

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2018/00033

In the matter between:

NASHILONGO JASON NASHILONGO

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Nashilongo v S* (HC-NLD-CRI-APP-CAL-2018/00033) [2019]
NAHCNLD 68 (16 July 2019)

Coram: TOMMASI J *et* JANUARY J

Heard: 16 October 2018

Delivered: 16 July 2019

Flynote: Appeal – Sentence – Cumulative effect of sentence – Sentencing court failing to consider the proximity in time and the link between the place and the complainant in two counts of housebreaking with the intent to steal and theft – Such failure amounts to a misdirection as the cumulative effect *in casu* resulted in a sentence which is unduly harsh.

ORDER

1. Condonation is granted for the late noting of the appeal;
2. The sentence imposed in respect of counts 1 and 2 are set aside and substituted with the following sentences:

Count 1 18 months' imprisonment

Count 2 24 months' imprisonment

It is ordered that 6 months' imprisonment of the 18 months' imprisonment imposed in respect of count 1 is to run concurrently with the sentence imposed in respect of count 2.

3. The sentence is antedated to 18 July 2015.

JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] The appellant was convicted of two counts of housebreaking with the intent to steal and theft. He was sentenced to 24 months' imprisonment of which 6 months' imprisonment was suspended in respect of count 1 and to 36 month's imprisonment of which 6 months' imprisonment was suspended in respect of count 2. The appellant now appeals against the sentence.

[2] The appellant was sentenced on 18 May 2017 and he lodged his appeal on 23 April 2018. He filed an affidavit with his appeal explaining that he is an uneducated person. He acknowledged that the interpreter explained that he should file a notice of appeal within 14 days but he was confused at the time. He recalled this explanation when his family member visited him and explained that he could appeal his sentence.

[3] The State raised a point *in limine* in respect of the late noting of the appeal and submitted that the explanation given for the delay is not reasonable and that there has been no misdirection. The appellant's counsel submitted that the explanation is satisfactory and that there are reasonable prospects of success.

[4] The delay in this matter is substantial. The reason advanced by the appellant is common amongst self-actors and inmates. The explanation is not a good explanation but the court cannot ignore the fact that the appellant is unrepresented, uneducated and functionally illiterate. The final consideration is whether the appellant has reasonable prospect of success.

[5] The appellant pleaded guilty to both counts. He admitted that he on 10 April 2017 broke into the house of the complainant and stole linen to the value of N\$1028. He also admitted that he broke into the house of the complainant on 11 April 2017 and stole goods to the value of N\$2142. He informed the court that he is 25 years old and not married and has no children. He completed grade 8 and is unemployed. He is living with his grandmother and he requested to do community service.

[6] The court considered the personal circumstances of the appellant, the interest of society, the gravity and prevalence of the offence and concluded that a custodial sentence, despite the fact that the appellant was a first offender, was inevitable.

[7] The grounds contained in the notice of appeal criticize the learned magistrate for failing to consider that the appellant pleaded guilty and that the stolen items were recovered and for imposing direct imprisonment rather than a fine or community service or suspended sentence. On these grounds there are no reasonable prospects of success.

[8] Counsel for the appellant, instructed by the Directorate of Legal Aid, submitted that the learned magistrate failed to consider the cumulative effect of the sentences. The two counts of housebreaking were committed against the same complainant, at the same place and two days in succession.

[9] It is trite that an appeal court's interference with sentence would only be justified where sentence is vitiated by irregularity or if there is a misdirection as sentence primarily falls within the discretion of the trial court.

[10] The appellant was unrepresented and the learned magistrate had a duty to assist the appellant to place all the relevant information before the court which would be necessary for the court to come to an appropriate sentence. It was apparent from the charge sheet that the offences were linked in that the place and the complainant in both counts were the same. The sentencing court ought to have considered the proximity in time and the fact the offences were committed at the same place and at the premises of the same complainant.

[11] The failure of the sentencing court to consider this factor amounts to a misdirection and it warrants this court's interference.

[12] The sentence of 5 years' imprisonment for the two offences, in view of the close proximity in time and the link between the place and the complainant, is unduly harsh. (See *S v Ndikwetepo & others* 1993 NR 319 (SC)).

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

1. Condonation is granted for the late noting of the appeal;
2. The sentence imposed in respect of counts 1 and 2 are set aside and substituted with the following sentences:

Count 1 18 months' imprisonment

Count 2 24 months' imprisonment

It is ordered that 6 months' imprisonment of the 18 months' imprisonment imposed in respect of count 1 is to run concurrently with the sentence imposed in respect of count 2.

3. The sentence is antedated to 18 July 2015.

M A TOMMASI
JUDGE

I agree,

H C JANUARY

JUDGE

APPEARANCES

For the appellant:

Mr P Nsundano

Directorate of Legal Aid, Oshakati

For the respondent:

Mr J Mudamburi

Office of the Prosecutor General, Oshakati