

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI
APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2017/00003

SILAS TANGENI AWENE

APPELLANT

v

THE
RESPONDENT

STATE

Neutral citation: Awene v S (HC-NLD-CRI-APP-CAL-2017/00003) [2019] NAHCNLD 141 (05 December 2019)

Coram: JANUARY J *et* SALIONGA J

Heard: 24 September 2019

Delivered: 05 December 2019

Fly note: Criminal Procedure —Appeal — Condonation – Appellant filed a Notice of appeal timeously — Legal representative withdrew original notice – New amended notices filed out of time — Condonation granted — Plea of not guilty — Circumstantial

evidence – Testimony of complainant corroborated—Appellant version not reasonably possibly true – Appeal dismissed.

Summary: The appellant was convicted on a charge of theft. He filed his notice of appeal timeously in a layman language. Subsequently counsel withdrew the initial notice of appeal and filed a new amended notice of appeal. Appellant applied for condonation which was granted. Complainant testified that he was with accused and no one else. His version on that issue was corroborated by all state witnesses. Appellant testified in his defence denying the allegation of theft. The court was faced with circumstantial evidence as no one saw the appellant accessing the money. The court should only convict on circumstantial evidence if the inference sought to be drawn is consistent with the proven facts, and that the proven facts exclude every reasonable inference from them save the one to be drawn. The court a quo was satisfied that appellant was the only person who was sitting in close proximity with the complainant but refused to be searched in the circumstances where it was reasonable to do so that evening. The appeal court found no misdirection on the court a quo's part in analyzing and evaluating the evidence in its totality and as such there is no justification to interfere with the learned magistrate. The appeal is dismissed.

ORDER

(1) The appeal against conviction is dismissed.

APPEAL JUDGMENT

SALIONGA J (JANUARY J concurring):

Introduction

[1] The appellant was charged with theft of N\$400 in the Tsumeb Magistrate's Court. He pleaded not guilty when the charge was put to him and after the evidence was led he was convicted as charged and subsequently sentenced to a fine of N\$2000 or 12 months imprisonment.

[2] Displeased with the conviction, appellant filed the purported notice of appeal which appears to be against conviction only. The initial notice was withdrawn and a new notice of appeal together with an application for condonation were filed out of the prescribed time period. Notwithstanding the aforesaid, respondent did not oppose the application for condonation and the parties were allowed to argue the matter on merits.

[3] The grounds of appeal are as follows:

- (a) The magistrate erred in law and /or fact by failing to consider the fact that appellant was exercising his right to privacy and dignity when he denied to be searched by the complainant and state witness four (4) who did not possess any search warrant.
- (b) The learned magistrate erred in law and /or in fact by solely relying on circumstantial evidence which draw inferences that appellant indeed committed the offence in question.
- (c) The learned magistrate erred in law and/or by failing to consider the fact that both complainant and state witnesses were private persons at the time of the offence and both parties were unauthorized to conduct any search on the appellant.
- (d) The learned magistrate erred in fact and/or in law by failing to come to the conclusion that the version of the appellant was reasonably possibly true under the circumstances.
- (e) The learned magistrate erred in fact and/or in law by failing to draw reasonable inferences that the money of the complainant could have

fallen, considering the distance he travelled before returning back to the bar.

- (f) The learned magistrate erred in fact and/or in law by failing to establish whether under the circumstances, the complainant was under the influence of alcohol after he initially left the bar returning to the bar.
- (g) The learned magistrate erred in law and /or in fact by coming to the conclusion that the state had proven the guilt of the appellant beyond reasonable doubt by proving all the elements of the offence he stood charged.

The merits of the appeal

[4] The charge against the appellant related to a theft incident that took place on 7 April 2016 at or near Steps Inn Bar in Tsumeb. It was alleged that an amount of N\$400 cash was wrongful, unlawfully and intentionally stolen from the trouser's pocket of Lucas Ihuhwa and not recovered. The property was of or in the lawful possession of Lucas Ihuhwa. During the trial the State called four witnesses and at the end of the State's case appellant testified under oath and had no witness to call:

The evidence

[5] Lucas Ihuhwa; is complainant and a police officer. He testified that on the date of the incident, he withdrew five hundred dollars. He used N\$50 to buy a recharge voucher. He then went to Steps Inn bar where he used another N\$ 50 dollars to buy a beer. According to him when he entered the bar there were only bar ladies. After some minutes the appellant came in. They greeted whereupon the appellant pulled a chair and sat on his right side. When the witness was done with his beer he began walking home. Some meters from the bar he realized that his money was not in the right pocket. He went back to the bar and found the appellant at a place where he was seated. Ihuhwa asked the appellant if he did not see the money to which he replied that he did not. When asked to search the appellant the latter refused. The witness testified that he

decided to search the appellant because it was only the two of them seated hence entertaining the belief that the appellant accessed the money in his pocket. In cross examination he denied having gone to certain bushes to pee but confirmed that when he and the appellant came back in the bar from outside there were a lot of people outside the bar who enquired what they were looking for.

