

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGMENT

Case no CA: 33/2017

In the matter between:

MARTIN SANDU MWAAMENANGE

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Mwaamenange v S* (CA 33 /2017) [2018] NAHCNLD 38
(19 April 2018)

Coram: TOMMASI J and JANUARY J

Heard On: 15 March 2018

Delivered: 19 April 2018

Flynote: Appeal – Sentence – Magistrate overemphasized the deterrence – Found the offence committed by the appellant fit the circumstances as they appear in *Thomas Goma Jacobs v The State*, case no. CA 7/96 (HC) – Appellant convicted of theft and not housebreaking with the intent to steal and theft.

Summary: The appellant was convicted for theft of approximately N\$800 from a Jackpot Machine. This money was recovered by the quick action of members of the public who saw the appellant steal the money. The appellant had a previous conviction of housebreaking with intent to steal and theft. He was sentenced to 4 years' imprisonment. The court held that the magistrate erred by finding that the theft committed by the accused is on par with the offence of housebreaking with the intent to steal and theft. Although the accused had a previous conviction the court still had to consider the current offence he committed, his personal circumstances and the interest of society. The appeal against sentence is upheld and the sentence of the appellant is reduced to 3 years' imprisonment of which 1 year's imprisonment is suspended.

ORDER

1. The appeal against sentence is upheld and the sentence imposed by the learned magistrate is hereby set aside and substituted with the following sentence:

The appellant/accused is sentenced to three years' imprisonment of which one year's imprisonment is suspended for five years on condition that the accused is not convicted of any offence of theft committed during the period of suspension;

2. The sentence is ante-dated to 10 October 2016.

JUDGMENT

TOMMASI J (JANUARY J Concurring):

[1] The appellant appeals against the sentence imposed in the district court sitting at Oshakati. He was convicted of theft and sentenced to 4 years' imprisonment.

[2] The appellant's ground of appeal simply implicate that he was sentenced to 4 years' imprisonment without the option of a fine. This court will interpret this to mean that the learned magistrate erred by not considering imposing a fine as an appropriate sentence.

[3] It is trite, as was correctly pointed out by Mr Tjiveze counsel for the State, that:

'Punishment being pre-eminently a matter for the discretion of the trial Court, the powers of the Court of Appeal to interfere with sentence are limited. Such interference is only permissible where the trial Court has not exercised its discretion judicially and properly. This occurs when it has misdirected itself on the facts material to sentencing or on legal principles relevant to sentencing. It will also be inferred that the trial Court acted unreasonably if there exists such a striking disparity between the sentences passed by the learned trial judge and the sentences which this Court would have passed . . . or to pose the enquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this Court to be so startlingly . . . or disturbingly inappropriate - as to warrant interference with the exercise of the learned Judge's discretion regarding sentence. A Court of appeal will not readily differ from a trial Court in its assessment either of the factors to be had regard to or as to the value to be attached to them; . . . ' ¹

[4] The appellant was convicted of having stolen money from a jackpot machine. The amount was recovered due to intervention by members of the public who saw the appellant taking the money. The amount was not specified but the appellant admitted that N\$800 was confiscated by the police. He was 25 years old, single and the father of two children. He was a panel beater. The appellant was previously convicted of housebreaking with intent to steal and theft, assault with intent to do grievous bodily harm and escape from lawful custody.

[5] The learned magistrate considered the appellant's youthfulness as a mitigating factor. He considered the appellant's personal circumstances, the offence he committed and the prevalence and the circumstances under which the offence was committed. The learned magistrate also took into consideration the interest of society. The learned magistrate furthermore referred to the case of *Thomas Goma Jacobs's v The State*, case no. CA 7/96 (HC) delivered 22 April 1996, indicating that

¹ See *S v Myburg* 2008 (2) NR 592 (SC) at page 628 referring to *S v Van Wyk* 1993 NR 426 (SC) (1992 (1) SACR 147 (HC) at 165d - g) and the authorities there cited. *S v De Jager & another* 1965 (2) SA 616 (A) at 629A - B; *S v Pillay* 1977 (4) SA 531 (A) at 535D - G.

'though this offence is theft, the decision of Strydom JP, as he then was, fits the accused's circumstances.'

[6] Mr Nsundano, counsel for the appellant argued that the court misdirected itself by overemphasizing the prevalence of the offence and the deterrence of would be offenders whilst neglecting the other factors.

