REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 40(B)/2011

In the matter between:

TIMOTEUS KAMATI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kamati v S* (CA 40B/2011) [2017] NAHCNLD 114 (02 November 2017)

Coram: TOMMASI J and JANUARY J

Heard: 27 April 2017

Delivered: 02 November 2017

Flynote: Criminal Procedure – Appeal – Convictions and sentences – 1. Robbery with aggravating circumstances – 2. Contravening section 2 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended – Possession of a fire-arm without a license; 3.

Contravening section 33 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended – Possession of ammunition.

Summary: The appellant pleaded not guilty in the Regional court on all charges. He was convicted on all charges and sentenced as follows; count 1 to 20 (twenty) years' imprisonment, 5 (five) years' of which is to be served concurrently with a sentence in R/C case no 15/2004; count 2 to 5 (five) years' imprisonment; count 3 to 3 years' imprisonment. The learned magistrate ameliorated the impact of the sentences by ordering that 5 years of the 20 years' on count 1 shall be served concurrently with the sentence in Regional Court case no 15/2004. The sentence in count 3 was ordered to be served concurrently with the sentence on charge 2. This appeal is against both convictions and sentences. The convictions and sentences are confirmed.

ORDER

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1. The appeal is dismissed;
2. The convictions and sentences are confirmed.

JUDGMENT

JANUARY J (TOMMASI J CONCURRING)

[1] The appellant in this case was convicted in the Regional Court sitting at Eenhana on charges of: 1. Robbery with aggravating circumstances; 2. Contravening section 2 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended – Possession of a fire-arm without a license; 3. Contravening section 33 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended – Possession of ammunition.

[2] The appellant was undefended. He was tried with a co-accused who was also undefended. The co-accused also filed a notice of appeal but it was not heard before this court. The appellant was sentenced; on charge 1 to 20 (twenty) years' imprisonment, 5 (five) years' of which is to be served concurrently with a sentence in R/C case no 15/2004 (It seems to be a different case where the appellant was sentenced on in a case that appeared before the same magistrate in the Regional Court). Charge 2 to 5 (five) years' imprisonment; charge 3 to 3 years' imprisonment. The presiding magistrate is no longer a magistrate and could not provide additional reasons on the notice of appeal.

[3] The State proved previous convictions of the appellant in this matter in relation to R/C case no. 15/2004. In that case the appellant was convicted previously for robbery with aggravating circumstances; contravening section 21 of Act 7 of 1996 as amended – possession of a machine gun; and section 33 of Act 33 of 1996 – possession of ammunition. He was previously sentenced to 10 years' imprisonment for the robbery with aggravating circumstances; 10 years' imprisonment for the possession of a machine gun of which 5 years were to run concurrently with the sentence on the robbery charge and 3 years' imprisonment on the possession of ammunition to run concurrently with the sentences on the robbery and possession of the machine gun charges. Effectively he had to serve 15 years' imprisonment.

[4] In this matter on appeal the complainant testified and informed the court in brief that she was a sales lady at a bottle store. She had a sleeping room at the bottle store sleeping alone in the room. On 03 June 2003, after she closed the bottle store, she was awakened in the middle of the night by a noise of the corrugated iron zinc plates surrounding the bottle store made as if a person was cutting it. She went to the direction of the sound and saw a person in the illumination of fridges in the bottle store. She did not know the person. She saw the person cutting the corrugated zinc plates. The person stopped when he noticed her. She started screaming but nobody came to her assistance. The person outside said: 'you bad child just open, if you are not opening we are going to kill you, the place is not yours. You are not the owner, you are just a seller there, and

you what can happen to a seller.' There were two persons talking. She did, however not see the other person.

[5] This complainant went to a phone but could not phone anyone as she detected that the phone was not functioning. The one person outside demanded her to open the place. She eventually threw the keys outside underneath the door. The persons tried to open the door but were unsuccessful. The person or persons threw the key back and demanded her to open. She unlocked the door after pleading that the persons should not do anything to her.

[6] One person came in and demanded money wielding a fire arm, a pistol, and pointing it on the complainant. This person spent almost an hour with her and although it was the first time to see him, she was able to identify him as the appellant in illumination emerging from big Coco-Cola fridges inside the bottle store. Appellant produced a camouflage bag and demanded the complainant to throw all money into it. She first poured coins into the bag and on further demand also put money in notes into the camouflage bag.

