



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 68/2016

In the matter between:

SALATIEL JOSEPH NAKAKOTI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nakakoti v S* (CA 68/2016 [2017] NAHCNLD 45 (06 June 2017))

Coram: JANUARY J and TOMMASI J

Heard: 30 March 2017

Delivered: 06 June 2017

Flynote: Criminal Procedure – Appeal — Condonation – Appellant filed Notice of appeal out of time – Legal representative from Directorate Legal Aid – Withdraws

original notice – Filed new amended notices out of time – No prospects – Struck from the roll.

Summary: The appellant was convicted for housebreaking with intent to steal and theft. He filed his notice of appeal out of time. The initial notice of appeal was only against sentence. In the supporting affidavit he stated that he did not want to appeal but did so as an afterthought because he is disabled and realized that he could not serve the sentence. Subsequently counsel was appointed by the Directorate Legal Aid. Counsel withdrew the initial notice of appeal and filed a new amended notice of appeal against conviction only. The appellant denied the allegation of housebreaking with intent to steal and theft. He was charged with a co-accused who pleaded guilty. He called the co-accused as a witness who exculpated him. Evidence of the co-accused is treated with caution. He is not corroborated in relation to his version from whom part of the stolen money was recovered. The witnesses stated that more or less half of the amount was recovered from appellant. This court found that the appellant has no prospects of success on appeal. Condonation for the late filing is refused. The appeal is struck from the roll.

ORDER

1. The application for condonation is refused;
 2. The appeal is struck from the roll.
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APPEAL JUDGMENT

JANUARY J (TOMMASI J CONCURRING)

[1] The appellant in this matter was convicted and sentenced on a charge of housebreaking with intent to steal and theft in the district court of Oshakati having sat at

Omungwelume. He was sentenced on 08 September 2014 to 4 years' imprisonment of which one and a half years' were suspended on conditions. The appellant in person first lodged his notice of appeal with an affidavit on 23 September 2016 to the Ministry of Safety and Security (Oluno Correctional Facility). The aforementioned documents were filed with the clerk of court, Oshakati on 11 November 2016.

[2] The appellant stated in this affidavit that he did not want to appeal at the time of his conviction and that the idea of appeal was just an afterthought that occurred as a result of his personal circumstances. He further stated that he was unable to serve the sentence of 4 years' imprisonment. He is disabled, can no longer move on his own and is in a wheelchair. In the notice of appeal he asked for a reduction of the sentence or to be granted a fine.

[3] Mr Bondai is representing the appellant in this appeal and the respondent is represented by Ms Amupolo. Mr Bondai withdrew the initial notice of appeal and filed a new notice of appeal on 16 March 2017 with an application for condonation of the late filing of heads of argument. He stated that the heads of argument were filed late, five days late, due to a number of factors. Firstly, due to a heavy work load because of a shortage of staff members at the office of the Directorate Legal Aid, Ondangwa. Secondly, he encountered difficulty to secure an interpreter and lastly that the preparation of the appeal took longer than anticipated. As a result Ms Amupolo was also late with her amended heads of argument and also applied for condonation.

[4] Condonation is granted for the late filing of heads of argument for both parties.

[5] Ms Amupolo raised *points in limine* in relation to the new founding affidavit by the appellant compared to the initial one filed by the appellant in person. I have already restated the initial statement in paragraph 2 above. In the new affidavit the appellant explained that the reasons for the delay are that he faced challenges which made it difficult for him to compile and file/lodge his appeal. He says further that he is disabled, in a wheel chair, is a lay person who is unschooled in law and in the art of drafting pleadings. He failed to get assistance to draft his notice of appeal on time. The trial court did not explain to him where he could get help to draft his appeal and that he only

got assistance from a fellow inmate in September 2016. He submits that his failure was neither wilful nor negligent.

[6] The new affidavit is in certain aspects in stark contrast with the initial affidavit. In the initial affidavit the appellant states that he did not want to appeal and that the idea to appeal is just an afterthought which occurred as a result of his personal circumstances. (my emphasis). The circumstances are that he is disabled and in a wheel chair. He further only prayed for a reduction in sentence or a fine. Nothing was mentioned on the conviction. In the new notice he is appealing only against conviction. It is now alleged that the magistrate did not explain to the appellant more particularly whom he may approach for assistance. All of a sudden he still maintains his innocence.

[7] I agree with Ms Amupolo that the appellant's reasons for the delay are not sound and convincing. On his own admission his right to appeal was explained and moreover the record reflects that the appellant signed the annexure on 08 September 2014 that he understood and he required no further explanation.

[8] The Notice of appeal was filed 2 years and 3 months after sentence. It is not clear when the appellant became wheel chair bound nor is there an explanation why it took him so long to appeal. The first explanation filed by the appellant on sentence has no ground for an appeal. He has in any event withdrawn that appeal. This court can however not ignore his affidavit in that appeal. He stated therein that the decision to appeal is an afterthought because of the circumstances of being disabled and in a wheel chair. He still is in a wheel chair before this court. (my underlining)

[9] I agree with Hoff J where he iterates the following in *Nawa v The State*;

' [8] It is trite law that the onus rests on an applicant in an application for condonation to provide a satisfactory explanation to the court for his or her default as well as dealing with the prospects of success on appeal in respect of the merits of the case. Where an applicant fails in respect of the first requirement the court may decide not to consider the prospects of success.

