



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**APPEAL REASONS**

Case no: CA 41/2016 & CA 69/2016

In the matter between:

**ERNST GEINGOB**

**1<sup>ST</sup> APPELLANT**

**IMMANUEL KHOMAGAB**

**2<sup>ND</sup> APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Geingob v S* (CA 41-2016 & 69-2016) [2017] NAHCNLD 81 (11 August 2017)

**Coram:** TOMMASI J et JANUARY J

**Delivered:** 10 August 2017

**Released:** 11 August 2017

**Flynote:** Appeal — Extension of time period provided for by Rule 67 of Magistrate's Court Rules for noting of appeal — Granted only in respect of sentence

—Housebreaking with intent to steal and theft — Norm custodial sentence — Judicial officer to exercise sentencing discretion in judicial manner in respect whether custodial sentence is appropriate and to determine the appropriate duration thereof — State failed to prove value. Magistrate conclusion that value was substantial unsubstantiated — Error warrants interference — Court not interfering with decision to impose custodial sentence but only with the duration of the sentence imposed.

**Summary:** The appellants pleaded guilty in the district court to housebreaking with intent to steal and theft. The items comprised of laptops, cell phones, sneakers and clothing items. The learned magistrate accepted that the value of these items were substantial without evidence or any admission by the appellants. The court held that the court erred in concluding that the value of the goods stolen was substantial and that the court, in light of the error could interfere with the sentence. The court held further that the decision to impose a custodial sentence despite the fact that the appellants were first offenders was sound. The court therefor only reduced the period of imprisonment.

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## ORDER

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1. Both appellants' applications for the extension of the time provided for in Rule 67 of the Magistrate's Court Rules in respect of their appeal against conviction are dismissed but condonation is granted for their appeal against sentence;
2. The appeal against sentence is upheld and the sentence of 4 years' imprisonment in respect of both appellants is hereby set aside and substituted with the following sentence;

'Both accused are sentenced to 3 years' imprisonment of which 6 months' imprisonment is suspended for a period of 5 years on condition that the accused are not convicted of housebreaking with the intention to steal and theft, committed during the period of suspension;

3. The sentence for both appellants is ante-dated to 11 January 2016.
4. Reasons to follow.

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## REASONS

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TOMMASI J (JANUARY J concurring)

[1] The appellants herein appealed against conviction and sentence and filed an affidavit explaining the delay in filing their notices of appeal. The court gave the above order and undertook to give reasons. These are the reasons.

[2] The appellants herein appeared with other co-accused in the district court sitting at Tsumeb. First and second appellant pleaded guilty to housebreaking with intent to steal and theft. They were convicted on their plea and sentenced to 4 years' imprisonment on 11 January 2016.

[3] First Appellant drafted a notice of appeal on 13 January 2016 but the date stamp of the clerk of the court indicates that it was received on 24 June 2016. The appellant filed an affidavit wherein he states that he is a layperson and he did not know where to file his notice of appeal and he was only advised at the correctional facility where to file the notice of appeal (CA 41/2016).

[4] The appellant raised a number of grounds but I summarize it as follows:

- (a) The court erred in finding that the state had proven its case beyond reasonable doubt;
- (b) The court erred by relying on the lies by the prosecutor that the appellant stole the following items: 2 X Blackberries; 1 x Box Play station; 1x DVD Player;

- (c) The magistrate failed to request the state to bring technical evidence which could link him to the offence;
- (d) The appellant agreed that he committed housebreaking case, he pleaded guilty to it; and give back the items he stole from the complainant.
- (e) The sentence is flatly unreasonable and he applies for a reduction of the sentence.

[5] The second appellant on 18 October 2016 filed a similarly worded notice of appeal (Case No 69/2016) and a similarly worded affidavit explaining the delay in filing the notice of appeal.

[6] Two separate Criminal Appeal cases were registered but same was consolidated in view of the fact that the two appellants were co-accused in the same case. Before the matter was consolidated the court was unaware of the fact that the cases were connected and the court heard the two appellants in person. The appellants were however represented and counsel for first and second appellant were afforded the time to peruse the record of the submissions made to court by the appellants in person and to file additional heads of argument. The court takes into consideration both the submissions made by the appellants in person as well as the submissions made by counsel on their behalf.

[7] Ms Nghiyoonanye, counsel for the State, in her heads of argument raised the following points in limine.

