

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 30/2016

In the matter between:

EBBYSON MEGAMENO UUSIKU

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Uusiku v S* (CA 30/2016) [2017] NAHCNLD 54 (22 June 2017)

Coram: JANUARY, J and TOMMASI, J

Heard: 18 May 2017

Delivered: 22 June 2017

Flynote: Criminal Procedure – Appeal – Sentence – 2 Charges of housebreaking with intent to steal and theft – Charges taken together for purpose of sentence – 5 Years’ of which 12 months suspended – appropriate.

Summary: The appellant pleaded guilty in the magistrate's court on 2 (two) charges of housebreaking with intent to steal and theft. The magistrate took both charges as one for the purpose of sentence. Both crimes were perpetrated on the same night in the same town of Eenhana. The value of stolen property was N\$12 700 and N\$14 950 respectively. Sentenced to 5 years' imprisonment of which 12 months are suspended for 5 years on condition that the accused are not convicted of housebreaking with intent to steal and theft committed during the period of suspension. This court finds the sentence appropriate.

ORDER

1. The appeal is dismissed.

APPEAL JUDGMENT

JANUARY, J (TOMMASI, J CONCURRING)

[1] This is an appeal against sentence. The appellant and a co-accused were convicted on their pleas of guilty on 2 (two) charges of housebreaking with intent to steal and theft. Both crimes were committed on 25th February 2015 breaking into houses and having stolen property to the value of N\$12 700 and N\$14 950 respectively.

[2] The magistrate took both charges together and sentenced both the appellant and his co-accused to 5 years' imprisonment of which 12 months are suspended for 5 years on condition that the accused are not convicted of housebreaking with intent to steal and theft committed during the period of suspension.

[3] Ms Samuel is *amicus curiae* appearing for the appellant and Mr Pienaar is representing the respondent.

[4] The grounds of appeal in brief are misdirections and/or errors in law or fact relating to what the magistrate considered in sentencing the appellant; the magistrate accepted that the appellant travelled 350 km from Tsumeb to Eenhana to come and break in and steal; the magistrate erred to find that the appellant came to Eenhana because he believed it is easier to steal in that town; the magistrate erred by not considering the reasons given by the appellant that he committed the crimes to pay his school fees; the magistrate failed to consider the personal circumstances of the appellant; she failed to be lenient to the appellant; she overemphasized deterrence causing the appellant to be exposed to hard-core criminals; she misdirected herself only to consider the value of the stolen goods but ignored the fact that all the stolen item except a cell phone to the value of N\$6 000 were recovered.

[5] The appellant stated as follows in mitigation; 'I was going to register at Namcol at lipumbu Secondary School at Oshakati in Grade 12, I have a small baby who is being cared by my mother in Tsumeb from where I originated. I came from Eenhana once when my uncle requested me to accompany him to offload the truck he drove. When I came to steal I just came on my own believed it was easier to steal in this town. That is all I can say.'

[6] I am *verbatim* quoting what the appellant stated to make the point that although any accused has the right to appeal, there should be merits in the appeal. In this case new facts were brought in the notice of appeal and in the Heads of Argument that were not disclosed to the learned magistrate in the court *a quo*. Amongst others, that the appellant came to Oshakati 14 days before the incident to try and register for school; that he was in Eenhana to visit a friend; that the learned magistrate erred by not establishing the last mentioned fact from the appellant; that all the items were recovered apart from a cell phone to the value of N\$6 000.

[7] Sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo*. A court of appeal can only interfere;

- when there was a material irregularity; or
- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;

- or induced a sense of shock; or
- was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;
- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.¹

[8] The appellant's age is reflected on the charge sheet as 22 years old. The magistrate gave extensive reasons in sentencing the appellant. It is to be noted that the co-accused also originates from Tsumeb. It is evident in her judgment that she properly considered both aggravating and mitigating factors. In my view, the sentence reflects that. Considering that two separate houses of different owners were broken into on the same night and that valuable items like a lap top, an X-box and PlayStation game, 5 expensive cell phones, Diesel male perfume, cash of N\$600 and N\$100 respectively, a watch and wallet were amongst others stolen. I find the sentence appropriate. There is no misdirection.

[9] It is evident from the many reviews and appeals that this court deals with that housebreaking is prevalent and on the increase. The perpetrators are generally in the age group of both the appellant (22 years) and his co-accused who is 19 years of age. The average sentence for an individual housebreaking case with the stolen items valued as in this case, in the normal course of events, attracts a custodial sentence of between 3 and 4 years' imprisonment. In my view, the sentence reflects lenience, mercy, individualization, aggravation and mitigation.

[10] In the result;

1. The appeal is dismissed.

¹ *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 (HC) at 363 to 364G.

H C JANUARY

JUDGE

I Agree

M A TOMMASI

JUDGE

Appearances:

For the Appellant:

Ms Samuel

Of Samuel Legal Practitioner

For the Respondent:

Adv Tjiveze

Of Office of the Prosecutor-General