

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 11/2016

In the matter between:

ERRASY BRAVO MERRADISON

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Merradison v S* (CA 11/2016) [2017] NAHCNLD 6 (13 February 2017)

Coram: JANUARY J, TOMMASI J (CONCURRING)

Heard: 27 January 2017

Delivered: 13 February 2017

Flynote: Appeal — Sentence — Previous convictions — What is previous conviction — Misdirection — Sentence set aside

Summary: The appellant was convicted for housebreaking with intent to steal and theft and sentenced to 3 (three) years imprisonment. The appeal is against sentence. The State proved a 'previous conviction' that was committed after the housebreaking.

The magistrate considered the appellant not to be a first offender because he was recently convicted for malicious damage to property. The record is silent to malicious damage to property. The consideration that the appellant was not a first offender was a misdirection. The sentence is set aside. This court imposed sentence afresh.

ORDER

1. The appeal succeeds;
2. The sentence of three years' imprisonment is set aside and substituted with;
3. 3 (three) years' imprisonment of which 1 (one) year imprisonment is suspended for 5 years on condition that the accused is not convicted for housebreaking with the intention to steal and theft.
4. The sentence is antedated to 14 December 2015.

JUDGMENT

JANUARY J, TOMMASI J (CONCURRING)

[1] The appellant in this matter was convicted in the magistrate's court Oshakati for housebreaking with the intention to steal and theft of property to the value of N\$1748. He was sentenced to 3 (three) years imprisonment. The appeal is against the sentence.

[2] Sentencing is pre-eminently within the discretion of the trial court. A court of appeal can only interfere;

- when there was material irregularity;
- or 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 existed 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

[3] The appellant pleaded guilty in this matter. The public prosecutor proved a 'previous conviction', escaping from lawful custody, committed on 07 September 2015. 'For the purposes of sentencing, a previous conviction is a conviction which was brought out before the current crime was committed.'² This crime of Housebreaking with intent to steal and theft was committed on 14th August 2015 before the so called previous conviction. The accused was represented on the date of his sentencing. His legal representative objected to the 'previous conviction' and alerted the court to the fact that it was a crime committed after the housebreaking. The accused confirmed the commission of the escaping.

[4] The accused was 19 years old on the date of sentencing. He has one child aged 1 year and 9 months old. He passed grade 8 at school and was at the time serving the sentence for the conviction of escaping. Property to the value of N\$1700 was recovered.

[5] The learned magistrate in her reasons for the sentence stated *inter alia* as follows; 'Accused is not a first offender as he was recently convicted of malicious injury to property and it indicates Accused has a tendency to partake in criminal activities although the court notes the conviction to be after this offence was committed.'

[6] The learned magistrate mentions malicious damage to property as a previous conviction. There is no evidence when this crime was committed. The record is silent on malicious damage to property and the escaping was committed after this crime of housebreaking. In my view there is nothing wrong to mention that an accused has a character and the propensity to commit crimes provided that he was convicted for the crimes. This may happen especially with magistrates who sit at magistrate's courts and eventually get to know accused persons who frequently appear and are convicted in

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 at 363 to 364G

² Guide to Sentencing in South Africa, S S Terblance, Lexis Nexis, 2nd Edition 2007 at p80 paragraph 3.1

their courts. The law is however clear that previous convictions should be proved or admitted. The magistrate was wrong if she referred to the previous conviction of malicious damage to property as this was never admitted or proven. The escaping was committed after the housebreaking and does not qualify as a previous conviction.

[7] It is clear from her reasons that the learned magistrate did not regard the accused as a first offender and in my view the sentence reflects that. This is a misdirection and this court may thus interfere with the sentence.

[8] Considering the personal circumstances, the guilty plea, the fact that almost all the property was recovered, the youthful age of the accused, that the accused is a first offender and balanced against the interest of society and the fact that this is indeed a serious and prevalent crime attracting normally custodial sentences, it is in my view inescapable that the accused must serve a custodial sentence.

[9] In the result:

1. The appeal succeeds;
2. The sentence of three years' imprisonment is set aside and substituted with;
3. 3 (three) years' imprisonment of which 1 (one) year imprisonment is suspended for 5 years on condition that the accused is not convicted for housebreaking with the intention to steal and theft.
4. The sentence is antedated to 14 December 2015.

HC JANUARY, J

MA TOMMASI, J

APPEARANCES:

For the Appellant:

Mr Nsundano

Legal Aid – Oshakati High Court

For the Respondent:

Adv. Pienaar

Office of the Prosecutor-General