[9] This Court in *Nashapi v S* (CC 02/2004) [2013] JNAHCMD 291 per Cheda J, held that this Court will not sympathize with an untruthful applicant and where a litigant in his or her quest for justice seeks a sympathetic hearing, it is incumbent upon such litigant to take the court in its confidence by making a full disclosure of the circumstances which caused the delay in filing the notice of intention to appeal, timeously. This Court reminded litigants that a Court can only determine an issue on the basis of facts genuinely laid before it by those who seek a redress of wrongs either real or imagined, and when the truth is lacking the matter will no doubt be disabled in its fair and just adjudication.’¹

[10] In the circumstances, I do not find the explanation of the appellant as reasonable and *bona fide*. In fairness to the appellant, I have however considered the prospects of success of the appeal.

[11] The grounds of appeal against conviction are as follows in the new notice of appeal:

1. ‘ The trial court erred both in fact and law in rejecting and/or failing to attach sufficient weight to the testimony of Andreas Angongo Malakia, the appellant’s defence witness;
2. The trial court misdirected itself in convicting the appellant as an accomplice when there is no evidence on record that the appellant associated with and/or assisted the principal offender to commit the crime of housebreaking with intent to steal and theft;
3. The trial court erred and misdirected itself in relying on the evidence of state witnesses to convict the appellant of the offence when such evidence was matted by inconsistencies and contradictions.’

[12] The appellant was charged with a co-accused who pleaded guilty and was sentenced. A separation of trials then took place. The appellant pleaded not guilty and gave a plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977. He stated: ‘ I wish to disclose that I am not the one who committed the said offence. The person who committed the offence pleaded guilty and is already convicted.’

¹ CA 144/2013 [2015] NHCMD 4 (22 January 2015)

[13] The complainant testified that she made a case of housebreaking because her house was broken into. Cash of N\$7000.00, face wash soap of N\$50.00, matches of N\$1.00 and 16 x recharge vouchers of N\$10.00 each were stolen. She observed one set of footprints that entered the house. The footprints were tracked from the house. Another set were observed in the mahango field. Items recovered were 12 x recharge vouchers, N\$6840.00 cash, the face wash soap and match box.

[14] One witness, the nephew to the complainant's husband, was also informed of the housebreaking. He visited the scene and observed a footprint. It was first one footprint but upon following the footprint it joined another set of footprints. There were two sets of footprints. Eventually this witness was informed that the appellant and another person were arrested. He went to the place and found appellant before court who was armed with a panga. The appellant admitted that he was at the complainant's house but that he did not enter. Appellant handed N\$3360.00 to this witness. The other person was about 50 meters away and handed over N\$3350.00.

[15] Another witness who is a pensioner also visited the scene and saw footprints of one person. He saw doors open and the door that was broken. This witness phoned the police. He was amongst those that followed the footprint. Although there was grass he could observe that later on there were two foot prints. First the imprints were bare feet but later on they wore shoes. Upon following the imprints appellant was found armed with a panga. According to this witness N\$3350.00 was found in the wallet of the appellant.

[16] The appellant testified in his defence. He stated that the person who was with him broke into the house. Apparently the person informed the appellant that he is going to relieve himself in the bush and left. The appellant waited for a long time and eventually proceeded with his journey. The person caught up afterwards. The person was followed by people carrying pangas and knobkerries. The appellant stated that the money was all recovered from the co-accused. He was searched and his N\$50.00 was confiscated. He was cut with a panga.

[17] The appellant called the co-accused who stated that it was only he who broke into the house and took the money and items mentioned in the charge. According to him the appellant was not involved. He further stated that all the money was recovered from him. The co-accused is an accomplice and his evidence must be approached with caution. His evidence in relation to the amount of money found on the appellant is in contradiction to what witnesses testified to that more or less half of the amount stolen was found on the appellant. In my view the learned magistrate was correct in rejecting the appellant and his witness's evidence.

[18] After perusing the record of proceedings, I find that there are no prospects of success. Although the magistrate did not provide reasons for the conviction, the evidence of the money found on the appellant connects him to the housebreaking beyond reasonable doubt.

[19] Whereas the explanation for the delay is not reasonable in the circumstances and there are no prospects of success on appeal, the application for condonation is refused.

[20] In the result:

1. The application for condonation is refused;
2. The appeal is struck from the roll.

H C JANUARY
JUDGE

I Agree

M A TOMMASI
JUDGE

APPEARANCES:

FOR THE APPELLANT:

MR BONDAI

OF DIRECTORATE OF LEGAI AID

FOR THE RESPONDENT:

MS AMUPOLO

OF PROSECUTOR - GENERAL'S OFFICE