

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGMENT

Case No: HC-NLD-CRI-APP-CAL-2017/00010

In the matter between:

ONESMUS ERASTUS EMBULA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Embula v S* (HC-NLD-CRI-APP-CAL-2017/00010) [2019] NAHCNLD 9
(29 January 2019)

Coram: TOMMASI J and JANUARY J

Heard: 24 January 2019

Delivered: 29 January 2019

Flynote: Criminal Procedure – Appeal – Undefended accused – Warning statement – Admitted by mere production – Requirements for admission not complied with – Irregularity – No other reliable evidence – Conviction and sentence set aside.

Summary: The appellant was convicted for housebreaking with intent to steal and theft. His warning statement was admitted by the mere production thereof. It was not

explained to the appellant that the statement may be objected to if certain requirements are not complied with. The appellant raised that he was assaulted and the content of the warning statement was not what he told the police officer. This court found that there was an irregularity. There was no other reliable evidence presented. The conviction and sentence are set aside.

ORDER

1. Condonation for late filing of appeal is granted;
2. The appeal succeeds;
3. The conviction and sentence are set aside.

APPEAL JUDGMENT

JANUARY J (TOMMASI J concurring):

[1] The appellant was convicted with a co-accused in the magistrate's court Outapi for housebreaking with intent to steal and theft. It was alleged that the appellant and a co-accused broke into a shop and stole numerous items to the value of N\$9598. Both accused were sentenced to 4 years' imprisonment of which 1 year is suspended for a period of 4 years on condition accused is not convicted of housebreaking with intent to steal and theft committed during the period of suspension.

[2] The appellant initially represented himself when he filed his notice of appeal timely. He afterwards applied for legal aid, was successful and is now represented by Mr Aingura. The State is represented by Mr Gaweseb. Mr Aingura withdrew the initial notice of appeal and consequently filed a new notice of appeal out of time with an application for condonation. Mr Gaweseb did not oppose the application for condonation because he submitted that there are prospects of success on appeal. I agree and grant condonation.

[3] The appeal is against the conviction of the appellant. On the evidence presented, it is common cause that a shop was broken into and items to the value of N\$9598 were stolen. The identity of the perpetrator(s) was / were however in dispute.

[4] The appellant pleaded not guilty and gave a plea explanation. He stated: 'I am not guilty because I was arrested because I gave my phone to someone and that phone was said to have been part of the things that were taken.'

[5] There was no direct evidence presented implicating the appellant. The magistrate relied on a warning statement wherein the appellant allegedly confessed to the crime. The arresting officer testified that he arrested the appellant. He also recovered some of the stolen items but it is not clear from whom or where he recovered the stolen items. He testified that he warned the appellant of his rights. The appellant apparently indicated that he did not want to waste time, admitted that it was him and the other accused who did it.

[6] It is in my view significant that the appellant was not represented at the time. The record reflects that the public prosecutor simply handed the warning statement to the witness. He identified it and proceeded to read the content into the record. The appellant was at this stage not informed that he may object or that a trial within a trial may be necessary to determine the admissibility of the statement. Only after the warning statement was read into record did the magistrate ask if the appellant had any objection thereto.

[7] The appellant denied that he made the statement and that the officer asked him about the content thereof or that he told him that. The appellant stated that he only told the officer about his cell phone. The magistrate simply accepted that there is no objection and admitted the warning statement. The appellant was never informed that there are requirements to be complied with before the statement may be admitted and that a trial within the trial might have been necessary.

[8] In cross-examination the appellant alluded to an assault perpetrated on him by the witness during his arrest. The learned magistrate simply concluded that the statement was made voluntarily and without undue influence despite the allegation of

assault. The magistrate also did not assist the appellant during cross-examination of the witness.

[9] Mr Aingura submitted that the only evidence the magistrate relied on to convict the appellant was the warning statement which he submitted is inadmissible. Mr Gaweseb conceded to the inadmissibility of the warning statement and that there is no other reliable evidence to sustain the conviction.

[10] There was also evidence of a cell phone that a witness received from the appellant. This cell phone was allegedly part of the stolen property and was identified as such. In my view this evidence is confusing and unreliable. On the evidence, the appellant borrowed a cell phone to a witness at about 24h00 on the date of the alleged crime. The appellant testified that the cell phone belonged to him. The only evidence is that this phone was identified as part of the stolen property. It was not identified in court. It was not clarified how it was identified and the colour was also in dispute. This evidence in my view does not prove the case against the appellant beyond reasonable doubt.

[11] I find that the mere admission of the warning statement constitutes an irregularity and I agree that the conviction must be set aside.

[12] In the result:

1. Condonation for late filing of appeal is granted;
2. The appeal succeeds;
3. The conviction and sentence are set aside.

**H C JANUARY
JUDGE**

I agree

**M A TOMMASI
JUDGE**

Appearances:

For the Appellant:

Mr S Aingura

Of Aingura Attorneys, Oshakati

For the Respondent:

Mr T Gaweseb

Of Office of the Prosecutor-General, Oshakati