[7] Mr Tjiveze submitted that there has been no misdirection and the learned magistrate duly considered the relevant factors. He however, in his heads of argument indicated that the 4 years imprisonment may be confirmed, with half of that sentence being suspended.

[8] The learned magistrate indeed emphasized the prevalence of theft on the court roll. What must be determined is whether the situation is such that the court was justified to emphasize these factors at the expense of the other factors such as the personal circumstances of the appellant. In the *Jacobs* matter the court held the view that given the nature of the offence and the prevalence thereof, that custodial sentence ought to be the norm. Housebreaking with intent to steal is a compound crime. Together they form a serious threat to the safety and property of ordinary civilians. This court's view on the nature of this combination is well known. Strydom AJA, stated the following in *S v Jason & another* 2008 (1) NR 359 (SC):

'In this day and age where innocent people have to barricade themselves behind bars in their own homes in order to protect themselves, and their property, from the attention of murderous marauders and thieves who choose to enrich themselves at their cost, and often at the cost of their lives, the duty of our courts is clear, to send out a message that it would protect the public in the only way possible for them, namely long terms of imprisonment. That would effectively remove such criminals from our society and would, hopefully, bring it home to others, with similar intentions, that the risk is not worth it.'

Thus the situation arose where the courts were enjoined to emphasize deterrence at the expense of other factors in cases of housebreaking with intent to steal and theft.

[9] Theft on the other hand may be a minor offence like shoplifting or serious as in stock theft. The learned magistrate indicated that he considered the manner in which the theft was committed but it is my considered view that he misdirected himself when he equated the theft the appellant committed with the offence of

housebreaking with the intent to steal and theft. What both crimes have in common is the prevalence thereof but that is where the similarity ends. The appellant by way of cunning stole the money. I by no means trivialize the nature of the offence the appellant committed for he stole from a small business owner who derived his income from the machine. The offence committed by the appellant does not fit the nature of the offence which was considered in the *Jacobs* matter.

[10] This court considers the appellant stole approximately N\$800 from a Jackpot machine. The money has been recovered and the appellant did not benefit from his crime due to the quick action of the public. I have already alluded to the fact that the appellant stole from someone who invested in the machine with hard earned money in order to derive an income from it. The community expressed their dissatisfaction with the behavior of the accused by reporting his criminal conduct to the owner. Society would similarly expect the courts to impose a sentence which will give expression to their intolerance for offences of this nature and which would deter others who contemplate committing similar offences.

[11] The appellant is young and has dependents. He is not a first offender. He was convicted of housebreaking with intent to steal and theft on 28 May 2014 and was sentenced to 12 months' imprisonment. He committed this offence on 3 June 2015. The appellant short detention in prison did not deter him from re-offending and a more deterrent sentence is called for. However, when considering the fact that he has a previous conviction for housebreaking with intent to steal and theft I am reminded of what was stated by Liebenberg J (Shivute J concurring) in *S v Muchaka* 2017 (2) NR 574 (HC):

'Earlier convictions impact on character of the offender, especially where he or she was not deterred by the experience of previous convictions and sentences. Against this background, a more deterrent sentence seems justified. In determining what sentence in the circumstances of the case would be suitable, the court must still have regard to all those principles applicable to sentence. The court is still required to consider the accused's personal circumstances (of which his previous convictions is but one factor) against the seriousness of the offence committed, and the interests of society. What weight should be accorded to this factor lies within the discretion of the court.'

[12] Having regard to the accused, the offence he committed and the interest of society, the court is of the view that an appropriate sentence would be a sentence of three years' imprisonment of which one year's imprisonment is suspended for five years on condition that the accused is not convicted of any offence of theft committed during the period of suspension.

[13] In the result the following order is made:

1. The appeal against sentence is upheld and the sentence imposed by the learned magistrate is hereby set aside and substituted with the following sentence:

The appellant/accused is sentenced to three years' imprisonment of which one year's imprisonment is suspended for five years on condition that the accused is not convicted of theft committed during the period of suspension;

2. The sentence is ante-dated to 10 October 2016.

M A TOMMASI
JUDGE

I agree

H C JANUARY
JUDGE

Appearances:

For the Appellant:

P Nsundano

Instructed by Legal Aid, Oshakati

For the Respondent:

L Tjiveze

Prosecutor General Office, Oshakati