevalence of the crime and the interest of society but paid scant attention the offender.

[14] In the oft quoted case of S v Jacobs CA 7/96 and delivered on 22 April 1996 Strydom J, as he then was, stated as follow:

“The many reviews that this Court is dealing with every day and the outcry from the society are all proof of the prevalence of crime and more particularly crimes such as housebreaking and theft. Those who commit this crime overlook nobody. No distinction is made between the rich and the poor. All levels of society have fallen victim to thieves and housebreakers alike. Whether we want to believe it or not we are involved in a war against crime which at present shows no sign of abating. The situation calls for exceptional measures and in this process the Courts play an important role. In this regard the imposing of a prison sentence for housebreaking and theft, even in the case of a first offender, has become more or less the general rule. Because of the prevalence of the crime the shoe is now on the other foot and it is only in exceptional circumstances where a non-custodial sentence is imposed by the Courts.”

[15] This case must be seen in the light of a later decision in this court where Damaseb JP, (Silungwe AJ concurring) stated the following:

“The Ondangwa magistrates’ court has, in recent times, been imposing markedly heavy sentences on persons convicted of housebreaking with intent to steal and theft. Although such sentences have often met with disapproval and even reversal by this court, the trend does not show signs of abating. While it is trite that sentencing is pre-eminently the duty of the trial court, it is incumbent upon such court to exercise its discretion judicially. Moreover, such court is ultimately bound by decisions of a superior court. After all, it is always needful for the sentencer to determine with care what appropriate sentence would, in the peculiar circumstances of the case, best serve the interests of society as well as the interests of the offender. It is certainly in the interests of society that the accused receives an appropriate sentence.”

[16] There is no merit in the submission by counsel that the learned magistrate failed to take into consideration that the complainant failed to pay the appellant as the magistrate rejected the appellant’s claim of right as false.

The appellant did not challenge the conviction and the factual finding by the learned magistrate cannot be challenged in the appeal against sentence.

[17] The magistrate failed in his duty to assist the unrepresented accused by eliciting information in respect of his personal circumstances and failed to record whether the mitigating factors which have been presented were taken into account. These grounds sufficiently establishes that the magistrate, when he sentencing the appellant, did not apply his judicial discretion properly.

[18] The appellant served one year and 1 month to date and although the evidence of the personal circumstances of the appellant is very scant, it would be prejudicial to the appellant to remit the matter to the district court for the magistrate to consider sentence afresh. The court therefor takes into consideration the personal circumstances as set out above. It is evident that the appellant was not able to afford a fine as he was granted bail and he indicated that he was not able to afford the bail which was set at N\$800.00

[19] This court's approach to sentencing of housebreaking with intent to steal and theft is set out above. The offence is serious and prevalent. There is a need for prevention and general deterrence to protect the interest of society. The appellant broke into the house of his previous employer who is a 66 year old man. Offenders who venture into the business of breaking into the privacy of people's homes and businesses must know that the courts would not hesitate to impose custodial sentences even in cases of first offenders.

[20] The court however must not lose sight of the particular circumstances of the present case. The theft in this instance was of N\$95 and the safe which were recovered. The appellant is relatively youthful and capable of reform.

[21] A custodial sentence is appropriate but a term which fits the crime, is fair the appellant and serves the legitimate expectations of society.

[22] In the result the following order is made:

1. Condonation is granted for the late noting of the appeal;
2. The appeal against sentence succeeds and the sentence imposed by the district court is hereby set aside and substituted with the following sentence; - the accused is sentenced to 1 year's imprisonment.
3. The sentence is ante-dated to 28 October 2015.

M A TOMMASI
JUDGE

H C JANUARY
JUDGE

APPEARANCES:

APPELLANT: In Person

RESPONDENT: Adv. Matota
Office of the Prosecutor-General