

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
APPEAL JUDGMENT

CASE NO: CA 58/2016

In the matter between:

WERNER NGHUPOKUYE HAFENI HEITA

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Heita v S* (CA 58/2016) [2017] NAHCNLD 43 (11 May 2017)

Coram: **Tommasi J and January J**

Heard: **17 March 2017**

Delivered: **11 May 2017**

Flynote: Application for condonation — Application to advance an acceptable explanation for delay and to show that there are reasonable prospects that he would succeed on appeal.

Summary: The appellant was convicted of housebreaking with the intent to steal and theft of cash to the value of N\$43 530 and sentenced to four years' imprisonment. He applied for condonation for the late noting of the appeal. The

court held that reasons for the delay of over a year was not adequately explained; and that there are no reasonable prospects that the appellant would succeed with his appeal against sentence.

ORDER

1. The application for condonation is dismissed.
 2. The appeal is struck from the roll and considered finalised.
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JUDGMENT

TOMMASI J (JANUARY J concurring)

[1] The appellant appeals against sentence only. He was convicted of housebreaking with the intent to steal and theft of cash to the value of N\$43 530 and sentenced to four years' imprisonment.

[2] The appellant note his appeal one year and four months after he was sentenced and he now applies for condonation. The State raised a point *in limine* that the appellant failed to give an acceptable explanation for the length delay and that this court ought to dismiss the application for condonation. The appellant appeared in person and the State was represented by Ms Amupolo.

[3] The appellant stated in an affidavit that, although he was advised to file his appeal within 14 days, he did not understand the procedure to note an appeal as he is uneducated. It was only after a year and some months that he found an inmate

who held him to file the notice of appeal. He explained that he laboured under the impression that he was supposed to pay for the appeal but he failed to clarify this aspect with the magistrate.

[4] The grounds of appeal merely stated that the learned magistrate failed to take into account the facts in mitigation i.e. that he is a first offender; that his father passed away and his mother lives in Angola; that he is the sole breadwinner for his siblings; and that he was the caretaker of the livestock.

[5] It is trite that this court would only interfere with the sentences imposed by a lower court if the sentencing court failed to exercise his/her sentencing discretion judicially or properly.

[6] The learned magistrate took into consideration the fact that the accused was a first offender and his personal circumstances. The appellant mentioned in mitigation that he is still young and he wanted to go back to school; that he had one child whose mother was still schooling; that his father passed away and that he was left the responsibilities of his nephews and nieces.

[7] The learned magistrate however also took into consideration that the appellant was entrusted with taking care of the security of the place which he had broken into; that the owner of the premises suffered extensive financial loss as nothing was recovered. The learned magistrate took into consideration the insidious nature of this offence and found that there was nothing in the personal circumstances to persuade him to deviate from the norm for offences of this nature i.e. to impose a custodial sentence.

[8] It is evident that the learned magistrate considered the appellant, the offence he has committed and the interest of society. There is no indication that he failed to apply his discretion judiciously.

[9] The reasons advanced by the appellant does not adequately explain the length delay. It is highly unlikely that a person who genuinely feels aggrieved by a conviction or sentence would wait for more than a year to find out how to appeal. The appellant furthermore failed to persuade this court that there are reasonable prospects that he would succeed with his appeal against sentence.

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

1. The application for condonation is dismissed.
2. The appeal is struck from the roll and considered finalised.

MA TOMMASI

JUDGE

I agree

HC JANUARY

JUDGE

APPEARANCE

For The Appellant:

In Person

Werner Nghuupokuye H. Eita

For The Appellant:

Ms Amupolo

Prosecutor General