- (a) The notices of appeal are filed outside the time period provided for by Rule 67 of the Magistrate's Court; and
- (b) The grounds do not comply with rule 67(1) of the Magistrate's Court Rules in that it lack the requisite clarity and particularity.

[8] The first appellant's notice of appeal is dated 13 January 2016 i.e. two days after he was sentenced. His notice was however only lodged with the clerk of the court on 7 July 2016. Second appellant appeared with first appellant being under the impression

that his appeal would also be heard. The court had no record of an appeal lodged by him. He was then allowed an opportunity to file a new notice of appeal. What is apparent is that both appellants were aggrieved by their conviction and sentence. First appellant explained in his affidavit that he is a layperson with no knowledge how to file the notice of appeal and he was only advised at the correctional facility how to file the notice. Second appellant's explanation is exactly the same. The appellant's explanations do not adequately explain the delay.

[9] The appellants pleaded guilty and were questioned in terms of s 112 (1)(b) by the court *a quo*. Their grounds in respect of the conviction are not clear and specific and there is therefore no valid appeal before the court in respect of the conviction. This court is in any event of the view that there are no reasonable prospects that they would succeed in the appeal against conviction.

[10] There are however reasonable prospects that they would succeed with their singular ground in respect of sentence, which is clear and specific. This court would therefore consider their appeal against sentence on the merits.

[11] The appellants pleaded guilty to having broken into the house of the complainant and having stolen goods, the value whereof was not proven. During questioning first appellant admitted that he stole a laptop, touch screen tablet written Foti, Samsung cellphone, camera, Adidas and Nike sneakers, coins in pula and Angolan kwanza, two pieces of meat, short trousers and t-shirts. This constituted only some of the items which the appellant was charged with and a few items he was not charged with. The State accepted the plea on the limited items. There was no admission that he had formed common purpose with the Second Appellant, nor did he make any admission in respect of the value of the property.

[12] Second appellant admitted to having stolen an HP laptop, Acer Laptop, Toshiba laptop, black Samsung, Ericson cellphone, Sony video camera, 2 Fugui cameras, Adidas and Puma sneakers, fondi tablet, black ladies handbag and 2 new school bags. These items are slightly different from those mentioned by the first appellant but did not include all the items listed in the charge sheet. The State also accepted his plea. Second

appellant also did not admit to having formed common purpose with First Appellant and neither did he make an admission in respect of the value of the property.

[13] Two other co-accused pleaded guilty to receiving stolen property and stated during s 112 (1)(b) questioning that they bought it from First Appellant.

[14] First appellant informed the court that he is 35 years old, not married and that he has no children. He was employed in the construction industry as a bricklayer. Second appellant informed the court that he was 31 years old; he does tenders; and he is not married but had one daughter who was 9 years old. No previous convictions were proven against the appellants.

[15] The prosecutor informed the court that most of the items were not recovered. He informed the court that three laptops, A Sony video camera, Samsung, foreign currency, two Adidas sneakers, a handbag, trousers and a wallet were recovered.

[16] The court, when sentencing the appellants took into account the seriousness and prevalence of offence; the fact that imprisonment has become the norm for this offence; the substantial value of the stolen items of which only some of the goods were recovered.; their personal circumstances, the fact that they are first offenders and that they pleaded guilty which he considered as a sign of their remorse. The learned magistrate pointed out that although the recovery of the goods is a relevant factor that he did not consider it to have anything to do with the commission of the offence. The learned magistrate stated further that usually goods are recovered because of the swift response by the police and at times by sheer luck. The learned magistrate in his statement in terms of Rule 67 indicated that he had nothing to add to these reasons.

[17] Ms Mugaviri, counsel on behalf of the first appellant indicated that some of the items which the first appellant mentioned did not form part of the charge against the appellant. This is not entirely correct but at least two of the items were not recorded in the charge sheet i.e the coins and the two pieces of meat. She furthermore pointed out that the value of the items were not proven but was left open to speculation. She further submitted that although the court failed to take into consideration that some of the items were recovered which ought to have persuaded him to deviate from the norm. She cited

cases where the value of the items stolen was substantial but lesser sentence were imposed. She furthermore criticized the failure of the learned magistrate to assist the appellant to place more information before the court. She argued that this ought to have been done in view of the fact that this offence usually attracts effective imprisonment, even for first offenders. She also took issue with the fact that the learned magistrate made “baseless remarks” regarding the manner in which the goods are “usually recovered”. She held the view that the time the appellants already served i.e 1 year and 7 months was an appropriate term of imprisonment.