[7] Appellant demanded a jersey from her. She did not have one and gave him a long sleeve shirt. He, however threw it down. Appellant took a long trouser and belt belonging to someone else. He went to the shelves and took a 750 ml of Richelieu, two pairs of shower slippers, a torch and batteries, an okapi knife, two packets of Peter Stuyvesant and 3 packets of Dunhill cigarettes and two watches. The items form part of items sold in the bottle store. Appellant demanded and forced the complainant to drink the bottle of 750 ml Richelieu. She drank it, afterwards felt bad and started to vomit. She fell asleep and awoke the next morning when she heard people talking. She was locked inside and the persons outside broke the door open for her to come out.

[8] A certain Mr Nangolo opened the door with an iron bar. He detected foot prints and followed the prints with a certain Willbard Nakwafila and other persons. Money in the amount of N$5864.25, 2 pairs of shower sandals, the watches, knife, torch, batteries and cigarettes were recovered and returned to the complainant the following day.

[9] A neighbouring sales lady of another cuca-shop, also sleeping at that shop, confirmed hearing the complainant screaming and hearing sounds of corrugated zincs being cut. She heard a voice speaking in the Kwanyama language. The next day this witness went to awake another sales man, Mr Nangolo. She asked him if he also heard the screams. He did not hear the screams. They then went to the complainant's place and found her being locked inside her room.

[10] Another witness who testified is a person who worked for a security company. This company issued fire-arms to security officers. He identified the 7.65 mm CZ 70 licence and the fire-arm with serial number J74603 belonging to Namibian Protection Services and he reported it being stolen from the company.

[11] A police officer from Special Field Force Services testified. He was informed of the robbery and departed with other police officers to the scene of crime. Foot prints were pointed out to him by members of the public. He followed these foot/shoe prints for 4 to 5 km with members of the public. A member of the public noticed a person hiding behind a wooden log pointing a fire arm to the police officer. Another person was also in the vicinity but ran away. This police officer fired two warning shots on both sides of the person and he eventually threw down the fire- arm and apprehended him. It was the same fire-arm that was produced as an exhibit in court with serial number J74603 with 7 (seven) bullets. One bullet was in the chamber. The person who had the fire-arm tried to fire it but it did not respond to the triggering as the hammer mark was clearly on the casing of this bullet.

[12] This police officer arrested the person who is the appellant in this matter. The appellant was sober. The police officer discovered an amount of money, notes and coins, N$2500 in a camouflaged bag which was dug out from the ground by the appellant on demand of the police officer. Other police officers followed the tracks of the person who ran away and apprehended him. The other person was arrested in no-mans-land on the border to Angola. This accused was found with N$2620 in notes hidden between his underpants and the trouser he was wearing.

[13] The shoe prints that were followed appeared to be those of shoes and later changed to shower slippers' prints up to a point where the persons changed into wearing shoes. The appellant was found in possession of the shower slippers in the vicinity where he was apprehended.

[14] Eventually some police officers joined in following the tracks. A road block was set up. While this witness and some police officers were at the road block the witness heard a gunshot in a certain direction. He went into the direction of the gun shot. He saw police officers approaching with the appellant. The police officers showed the witness a brownish bag, a green torch, batteries, 2 packets of cigarettes, N$3244.25 in cash, an Okapi knife, a screw driver and a pistol. The witness returned the money to the complainant. He identified the other items in court as exhibits.

[15] Hansfried Neumbo Kuutondokwa is another one of the police officers who followed tracks/shoe prints. They followed two sets of tracks. The police officers divided themselves in 2 groups. He heard two gunshots and ran in that direction where he found the appellant already arrested. He followed the tracks of the second person and eventually the co-accused was arrested in no-man's-land on the border of Namibia and Angola. The co-accused was found in possession of N$2620 hidden between his legs. The money was returned to the rightful owner.

[16] The appellant testified in his defence. He alleged that he and the complainant had a relationship being boyfriend and girlfriend. He stated that on 01st June 2003 he went to the workplace of the complainant at Epembe. The complainant allegedly promised to give him money but undertook to give it to the appellant the following day in the afternoon because the money that she had at the time was not enough.