[6] Ndahafa David was the sales lady at Steps Inn bar on the 7 April 2016. She testified that on the date in question, complainant was in the Steps Inn bar and he bought a beer. Whilst drinking accused came in and sat next to the complainant. The complainant offered him a drink and the two shared a beer. When the complainant was done he went outside but returned saying he lost his money.

[7] Maria Hailonga was with Ndahafa David at Steps Inn bar during the period in which the incident occurred. She corroborated the evidence of the complainant and that of second witness in that when the accused came in the bar he sat next to the complainant. She saw the two drinking a beer but did not see who paid for it. She further testified that apart from the complainant and appellant who were in the bar sitting at the counter, Nuuyoma was in the bar but, sitting on the other side.

[8] Phellemon Nuuyoma knew the accused as a colleague. The witness testified that on 7 April 2016 at around 21h00 he found the complainant by the counter drinking beer at Steps Inn bar. He greeted him and went to sit on the other side of the bar. Few minutes later appellant came in and went straight to the complainant. Appellant was given a glass and they drank together. After few minutes the complainant went out and returned. He went to the appellant where he was seated. He said he lost the money and the two went outside. The witness followed them. He found complainant telling the appellant that he was only with him if he could search him. The appellant refused. The witness intervened urging the appellant to grant permission to be searched but he refused and became angry. That was the State case.

[9] In his defence, the appellant testified that he was at Steps Inn bar around 20h30 but sat a distance of about 3 meters from the complainant. He testified that he bought a beer and cigarette and went outside to smoke. He came back and continued watching soccer. He later felt someone touching his shoulder and whispering that he lost his wallet in which the money was. He further testified that the complainant did not know the time he lost the money but realized it is gone at the point when he was urinating on his way home. The witness assisted the complainant to look for the money. They went up to the point where complainant was helping himself but did not find anything. They returned to the bar and appellant continued watching soccer. When the soccer was done appellant left home. It was at that stage that complainant requested to search him. He told the complainant that he could not search him because he did not have anything of his. Appellant denied to have stolen complainant's money. According to him in the bar there were a lot of people watching soccer and buying alcohol. In his words the bar was full.

[10] Ms Amupolo, counsel for the appellant, submitted that the State failed to prove its case beyond reasonable doubt. She argued that the evidence led does not support a conclusion that the only reasonable inference to be drawn was that the appellant had stolen the money. Counsel contended that 'except for the fact that the appellant was at Steps Inn bar at the same time as the complainant and his refusal to be searched by the complainant...', no further evidence was produced leading to an inference to be drawn that the appellant indeed stole the complainant's money. Therefore in her view the learned magistrate misdirected herself in the application of the law to the facts.

[11] Mr Shileka acting for the respondent, submitted that the appellant failed to muster any ground that shows that the learned magistrate erred or misdirected himself in convicting the appellant on a charge of theft. He further submitted that the analysis and approach adopted by the learned magistrate should not be faulted. It is now a settled legal principle that an appeal court's power to interfere with the factual findings and findings on credibility of the trial court is limited. See *S v Grey van Pittius & another*

1990 NR 35 (HC) at p 40. Shileka was of the view that the magistrate was correct in concluding that the appellant cannot get a benefit of doubt.

[12] On the right to privacy, I respectfully agree with the respondent's submissions that the circumstances of this case called for the appellant to be searched at that right moment. Counsel submitted further that the rights to privacy as stated in *Prosecutor-General of the Republic of Namibia v Gomes & others* 2015 (4) NR 1035 (SC) is not absolute or without limit. He further submitted that on the contrary his rights called for him to allow the complainant to search him in order to avoid any suspicions under the circumstances. The appellant being a police officer had nothing to lose in allowing to be searched if he was not the one who stole the money. He further argued that the analysis of the court a quo's judgement shows that the learned magistrate was alive to duties upon him to carefully weigh the cumulative effect of all circumstances. In his view the court a quo was correct in drawing inference that the appellant stole the money.

