

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

APPEAL JUDGMENT

Case no: CA 38/2017

In the matter between:

SACKY LOMBOLENI

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Lomboleni v S* (CA 38/2017) [2018] NAHCNLD 26 (15 March 2018)

Coram: JANUARY J and TOMMASI J

Heard: 01 February 2018

Delivered: 15 March 2018

Flynote: Criminal Procedure – Appeal – Conviction & Sentence– Late filing of notice of appeal – Application for condonation – Reasonable explanation for delay – Prospects of success on appeal on sentence – Counsel requested to address court on sentence.

Summary: The appellant in this matter was properly convicted for Housebreaking with intent to steal and theft. - Reasonable explanation for the delay was provided but found not to be reasonable but there are prospects of success on appeal on sentence. The appeal is not against sentence but counsel were asked to address the court on

sentence which they did. The court found that there are prospects of success on sentence.

ORDER

1. The application for condonation is granted;
2. The conviction is confirmed;
3. The sentence of 4 years imprisonment is set aside; and
4. The appellant is sentenced to 2 years imprisonment;
5. The sentence is antedated to 19 October 2016.

JUDGMENT

JANUARY J (TOMMASI J concurring):

[1] The appellant in this matter was convicted for housebreaking with intent to steal and theft in the Tsumeb magistrate's court. He was sentenced on the 19th of October 2016 to 4 years' imprisonment. He was unrepresented in the court a quo and filed his notice of appeal, as date stamped by the clerk of court, on 14 November 2016 although it is dated 21 October 2016. He was then a self-actor. In that notice he requested that a fine should be imposed.

[2] He is represented in this court by Mr Shipila from the Directorate Legal Aid in this appeal and Mr Gaweseb is representing the respondent. The appellant with his first notice of appeal only appealed against sentence. That notice was not a proper notice of appeal. Mr Shipila withdrew that notice and filed a new notice of appeal on the 13th of November 2017 only against conviction.

[3] Mr Gaweseb raised a point in limine that the appellant's initial notice of appeal was filed almost 2 weeks late and no reasons for the delay are advanced. It is indeed so that the appellant did not provide reasons for the delay. Only Mr Shipila filed a supporting affidavit stating that the appellant is a lay person and that he would suffer great prejudice if the appeal is heard on his initial notice of appeal. He submitted that it would be in the interest of justice that the appeal should be heard on the new notice of appeal.

[4] Mr Gaweseb on the other side submitted that a lay appellant also has the obligation to comply with the rules of court and in addition he submitted that there are no prospects of success on appeal. This court has a discretion whether or not to grant condonation. The appellant's first notice of appeal *prima facie* seems to be drafted well within time although it is not a proper notice of appeal. The date stamp of the correctional facility, however, reflects that they received it on the 27th of October 2016. It was only filed on 14 November 2016. It is not clear what caused the delay in between. In these circumstances I decided to consider the merits of the appeal to establish if there are reasonable prospects of success on appeal.

[5] The new grounds of appeal are as follows:

'1. The learned magistrate failed in law and/or in facts in finding the accused guilty on the available facts and evidence.

1.1 The learned magistrate misdirected herself in law and/or in fact when she wrongly drew a negative inference from the Appellant's choice to remain silent while being questioned by the Police at the time of his arrest and inferred that the accused had fabricated the person from whom he received the bag found in his possession;

1.2 The learned magistrate misdirected herself in law and/or in fact by wrongly concluding that the doctrine of recent possession provided sufficient grounds upon which to find the Appellant guilty as charged;

1.3 The learned magistrate misdirected herself in law and/or in fact when she wrongly drew inference from the facts that the appellant got lucky on the day of the housebreaking when (he) found nobody at the home of the complainant, broke in and stole the bag.'

[6] The appellant pleaded not guilty and gave a plea explanation as follows: 'At the said date, time I was not in the vicinity. A day passed a friend of mine building at Dundee brought me a bag that I should hold it for him. My sister stays in Saamstaan. I stay in Kavukiland.'

[7] The State called witnesses to prove the crime. The complainant testified that her bag of clothes was stolen on the 19th of December 2013 from a shack in the yard where she stays. On the date she closed the door but did not lock it. She went to the neighbours and looked at photos. The neighbour's house is not far from her house. It started raining and she remained at the neighbours' place until the rain stopped. At about 21h00 she came into the room where the bag with clothes was stolen. She wanted to change clothes but could not find her bag with clothes. The complainant did not observe anything strange beforehand and no indication that someone had entered the room. She reported the matter to the police the same evening.

[8] Two days after the incident she crossed with the appellant in a street. He, according to her, acted suspiciously. She knew the appellant before as he used to visit ladies that she is residing with. The appellant also entered her room once when she was sleeping. On this occasion complainant awoke and the appellant was enquiring about the whereabouts of a lady called Tati. She informed the appellant that Tati was not there and he left. On the day that she crossed with the accused in the street, she found it suspicious that when she looked at the appellant on two occasions, he was looking down.

[9] The complainant reported her suspicions to Women and Child network. She also told them that she is suspecting the accused. They located where the appellant was staying and went there. The place belonged to the appellant's girlfriend. Upon a request to search the place the appellant refused but his girlfriend allowed the search. The complainant found her bag with clothes under a bed. The bag was locked with a padlock. The appellant did not deny that he brought the bag to his girlfriend's place but stated in cross-examination that he received the bag from a friend with the name Petrus Shiweda to keep for him. The complainant denied that the appellant said that but stated that he never replied like that. The complainant stated that the appellant offered to pay

her not to open a case against him. The appellant stated that he did not take the bag and she asked him why he wanted to pay her if he did not take the bag.