[17] He allegedly spent the night with the complainant. The complainant allegedly gave the appellant a 750 ml Richelieu brandy to drink which he eventually shared with the complainant. The complainant allegedly gave money in the amount of N$3244.20 to the appellant the following day upon which the appellant accompanied his co-accused to buy cattle. On their way the appellant and his co-accused encountered the police. The co-accused ran away whereas the appellant stopped when the police fired shots

besides him. The police informed the appellant that he committed an armed robbery. The police found money in plastic bags in possession of the appellant. He was arrested and taken to the police station. The appellant denies that he had a pistol in his possession and that he pointed it to the police officers.

[18] The co-accused also testified in his defence and corroborates the appellant to a certain extent in so far as that the appellant had an agreement with the complainant to give him some money. The complainant however denied that she ever had a relationship with the appellant, that she knew him before or had an agreement to hand over money to him.

[19] The crux of this appeal is that the appellant alleges that he did not have a fair trial. The appellant, correctly so, referred the court to the principle that in a criminal trial the onus is on the State to proof the case beyond reasonable doubt. That burden involves proving all elements of the offense and disproving any defences raised by an accused person.

[20] 'The correct approach to evaluating evidence is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.'[1]

[21] The appellant submits that he requested disclosure of the case docket but was never provided with it. The court *a quo* ordered disclosure of the case docket and Mr Matota who represented the State undertook to provide disclosure. When the case resumed with plea and trial the appellant pleaded and mentioned nothing of disclosure. The appellant, in my view quite capably cross-examined the complainant. I find it

[1] *S v Chabalala* 2003 (1) SACR 143 (SCA) Headnote and Paragraph 15 at 139i -140b.

significant that he cross-examined the complainant on more than one occasion about the content of her statement to the investigating officer indicating that he had disclosure. I find that his complaint about non-disclosure is just an afterthought.

[22] The appellant further submits that he was curtailed and frustrated in his cross-examination in that the court *a quo* asked a question: 'Is that all or do you still have something?' On this allegation I find that the court was quite patient with the appellant. His cross-examination covers about 10 typed pages of the record and not once did the learned magistrate curtail interfere with his cross-examination.

[23] The appellant also submits that the complainant contradicted herself in evidence in chief and that the court *a quo* failed to attach due weight thereto. The complainant is a single witness in relation to the robbery with aggravating circumstances. She is, however corroborated by another sales lady from an adjacent bar who heard the complainant screaming on the night of the incident. This witness also heard a cutting sound as if zinc plates were being cut.

[24] There is further circumstantial evidence in that a member of the public, a teacher, followed foot/shoe prints and alerted the police to it. The police followed the foot/shoe prints, came across the appellant who was in possession of a pistol/firearm, money and other items that were from the bottle store where the complainant was a sales lady. Moreover, I do not find material contradictions in the evidence of the complainant. She was consistent in her evidence and materially refuted the allegations of the appellant that there was a relationship between her and the appellant or an agreement that she promised the appellant money or handed the items to him.

[25] The neighbouring sales lady woke up early the next morning, went to a place of a man, Mr Nangolo and with Mr Nangolo and another lady went to the place of the complainant. They found the complainant locked inside her room.

[26] A teacher testified that he is a member of the public and on his way to school when the incident was reported to him. He drove to the scene and found the complainant at the door of her bedroom. The complainant was crying. Foot/shoe prints were pointed out to him. He followed the imprints for some distance with other persons

after which he reported the matter to the police. He joined with the police and held a road block. The witness heard gunshots. After this witness went into the direction of the gunshots he saw the police coming with the appellant.

[27] It is by now trite law that a court may convict an accused on the evidence of a single witness. Section 208 of the Criminal Procedure Act 51 of 1977, provides that a Court may convict an accused on the evidence of a single witness. However, when evaluating such evidence the Court is to exercise caution. Such witness should be credible and the evidence should be of such a nature that it constitutes proof of the guilt of the accused beyond reasonable doubt. Though the court must exercise caution, common sense should prevail. Evidence of a single witness need not be perfect in every respect. A court must be satisfied that truth was told.[2] The complainant is a single witness on the identity of the appellant. I am satisfied that she had ample time to observe the appellant in the illumination of the fridge. More over the appellant placed himself on the scene with the allegation that he received money from the complainant. The co-accused also placed the appellant on the scene.