[13] I must point it out that although the appellant listed five grounds of appeal. Some of these grounds are interrelated and others are not supported by evidence. I am going to deal with them simultaneously.

The law

[14] From the grounds listed it is apparent that the appellant's appeal is more centered at the court a quo's evaluation of evidence. Counsel for the respondent correctly made reference to the case of *Arnold v S*¹. In that case it was pointed out that the approach to adjudicating an appeal focusing on the trial court's evaluation and assessment of evidence has been addressed in *Isaac v S* (HC-MD-CRI-APP-CAL-2018/00011) [2018] NAHCMD 213 (16 July 2018) where the court stated as follows: 'Whereas a court of appeal does not have the same advantages as the trial court to have observed and heard all the witnesses and being steeped in the atmosphere of the trial, it should be very slow to interfere with the trial court's evaluation of the evidence. A court of appeal will not reject credibility findings of the trial court in the absence of irregularities or misdirection

¹ (HC-MD-CRI-APP-CAL-2018/00070) [2019]NAHCMD 279 (9 August 2019)

committed by that court. It is trite that the function of deciding on acceptance or rejection of evidence primarily lies with the trial court. And even where there is a misdirection it must be shown to be material as not every misdirection will enable the court of appeal to disregard the findings of the trial court.' I agree and endorse the aforesaid approach adopted.

[15] It was further stated in *S v Auala*² that: 'The evaluation of evidence requires from the court to consider the evidence as a whole, instead of focusing too intently upon the separate and individual parts of the evidence. Doubt may indeed arise when one or more aspects of the evidence is viewed in isolation, but when evaluated with the rest of evidence such doubt may set to rest.' In my view the aforesaid is the true reflection of the legal principle in our law.

Evaluation

[16] Both counsel agreed that the court *a quo* made its finding on circumstantial evidence. It is trite that; 'Where the court is required to draw inferences from circumstantial evidence, it may only do so if the "two cardinal rules of logic" as set out in *R v Blom* 1939 AD 188, have been satisfied. These rules were formulated in the following terms: (1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.'

[17] In the present case, the court *a quo* said the following in arriving at its decision to reject the appellant's defence.

'I agree that it was the accused's choice whether to be searched. However we look at the circumstances of the case. There is no direct evidence of a witness who saw the accused take (sic) the money. The State relies on circumstantial evidence which is like any evidence upon which a conviction may follow provided the inference sought to be drawn is consistent with all proven facts and the proven facts should be such that they exclude every reasonable inference save the one sought to be drawn. The complainant only suspected the accused who was sitting next to him. Should the accused have taken the money, such would have been found on him because he was still in the bar. Nuuyoma, their colleague suggested that the accused allow the

² (No.1) 2008 (1) NR 223 (HC)

complainant to search him so as to satisfy himself but the accused refused. Instead he became angry. He denied that fact in view of overwhelming evidence. He refused to be searched in the circumstances where such was the reasonable thing to do. Does he expect the court not to draw the inference that he stole the money? He was found to be a dishonest witness who accused everyone to be lying even on the most obvious aspects of the matter and even on the probabilities he cannot get a benefit of doubt.'

[18] Given the quoted above paragraph, I do not agree with counsel for the appellant's contention that there was no other evidence tendered to prove the charge against the appellant apart from the evidence that appellant was at Steps bar on the evening of the incident.

[19] The court a quo carefully weighted the cumulative effect of all the circumstantial evidence adduced by both state witnesses and the defence. Indeed, the evidence that the appellant sat close to the complainant is not circumstantial but direct evidence where all state witnesses corroborated on the issue. The court found that if the accused never sat close to the complainant why the complainant should say that the appellant was the only person next to him even wanting to search him. The court a quo further found that appellant was the one suspected to have taken the money because he was the only person sitting next to the complainant. He denied to have sat next to the complainant despite overwhelming evidence. Appellant refused to be searched in the circumstances where such was a reasonable thing to do. He admitted that there were other people in the bar and were not accused. The court a quo was correct in drawing an inference that the appellant stole the money.

Conclusion

[20] There is no misdirection and no justification for this court to interfere with the decision of the learned magistrate.

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

1. The appeal against conviction is dismissed

J T SALIONGA
JUDGE

I agree,

HC JANUARY
JUDGE

APPEARANCES

For the Appellant:

Ms M Amupolo

Of Amupolo & Company Inc., Ongwediva

For the Respondent:

Mr R Shileka

Office of the Prosecutor- General, Oshakati