

REPUBLIC OF NAMIBIA



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

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2018/00004

In the matter between:

SIMON SHEKUNANGELA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Shekunangela v S* (HC-NLD-CRI-APP-CAL-2018/00004) [2019]
NAHCNLD 5 (24 January 2019)

Coram: TOMMASI J and JANUARY J

Heard: 18 September 2018

Delivered: 24 January 2019

Flynote: Criminal Law – The doctrine of recent possession – 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 is the

person who committed the offence of housebreaking with the intent to steal and theft.

Summary: The appellant was found in possession of a stolen TV 9 days after the complainant's house was broken into. He agreed to sell the property and was transacting as the owner. The learned magistrate found that his possession was recent and his explanation i.e. that he obtained it from one Peter, was a fabrication. The court held that there are no reasonable prospects of success on the grounds raised in respect of conviction.

Held: that the learned magistrate gave careful consideration of all the factors during sentencing and there are also no reasonable prospects of success in respect of the sentence. The court accordingly declined to grant condonation.

ORDER

1. The application for condonation is dismissed; and
2. The appeal is struck from the roll.

APPEAL JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] The appellant appeals against his conviction of housebreaking with the intent to steal and theft and sentence of 4 years' imprisonment of which 1 year's imprisonment is suspended for 4 years on condition he is not convicted of the same offence committed during the period of suspension. He also simultaneously applies to this court for condonation for the late filing of his notice of appeal.

[2] The appellant, acting in person, lodged his notice of appeal well within the time frame provided for by the Magistrates' Court Rules. Ms Amupolo was subsequently appointed to act *amicus curiae* and she deemed it necessary to file a new notice of appeal. This meant that the appeal was filed out of time. It is evident that the appellant was desirous to note an appeal and the determining factor would be whether there are reasonable prospects of success.

Conviction

[3] The appellant's grounds of appeal which comply with Rule 67 of the Magistrate's Court rules are the following:

- '(a) That the magistrate erred by applying the doctrine of recent possession incorrectly; by classifying the appellant's possession as "recent"; and finding that the appellant did not have a reasonable explanation for his possession;
- (b) That the court failed to draw an adverse inference from the failure of the State to call the investigating officer;
- (c) The magistrate erred by concluding that "Peter" was only mentioned in evidence in chief of the appellant and as a result the appellant was untruthful.'

[4] The appellant pleaded not guilty to the offence and opted not to disclose the basis of his defense in terms of section 115 of the Criminal Procedure Act.

[5] The evidence adduced by the State may be summarised as follows: On 29-30 November 2016 the house of the complainant was broken into and a TV, DSTV remote and a cord were stolen. On 9 December 2016 the appellant requested his friend (Christof) to store the TV at his house as his room had leakages. Christof collected the TV in the presence of the appellant and took it to his house where he left it with a colleague (Elifas) as he had to leave town. Elifas later called Christof and informed him that he wanted to buy the TV. Christof facilitated the agreement, the appellant and Elifas agreed that the purchase price would be N\$2000. Elifas paid N\$1000 to Berta (Mee Beata) who was to give the money to the appellant. The remaining portion was to be paid on 25 December 2016. Before this date however the police called Elifas about the TV which they suspected was stolen. He then assisted the police to trace the appellant. This he did by arranging to meet him to pay the remaining N\$1000. The appellant ran away but was arrested near the place

they arranged to meet. The appellant denied having any knowledge of the TV. The complainant identified the TV.

[6] The appellant testified that he received the TV from a man named Peter who asked him to keep the TV for him. The appellant negotiated the sale on behalf of Peter but Peter, had to leave town before the money was paid. The appellant therefore gave Peter N\$600 and a phone worth N\$400. Peter agreed that he could take this money from the money which the buyer would pay. Peter left for Opuwo. When he was called to receive the money, he was arrested. The appellant did not call any witnesses.

[7] In *S v Kapolo* 1995 NR 129 (HC), Strydom JP, as he then was, at page 130 D - F stated as follow:

'It is correct that where a person is found in possession of recently stolen goods and has failed to give an 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. (See: Hoffmann and Zeffertt the SA Law of Evidence 4th ed at 605-6.) I also agree with the magistrate that there are instances where a lapse of 14 days or longer was still regarded as recent possession. The test to be applied in this regard was laid down in *R v Mandele* 1929 CPD 96 where the following was stated 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?”

The following citation follows the above citation from *R v Mandele, supra* and is relevant:

‘The nature of the article, the value of the article and in certain instances the class of person in whose possession the article is found are all elements which have to be taken into consideration in each case.’

