REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGEMENT

Case No.: CA 17/2017

In the matter between:

TOMAS FAUSTINUS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Faustinus v The State* (CA 17/2017) [2017] NAHCNLD 96 (28 September 2017)

Coram: TOMMASI J and JANUARY J

Heard: 17 August 2017

Delivered: 28 September 2017

Flynote: Criminal Procedure – Appeal – Conviction and Sentence – Housebreaking with intent to steal and theft – 3 years' imprisonment – Application for condonation – no explanation for delay – No prospects of success on appeal – Appeal struck from the roll

Summary: The appellant was convicted and sentenced housebreaking with intent to steal and theft after he pleaded not guilty and a trial was held. He now appeals against both conviction and sentence. He was sentenced to 3 years' imprisonment. He filed his notice of appeal out of time. He filed an application for condonation but did not advance any explanation for the delay. This court considered the merits to determine if the appellant has any prospect of success on appeal. There are no prospects of success on appeal. The matter is accordingly struck from the roll.

ORDER

1. I find that there are no prospects of success on appeal.
2. The appeal is struck from the roll and considered finalized.

APPEAL JUDGEMENT

JANUARY J (TOMMASI J CONCURRING)

[1] The appellant was sentenced on 22 July 2016 in the magistrate's court of Oshakati. He filed his application for condonation and notice of appeal on 19 August 2017. The learned magistrate properly explained the appellant's rights to appeal and review to him and he indicated that he understood and signed the pre-printed form that he understood.

[2] The appellant is representing himself in this appeal and was unrepresented in the court a quo. The grounds of appeal are not properly set out but the following can be discerned from the application for condonation, notice of appeal and oral address: That the appellant did not receive a fair trial in that he was not afforded the opportunity to have a lawyer either private or from the Directorate legal aid; that the court erred or misdirected itself by not allowing the appellant to call a defence witness or not summonsing his witness (the appellant withdrew this ground in his oral submissions);

that the court erred in convicting the appellant while none of the items stolen were found in his possession but a laptop was found in possession of someone else; that the court erred in sentencing the appellant without the exhibits; that the court erred in sentencing the appellant to direct imprisonment instead of a fine.

[3] The appellant did not give reasons for the late filing of his notice of appeal. Mr Tjiveze who is representing the respondent, however did not take issue with this omission and only submitted that there are no prospects of success and the appeal should thus be struck from the roll.

[4] I can only reiterate that for an application for condonation to be successful that any applicant needs to satisfy the court that he has a reasonable explanation for the delay and that there are reasonable prospects of success on appeal.

> '[11] The law states that an application for condonation must clearly set out adequate reasons for the late filing and that there are prospects of success on appeal. (See S v Iyambo (HC NLD case No CA 25/2012, 2 May 2013, Smuts J and Ueitele J)). The appellant also does not say that he has prospects of success on appeal. The appellant has not made out a case for condonation for the late filing of the appeal and there are no proper grounds of appeal. This notwithstanding, the application for condonation will be granted and the reasons for that will be apparent herein below.'[1]

Prospects of success

[5] I deal with the merits of the case to determine if there are prospects of success on appeal. The record reflects that the right to legal representation was properly explained at the first appearance of the appellant.[2] He was also informed that if he cannot afford to appoint a legal representation of his own, that he can apply for one to be appointed by the Directorate of Legal Aid. The appellant opted to conduct his own defence. The first appearance was on 18 April 2016. The case was postponed to 24 May 2016 and again to 11 July 2016 when the State closed its case. The appellant thus

[1] *S v Kapuire* 2015 (2) NR 394 (HC) at 398 D-E

[2] See; *S v Kasanga* 2006 (1) NR 348 (HC) Headnote; In order for an accused to be given a fair trial as envisaged by art 12 of the Namibian Constitution, an accused must be informed at the outset of his right to legal representation and that he can approach the Legal Aid Board for assistance.

had ample time to apply for legal aid if he opted to. The learned magistrate advised the appellant that he could call a witness whom the State opted not to call. The matter was rolled over to 12 July 2016 for the defence witness. On 12 July 2016 the defence witness was not available and the matter was then postponed to 22 July 2016 for the defence witness.

[6] On 22 July 2016 the defence witness was again not available. Upon enquiry the applicant informed the court that he was in contact with his witness. The witness allegedly stated that he will not come to court to testify about things that he does not know. The appellant also informed the court that he will proceed without his witness. The appellant opted to close his case without testifying. It appears that this witness was not a material witness for the appellant. There was therefore no reason for the magistrate to insist to call this witness.