[18] Ms Horn, acting *amicus curiae* for Second Appellant also took issue with the fact that the value of the stolen goods was not proven. She submitted that, although the value does not form part of the element of the offence of theft, it was a crucial element when considering an appropriate sentence. She held the view that the learned magistrate also failed to give proper consideration to the personal and mitigating circumstances of the Second Appellant; overemphasized the seriousness of the offence and the interest of society. She submitted that the sentence was shocking and disproportionate to the goods stolen.

[19] Ms Nghiyoonanye essentially conceded that value of property was relevant to sentencing and submitted that the learned magistrate indeed gave proper consideration to this aspect. She submitted that the court considered the fact that some of the goods were recovered and properly reasoned that same was not by any doing of the accused. She held the view that the sentence was not shockingly inappropriate.

[20] It has become the norm to impose custodial sentences for housebreaking and theft. I am in agreement with this approach. The nature and prevalence of this offence calls for severe sentences even for first offenders. This however does not mean that the court is compelled to impose custodial sentences in all cases. The judicial officer is empowered to exercise his/her sentencing discretion in a judicious manner to determine the appropriateness of a custodial sentence and the appropriate duration thereof. In *S v Kasita* 2007 (1) NR 190 (HC) at page 191, paragraph 2, Silungwe AJ: made the following remarks:

'The Ondangwa magistrates' court has, in recent times, been imposing markedly heavy sentences on persons convicted of housebreaking with intent to steal and theft. Although such sentences have often met with disapproval and even reversal by this court, the trend does not show signs of abating. While it is trite that sentencing is pre-eminently the duty of the trial court, it is incumbent upon such court to exercise its discretion judicially. Moreover, such court is ultimately bound by decisions of a superior court. After all, it is always needful for the sentencer to determine with care what appropriate sentence would, in the peculiar circumstances of the case, best serve the interests of society as well as the interests of the offender. It is certainly in the interests of society that the accused receives an appropriate sentence.'

[21] There is a general duty on a judicial officer to encourage an unrepresented accused to place his/her personal information and mitigating circumstances fully before the court, more so in cases of housebreaking with intent to steal and theft in view of the fact that these offences normally attracts a custodial sentence. The personal information provided to the court is very scant and the judicial officer could have done more to elicit more information from the appellants.

[22] It is trite that the value of stolen goods is relevant when it comes to sentencing. In this case the State failed to prove the value of the items. The learned magistrate concluded that the goods were of substantial value. This conclusion was not substantiated by evidence and the court erred in this regard. At best, given the nature and quantity of the items stolen, the court could infer that the theft was motivated by greed and not necessity.

[23] This court is of the view that it should not substantially reduce the sentence. The learned magistrate's reasons for imposing a custodial sentence despite the fact that they are first offenders, are sound. It is necessary for the courts to emphasize the deterrent aspect of punishment at the expense of the personal circumstances of the appellant's. The fact that the value of the property has not been established however compels this court to interfere with the duration of the custodial sentence imposed by the learned magistrate.



[24] In the result the court made the following order:

1. Both appellants' applications for the extension of the time provided for in Rule 67 of the Magistrate's Court Rules in respect of their appeal against conviction are dismissed but condonation is granted for their appeal against sentence;
2. The appeal against sentence is upheld and the sentence of 4 years' imprisonment in respect of both appellants is hereby set aside and substituted with the following sentence;

'Both accused are sentenced to 3 years' imprisonment of which 6 months' imprisonment is suspended for a period of 5 years on condition that the accused are not convicted of housebreaking with the intention to steal and theft, committed during the period of suspension;

3. The sentence for both appellants are ante-dated to 11 January 2016.
4. Reasons to follow.

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MA Tommasi  
Judge

I agree

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H C January

Judge

## APPEARANCE

For the 1<sup>st</sup> Appellant:

Ms Mugaviri

Of Mugaviri Attorney (Legal Aid)

For the 2<sup>nd</sup> Appellant:

Ms Horn

Of W Horn Attorney (*Amicus curiae*)

For the Respondent:

Ms Nghiyoonanye

Of Office Prosecutor General

Oshakati