



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 29/2016

In the matter between:

LYSIAS AKAWA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Akawa v S* (CA 29/2016) [2017] NAHCNLD 84 (15 August 2017)

Coram: TOMMASI J and JANUARY J

Heard: 15 June 2017

Delivered: 15 August 2017

Flynote: Criminal Procedure – Appeal – Sentence – Five charges of housebreaking with intent to steal and theft – committed in one night at different places – three years' imprisonment of which 15 months are suspended on each charge – inappropriate.

Summary: The appellant pleaded guilty in the magistrate's court on 1 charge of housebreaking with intent to steal and four (4) charges of housebreaking with intent to steal and theft. All crimes were perpetrated on the same night at different places with different complainants. The appellant was charged on charge 1 with housebreaking with intent to commit an offense unknown to the prosecutor. The appellant pleaded guilty and during questioning by the magistrate admitted that he broke in to steal money in this charge. He however did not find any money. He was sentenced on each charge to 3 years' imprisonment of which 15 months are suspended on condition that the accused is not convicted of housebreaking with intent to steal and theft committed during the period of suspension. This court finds the sentence inappropriate.

JUDGMENT

JANUARY J (TOMMASI J CONCURRING)

[1] This is an appeal against sentence. The appellant pleaded guilty to 1 charge of housebreaking with intention to steal and 4 charges of housebreaking with intent to steal and theft. He was sentenced on each charge to 3 years' imprisonment of which 15 months are suspended on conditions. It was ordered that the sentences on counts 4 and 5 are to run concurrently with the sentences on count 1, 2, and 3.

[2] The appellant was charged with two other co-accused persons in the matter. He pleaded guilty on all charges and the co-accused not guilty on 07 June 2013. The magistrate was satisfied that the accused is guilty on charges 1, 3, 4, and 5. The appellant admitted all the elements of the crime in count 2 but denied the amount of cash and some items alleged to have been stolen. A plea of not guilty was accordingly entered in respect of count 2. The appellant was tried with the other co-accused.

[3] The trial commenced on 23 April 2014. Proceedings had to be postponed periodically because one or other of the accused were absent on trial dates. Eventually on 05 April 2016, the trial of the appellant was separated from the co-accused in their

absence. The public prosecutor accepted the plea of guilty on housebreaking with intent to steal and theft of property of an unknown value on which the appellant initially pleaded guilty in relation to count 2. He was convicted on all 5 charges. I am referring to the history of the matter in passing because I am of the view that the case against the appellant could have been finalized at an early stage had the public prosecutor exercised his discretion to accept the plea of guilty at that stage.

[4] Mr Tjiteere appears in this matter *amicus curiae* and Mr Pienaar is representing the respondent. Mr Pienaar initially raised a point *in limine* that the appellant did not apply for condonation whereas his notice of appeal was filed late. The appellant at that stage was a self-actor. This court decided to hear the appeal on the merits.

[5] The crimes were all committed during the night of 14 September 2012 at different cuca-shops. The accused is a first offender and was 22 years of age when he committed the crimes. From the many reviews and appeals that this court is dealing with, housebreaking with the intent to steal and theft is mostly committed by offenders between the ages of 17 to 30 years. The appellant falls within that category. The norm for housebreaking is a custodial sentence even for first offenders where there are no exceptional circumstances.¹ The appellant is not married but has two children who are staying with his mother.

[6] Mr Tjiteere submitted that the appellant effectively will be in prison for 3 years and 9 months, considering that part of the sentences on the individual charges are suspended and sentences on charges 4 and 5 are to run concurrently with the sentences on charges 1, 2 and 3. He submitted that the sentences cumulatively are shocking and inappropriate.

[7] The calculation of Mr Tjiteere is however wrong. The appellant was sentenced to 3 years' imprisonment of which 15 months are suspended on each of the 5 charges. Three years equals 36 months. When subtracting the suspended 15 months it leaves a balance of 21 months effective imprisonment on each charge. Considering that the sentences on charges 4 and 5 are to be served concurrently, it means that appellant for

¹ See: *Tomas Goma Jacobs v The State*, Unreported, Case no. CA 7/96

now has to serve 63 months imprisonment equalling 5 years' and 3 months. This exercise is, however academic, only to determine the period the appellant will have to serve for now and not the approach that this court must follow to decide the appropriateness of the sentence of the lower court.

[8] In considering an appropriate sentence, the suspended imprisonment additionally imposed, also must be taken into account. The approach that needs to be applied is not to split the sentence but to consider whether the imposition of imprisonment to which suspensive conditions are attached, constitutes a tenable exercise of the magistrate's decision. It would be wrong to only look at part of the sentence as if the suspended part needs not to be undergone. The suspended part hangs over the head of the appellant as the proverbial sword of Damocles and is part of the sentence.²

[9] The sentence that this court needs to consider is the cumulative sentence of 15 years of imprisonment on 5 charges of housebreaking to steal and theft, committed on the same night at different places with different complainants, and its appropriateness. In my view the sentence is harsh, shockingly inappropriate and stands to be set aside. The respective value of the property stolen are respectively on the different charges as follow: Charge 1, no value as the applicant did not find any money; charge 2, value unknown; charge 3, N\$338.50; charge 4, N\$840; and charge 5, N\$535.

[10] I have already hereinbefore referred to the norm or general rule for sentencing in individual housebreaking with intention to steal and theft cases. It became the general rule in courts in an attempt to deter other likeminded would be offenders. There is in my view no justification to shy away from this norm where an accused goes on a spree of housebreakings with intent to steal and thefts. I however find that the cumulative effect of the sentences need to be afforded the necessary weight to impose a well-balanced sentence. This, I find, with due consideration of the relatively low value of the property stolen.

[11] I find that the learned magistrate did not judicially exercise his discretion in the matter. It is clear that, although he sentenced with a hand of mercy; considering the

² *S v Makoae* 1997 (2) SACR 705 at 707 (Headnote).

accused as a youthful offender; a first offender; the seriousness of the crimes; the prevalence of the crimes; aggravating circumstances i.e. the crimes committed on the same night , in my view he misdirected himself by not giving due weight to the cumulative effect of the sentences.

[12] In the result the accused is sentenced as follows:

1. Charge 1: 1 (one) year imprisonment which is in total suspended for 5 (five) years on condition that the accused is not convicted for housebreaking with intent to steal and theft committed during the period of suspension;
2. Charge 2: 2 (two) years' imprisonment of which 1 (one year is suspended for 5 (five) years on condition that the accused is not convicted for housebreaking with intent to steal and theft committed during the period of suspension.
3. Charge 3: 1 (one) year imprisonment;
4. Charge 4: 1 (one) year imprisonment;
5. Charge 5: 1 (one) year imprisonment.
6. The sentence is ante-dated to 06 April 2016.

H C JANUARY

JUDGE

I agree,

M A TOMMASI

JUDGE**Appearances:**

For the Appellant:

Mr Tjiteere

Of Dr Weder, Kauta & Hoveka Inc.

For the Respondent:

Adv Pienaar

Of Office of the Prosecutor-General