[7] The complainant in the housebreaking case testified that on 19 March 2016 he left his house at 10h00 after locking a door and burglar bar door with a pad lock. He returned after 21h30 and found the door and burglar bar door open. He detected that the doors were forced open with an unknown object. Upon further investigation he found that his Samsung flat screen television to the value of N$7 500, HP laptop worth N$4 000, a black bag worth N$500, a memory card reader and 32 gigabyte memory card worth N$100 and clothes with an unknown value were stolen. He called the police and eventually opened a case.

[8] A few days later the complainant received information that he could receive his HP laptop from a person called Songo. He went to Songo's house in the company of the police. Mr. Songo did not have the laptop with him but directed the complainant to the house of a certain Mr Kufanga. The complainant found the laptop and identified it on a certain marking with a blue sticker on the keyboard and the serial number. He switched on the computer and found certain plans of a house that he was previously working on.

[9] Mr Songo testified and stated that on 19 March 2016 he was at a certain bar at Baywatch, Ongwediva. He wanted to buy a second hand computer. The barman told Songo that he could assist. Mr Songo eventually was directed to a certain Kahembo.

This Kahembo accompanied Songo to a certain house where they met with the appellant. The appellant is well known to Songo as Owen. The appellant came out with the laptop that eventually turned out to be the one belonging to the complainant. Songo bought the laptop from the appellant for N$1 400 and gave the appellant the money.

[10] After about a week the police came to Songo's house with the complainant and enquired about the laptop. He admitted to the police and complainant that he bought the laptop from Owen who is the appellant. At the time Songo did not have the laptop as he handed it to Kufanga who is an IT guy studying at UNAM. Songo took the police and the complainant to Kufanga's house where the laptop was recovered. Songo bought the laptop at about 20h00 on 19 March 2016.

[11] Mr Kufanga testified and confirmed that he received the laptop from Mr Songo for formatting and fixing as it had a password. He was not present when the laptop was recovered. He was however called and he eventually instructed his cousin to hand back the laptop to the police. He installed Windows on the laptop in order to format it. The laptop was given to him for a second time by Songo for fixing. He then deleted Windows from it.

[12] After the testimony of Mr Kufanga the State closed its case and abandoned calling one witness. The court informed the appellant that he can call this witness which he opted not to do. The appellant also opted not to testify.

[13] There was a strong *prima facie* case against the appellant when the State closed its case. The magistrate properly explained to the appellant the consequences if he decides to remain silent.

> 'It is trite that an accused cannot be compelled to give evidence against himself (art 12(1)(f) of the Namibian Constitution) and has the right to be presumed innocent until proven guilty according to law (art 12(1)(d) of the Constitution). The entrenchment of those rights does not mean that an accused's election to remain silent in the face of incriminating evidence against him is without consequence in the overall assessment of the evidence by the Court. When the State has established a prima facie case against an accused which remains

> uncontradicted, the Court may, unless the accused's silence is reasonably explicable on other grounds, in appropriate circumstances conclude that the prima facie evidence has become conclusive of his or her guilt.'[3]

Ad Sentence

[14] Sentencing is primary 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.[4]

[15] I agree with Maritz J (as he then was) when he stated:

> 'The crime of housebreaking with intent to steal and theft is - as the magistrate has observed - a prevalent and serious one. It is regarded by the law and society as a particularly insidious form of theft. It is said that a man's home is his castle. If there is one place where a person should feel safe and secure it is in his home. Housebreaking with intent to steal and theft strike at and destroy the sense of safety and security which the occupants are entitled to enjoy. It constitutes an unlawful invasion of the complainant's privacy and an illegal misappropriation of his or her possessions - sometimes commercially irreplaceable goods of great sentimental value.

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[3] *S v Katari* 2006 (1) NR 205 (HC) Headnote G-I

[4] *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

> For these reasons society has a particular interest that the commission of this crime should be discouraged by an appropriate judicial response. Perpetrators should know that the norm is imprisonment without the option of a fine unless the circumstances of a particular case justify the imposition of a lesser sentence.'[5]

[16] I do not find any misdirection or error by the learned magistrate when she imposed 3 years' imprisonment. She considered the personal circumstances of the appellant and balanced it with the expectations of society and the seriousness of the crime. In my view she exercised her sentencing discretion judiciously and properly.

[17] In the result:

1. I find that there are no prospects of success on appeal.
2. The appeal is struck from the roll and considered finalized.

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H C JANUARY

JUDGE

I Agree

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M A TOMASSI

JUDGE

[5] *S v Drotsky* 2005 NR 487 (HC) 489 F-J – 490A

Appearances:

For the Appellant:	In Person
	Of Oluno Correctional Facility
For the Respondent:	Adv Tjiveze
	Of Office of the Prosecutor-General