[8] Ms Amupolo submitted that the television set could have passed hands from the original thief to the appellant and referred the court to *Hamupolo v State* (CA 40/2013) [2014] NAHCMD 258 (28 August 2014). This matter unfortunately does not aid counsel's argument as the court in that case set aside an acquittal of an accused who was found in possession of a stolen gambling machine and his explanation that

he obtained it from one “Peter”, was rejected. The court held that there was overwhelming evidence directly connecting the appellant to the offence.

[9] The doctrine of recent possession is none other than a determination by inferential reasoning based on the circumstantial evidence. One cannot look at each fact in isolation. In order to determine whether the appellant’s possession of the stolen item is recent, all factors must be considered, including the explanation by the appellant. The learned magistrate was required to determine, by inferential reasoning, whether the appellant is guilty of the offence of housebreaking with intent to steal and theft. All three grounds are closely connected in the determination of whether the appellant’s possession was “recent” and whether his explanation was reasonable.

[10] The learned magistrate considered the fact that the appellant was transacting as the owner, that he had control of the TV and was disposing of it by selling it. He further considered the time between the housebreaking and the time of the transactions and was satisfied that the accused was in possession of recently stolen property. He concluded that the appellant offered a bare denial and that appellant’s explanation of Peter is a recent fabrication.

[11] The appellant, according to his testimony, informed the investigating officer that he obtained the TV from Peter. Ms Amupolo submitted that the State ought to have called the investigating officer and the learned magistrate ought to have drawn an adverse inference from the State’s failure to call the investigating officer. She cited the case of ‘*S v Sithole*¹ where the Court held that an exculpatory explanation at the time of arrest, capable of a speedy verification may save both the arrestor and the arrestee a great deal of unnecessary trouble’. This may be so but in this case the learned magistrate considered other factors such as the appellant’s denial of any knowledge of the TV when he was arrested whereas he agreed with Elifas to collect the money for the sale of the TV. The learned magistrate also considered the appellant’s failure to mention the existence of Peter to Christof and Elifas during cross-examination when it was their evidence that he transacted as if he was the owner of the TV. In addition hereto the learned magistrate considered the fact that the appellant did not make use of the court’s repeated invitations to assist him to secure his witness. The

¹ Case No. 1995 NR 129 (this case reference does not make any sense).

magistrate was entitled to conclude that the involvement of “Peter” is a recent fabrication. There was, in my view, no reason for the State to call the investigating officer to testify.

[12] It is my considered view that the magistrate correctly applied the doctrine of recent possession by considering all the relevant factors. There are, to my mind no reasonable prospects that the appellant would succeed on the grounds raised in respect of conviction.

Sentence

[13] The appellant raises two grounds against sentence i.e.:

- ‘1. The learned magistrate erred in fact or in law by not considering the appellant’s personal circumstances; and
2. The sentence imposed induces a sense of shock and no reasonable person would have imposed it.’

[14] It is trite that the court of appeal would not easily interfere with sentence imposed by the sentencing court and will only do so in limited circumstances.

[15] The learned magistrate indicated that the personal circumstances of the appellant are taken into consideration. It is indeed so that the learned magistrate placed more emphasis on other factors such as deterrence and retribution but was careful not to overemphasize one at the cost of the others.

[16] Ms Amupolo raised the fact that the appellant was in custody for 8 months and 4 days and that the court failed to take this fact into consideration. This was however not raised as a ground and the learned magistrate was thus not afforded the opportunity to respond hereto. I decline to entertain this ground since this ground was not raised in the notice of appeal.

[17] The learned magistrate considered a range of decisions of this court. In all of the cases imprisonment ranging from 1 year to 5 years were imposed. It is trite that imprisonment for this type of offence is the norm. Thus the nature of the sentence is appropriate even in cases where an accused is a first offender. The learned magistrate raised serious concerns which the community was facing as a result of an increase in the offence of housebreaking and theft. The learned magistrate exercised

his discretion to impose a severe sentence which was ameliorated by suspending a portion thereof. It cannot be said the sentence is unduly harsh or shockingly inappropriate.

[18] The learned magistrate gave careful consideration to all the factors placed before him and properly exercised his judicial discretion. Under these circumstances there are equally no prospects that the appellant would succeed on the grounds raised in respect of the sentence.

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

1. The application for condonation is dismissed; and
2. The appeal is struck from the roll.

M A TOMMASI
JUDGE

I agree

H C JANUARY
JUDGE

Appearances:

For the Appellant:

M M Amupolo
Amupolo & Co. Inc, Ongwediva

For the Respondent:

R Shileka
Office of the Prosecutor General, Oshakati