[28] I have applied the above stated principles, have evaluated the evidence in totality and do not find any misdirection from the learned magistrate. The convictions are confirmed.

[29] This appeal is also against sentence. The State proved previous convictions against the appellant. He was previously convicted for 1. Robbery with aggravating circumstances; 2. Contravention of section 29(1) (a) of Act 7 of 1996-possession of a machine gun; and 3. Contravention of section 33 of Act 7 of 1996-possession of ammunition. These crimes were committed 0n 16th September 2002. The current crimes against which this appeal lies were committed on 03rd June 2003. The appellant was previously sentenced on charge 1 Robbery with aggravating circumstances to 10 years imprisonment. Charge 2 Possession of a machine gun 10 years' imprisonment of which 5 years were ordered to run concurrently with the sentence on charge 1. Charge 3

[2] Section 208 of the Criminal Procedure Act 51 of 1977; *S v Noble* 2002 NR 67 (HC); *S v HN* 2010 (2) NR 429 (HC).

Possession of ammunition to 1 year imprisonment ordered to run concurrently with the sentences on charges 1 and 2.

[30] The complainant is a defenceless woman who was surprised in the middle of the night. She was gun pointed with a pistol, robbed of money and items belonging to a bottle store and after all forced at knife point to consume 750 ml of Richelieu brandy. Thereafter she was locked inside her bedroom. I agree with the learned magistrate that serious aggravating circumstances are present.

[31] It is trite law that punishment falls within the discretion of the trial court. A court of appeal can only interfere with sentence and the discretion exercised by the trial court in certain limited instances.

> ‘It is, indeed, a settled rule of practice that punishment falls within the discretion of the Court of trial. As long as that discretion is judicially, properly or reasonably exercised, an appellate Court ought not to interfere with the sentence imposed. This principle emerges from a chain of authorities, but for our purposes it suffices to refer only to two of them.
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> In *S v Rabie* 1975 (4) SA 855 (A) at 857D there occurs the following passage:
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> > “In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal – should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court; and
> >
> > (b) should be careful not to erode such discretion; hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised.”
>
> It is explained in the same judgment that the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection.
>
> Another case in point is *S v Ivanisevic and Another* 1967 (4) SA 572 (A) in which Holmes JA stated at 575F-G that

> ". . . it has more than once been pointed out that the power of a Court of appeal to ameliorate sentences is a limited one; see Ex parte Neethling and Another 1951 (4) SA 331 (A) at 335H; R v Lindsay 1957 (2) SA 235 (N); S v De Jager and Another 1965 (2) SA 616 (A) at 629. This is because the trial Court has a judicial discretion and the appeal is not to the discretion of the Court of appeal: on the contrary, in the latter Court the enquiry is whether it can be said that the trial Court exercised its discretion improperly."

Another test applied by appellate Courts entertaining appeals against sentence which is said to be on the oppressive side is whether such sentence is so manifestly excessive that it induces a sense of shock in the mind of the Court. See *R v Lindsay* 1957 (2) SA 235 (N). If it does, the inference can be drawn that the discretion had not been properly exercised.'[3]

[32] In my view the sentences do not induce a sense of shock and this court cannot merely interfere because it would have imposed different sentences. The learned magistrate already ameliorated the impact of the sentences by ordering that 5 years of the 20 years' on count 1 shall be served concurrently with the sentence in Regional Court case no 15/2004. The sentence in count 3 was also ordered to be served concurrently with the sentence on charge 2.

[33] In the result;

1. The appeal is dismissed;
2. The conviction and sentences are confirmed.

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H C JANUARY, J

I agree

[3] *S v Ndikwetepo & others* 1993 NR 319 (SC) at 322F-323C.

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M A TOMMASI, J

Appearances:

For the Appellant: Timoteus Kamati

Of Oluno Correctional Facility

For the Respondent: Adv Matota

Of Office of the Prosecutor-General