[10] Emma Nangombe is the girlfriend of the appellant called by the State. The appellant is the father of their child and her boyfriend. On Christmas day the 25th of December she saw the complainant and a man approaching. They called and enquired about Sacky, the appellant. She called the appellant from inside the house. Thereafter this witness went inside the house and does not know what was discussed. At some point in time complainant and the man asked for permission to search the house for clothes. They searched and the complainant took a torch and looked under a bed where she found her bag of clothes. The witness did not know when and how the bag with clothes came there. The appellant explained to the police that he received the bag with clothes from his friend.

[11] Erastus Daniel is one of the men who accompanied the complainant to the house where the appellant and his girlfriend were. The complainant informed him on the 19th of December 2013 that her house was broken into and that she was suspecting a certain person. On 25th December 2013, the complainant again phoned him and stated that she had information about the whereabouts of her things. Mr Daniel accompanied the complainant with a certain Immanuel Hafeni to the place where they found the appellant. This witness corroborates the evidence of the complainant and previous witness. This witness confirmed that the appellant offered money to the complainant not to open a case. In addition the appellant said that he will not repeat it again. The appellant did not deny that he committed the crime. He did not say that he received the bag from a friend to keep for him. He further said that the bags belonged to him. In cross-examination this witness stated that there were 2 bags tied under the bed.

[12] Mwitilifa Festada testified that she is staying with the complainant. The witness found the complainant on 19th December 2013. The complainant reported that her things were stolen and that the door was not locked but just closed when she went to the neighbours. This witness received a phone call that the stolen items were recovered. At the police station the items were unpacked. She also identified her child's clothes bag, N\$200 and a cell phone with the complainant's bag. The appellant

requested that no case must be opened but that he will pay. The appellant did not say that the stolen items were brought to him by a person named Petrus Shigweda.

[13] The appellant testified in his defence. He testified that the bag was given to him by a friend, Paulus Shigweda to keep it for this person to be collected at a later stage. He stated that Paulus Shigweda was on contract work in Tsumeb. His contract apparently came to an end and he went to Swakopmund. The appellant conceded that it was his mistake not to tell the police and his girlfriend about the bag. He testified that he firstly kept the bag at his place and at a later stage took it to his girlfriend's place because he mostly stayed with the girlfriend and was afraid that his place might be broken into and the bag could be stolen. He was also afraid that children might be playing with it. The appellant denied that he broke in and stole the bag.

[14] It is trite law that the prosecution bears the onus of proving their case beyond reasonable doubt. An accused does not have to prove his innocence. The court a quo needed to consider if the explanation rendered by the appellant is reasonably possibly true even if it is false in the circumstances.

[15] The learned magistrate found that the appellant is familiar with the place where the complainant stayed as he visited there often. She inferred that on the day that the bag was stolen, he was lucky that no one was present at the place. She further relied on the doctrine of recent possession. She found that the appellant fabricated the person Paulus Shigweda as a scapegoat to justify his possession of the bag of clothes and convicted the appellant as charged.

[16] It is correct that where a person is found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, a court is entitled to infer that such person had stolen the article or that he is guilty of some other offence. There are instances where a lapse of 14 days or longer was regarded as recent possession. The test to be applied in this regard was laid down in *R v Mandele* 1929 CPD 96 at 98, namely: '...is the article one which could easily pass from hand to hand, and

was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief?¹

[17] The learned magistrate in this case did not only rely on the doctrine of recent possession. In addition, she found that the appellant did not mention at his first confrontation by the complainant and Erastus Daniel that he received the bag from Paulus Shigweda. The girlfriend of the accused however testified that the appellant stated that he received the bag from a friend but he did not mention a name. I am mindful that the girlfriend has an interest in the matter. As the girlfriend and mother of the appellant's child she might be biased. Her evidence should be evaluated with caution. In addition, common sense dictates that the appellant should have informed the girlfriend about the bag especially in circumstances where he wants it to be in safe custody, not to be stolen and not wanting children to play with it.

[18] The appellant could not remember the day when the bag was allegedly handed to him by Paulus Shigweda. When he was asked by the police to bring out his things he claimed ownership of the bag. In addition the complainant and Daniel Erastus testified that the appellant offered to pay the complainant not to open a case. This evidence was confirmed by Mwitilifa Festada. I find the evidence of these witnesses credible. In these circumstances I am of the view that there is no misdirection by the learned magistrate.

[19] This court requested counsel to address the court on the sentence of 4 years imprisonment for a first offender, 36 years old, having no previous convictions and with his personal circumstances, is it a competent sentence? Counsel addressed the court. Mr Shipula submitted that it is not a competent sentence whereas Mr Gaweseb submitted to the contrary.

[20] The appellant is 36 years old, has a girlfriend, has 7 children of which 5 stay with his father in the North and 2 are with him. He cuts poles at times and sells them. He could afford a fine of N\$400 although he was unemployed.

[21] This court noticed from reviews coming before it, that there is a tendency of magistrates in this Region to impose sentences for housebreaking cases to the

¹ *S v Kapolo* 1995 NR 129 (HC).

maximum of their jurisdiction, irrespective of the circumstances of the particular case. Individualization is a factor to be considered in the particular circumstances of each case. In this case almost the maximum sentence was imposed for a bag of clothes worth N\$450. The sentence is shockingly inappropriate and stands to be set aside.

[22] In the result:

1. The application for condonation is granted;
2. The conviction is confirmed;
3. The sentence of 4 years imprisonment is set aside; and
4. The appellant is sentenced to 2 years imprisonment;
5. The sentence is antedated to 19 October 2016.

H C January

Judge

M A Tommasi

Judge

APPEARANCES:

For the Appellant:

Mr Shipila

Directorate Legal Aid, Tsumeb

For the Respondent:

Mr Gawaseb

Office of the Prosecutor – General, Oshakati