



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

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2019/00097

In the matter between:

LESLEY K GAWASEB

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Gawaseb v S* (HC-NLD-CRI-APP-CAL-2019/00097) [2020]
NAHCNLD 104 (13 August 2020)

Coram: JANUARY J and SALIONGA J

Heard: 18 June 2020

Delivered: 13 August 2020

Flynote: Criminal procedure – Housebreaking with intent to steal and theft – 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 — Court entitled to infer that such person is the person who committed the offence – Sufficient evidence led that accused possessed the television – Failure for accused

to explain possession of such good detrimental to his case – Inference properly drawn — No misdirection on the part of the presiding magistrate.

Summary: The appellant was convicted on a charge of housebreaking with intent to steal and theft of goods valued at N\$3740. He was sentenced to five years imprisonment. The stolen television was found a day after the complainant's house was broken into in one of the witness's house. He left the property with the intention of picking it up. The learned magistrate found that his failure to give explanation of his possession was detrimental to his case. The court held that there are no reasonable prospects of success on the grounds raised in respect of conviction. His appeal against conviction is dismissed.

ORDER

In the result the following order is made:

1. There is no prospects of success.
2. The appeal against conviction is dismissed.

APPEAL JUDGMENT

SALIONGA J (JANUARY J concurring):

[1] The appellant was convicted in the Magistrates Court of Tsumeb on 22 August 2019 on a charge of housebreaking with intent to steal and theft. He was sentenced to five years imprisonment. He now appeals against the conviction. At the inception of this appeal Mr Gaweseb who appeared on behalf of the respondent raised a point in limine in that the appeal was filed out of the prescribed time period of 14 days as required. Counsel also raised the issue that the notice of appeal did not set out clear and specific grounds of appeal. At the hearing Mr Gaweseb did not oppose the application for condonation and the matter proceeded with the hearing on merits.

[2] The dissatisfaction of the appellant on his conviction was that the lower court misdirected itself in convicting the accused. He was not linked to the crime charged and as such there was no sufficient evidence upon which the court could convict him. That the break in was not proven. He further submitted that ownership of the alleged properties such as a television was not established. In other words the magistrate did not give reasons why he found the appellant guilty of housebreaking with intent to steal and theft.

[3] The following evidence was placed before the trial court. Festus Katjihoko was stopped by the accused while driving around Soweto in Tsumeb and he loaded him. He had a television which he said he was taking to Kuvuki land location. Upon enquiry as to whom the television belongs, accused responded that it belongs to his uncle. Although the driver was suspicious why the accused was taking a television to Kuvuki land, he dropped the passengers and does not know what happened thereafter.

[4] Zelroida Kanibes was together with the accused when she boarded a taxi. The taxi drove to Soweto where accused jumped off, went inside a certain house and came out with a television wrapped in a blanket and sat on the back seat. At that stage she became suspicious and that prompted her to text Loide Amases, her aunt about the description of Patric's television which had been stolen. She got similar description of a television which was a big and black television. They drove to Kuvuki land where the taxi dropped them off. She informed her aunt who contacted the police.

[5] Patric Geingob was at Okahandja when he was informed about the housebreaking at his house. He drove back to Tsumeb. Upon arrival he found that his television, N\$750 cash, pots and shoes were all stolen. The house has just been broken into as he was only away for the weekend. Both the door and the burglar bars were broken. He identified the television at the police station.

[6] Lucia Hamunyela was at home when the accused brought an item wrapped in an orange blanket and left it in the varena of her house saying he will get it later. She was inside the house she heard people calling her name and when she came out she saw it was police. At that stage the items were already uncovered and she saw it was a television. She informed the police that the television was brought by the accused. It was a big black television.

[7] Jesaya Shikongo arrested the accused at Kuvukiland. The accused after his rights were explained, informed the witness that he got the television from a certain Robert but failed to give further details.

[8] At the end of the State case, accused elected to remain silent and did not call any witness.

[9] The evidence in short was that the accused was seen with the television by the driver of a taxi, Festus Katjihoko and a passenger Zerolda Kanibes. There was also evidence by Lucia Hamunyela that accused left the television at her house and from where it was recovered. Complainant testified that his house was broken into and he recovered his television from the police station. Appellant argued that no fingerprints were lifted but I fail to understand how such failure will prejudice the appellant if the accused was properly linked to the commission of the crime. He had the duty to rebut the evidence led by the state witnesses and his failure to do so only leads to the conclusion that the prosecution's case was proved beyond reasonable doubt.

[10] Accused further argues that no reasons for convicting him were provided. In a detailed judgement the magistrate gave sufficient reasons why he finds appellant guilty and convicted him. I am not intending to repeat same suffice to say the magistrate relied on the principle of recent possession to find the accused guilty. The magistrate finds support for his contention in *S v Kapolo* 1995 NR 129 (HC). He further relied to the test applied in *R v Mandele* 1929 CPD and found that the complainant had only gone for a day and his house was broken into. Therefore it

could not be said a longer period had passed as the accused was seen with the television the next day.

[11] In the light of the above it is not correct for the accused to argue that no reasons were provided. The magistrate correctly applied the doctrine of recent possession by considering all the relevant factors. This Court found that there are no prospects of success on the grounds raised in respect of an appeal against conviction and in my view the appeal should not succeed.

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

1. There is no prospects of success
2. The appeal against conviction is dismissed.

J T SALIONGA
Judge

I agree,

H C JANUARY
Judge

APPEARANCES:

For the Appellant: Mr L Gawaseb (in person)
 Oluno Correctional Facility

For the Respondent: Mr T Gaweseb
 Of the Office of the Prosecutor-General,
 Oshakati