

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: HC-NLD-CRI-APP-CAL-2020/00010

FILLIPUS IYAMBO

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Iyambo v S* (HC-NLD-CRI-APP-CAL-2020/00010) [2020] NAHCNLD 91 (23 July 2020)

Coram: SALIONGA J *et* DIERGAARDT AJ

Heard: 09 July 2020

Delivered: 23 July 2020

Flynote: Criminal Procedure – Appeal – Sentence – 20 months imprisonment – Theft – Goods valued at N\$19000 – Court *a quo* duly considered personal circumstances of appellant – Court declined to interfere with the sentence. The appeal is dismissed.

Summary: The appellant who was convicted in the district court sitting in Oshakati on 30 October 2019 on three counts of theft and sentenced to 20 months imprisonment. Appealed the sentence passed on him by the District Court on various grounds. The appellant committed the theft on various occasions.

Held: that the magistrate did not commit any misdirection during the sentencing proceedings:

Held: Further that the sentence passed is appropriate in the circumstances of the matter and appeal dismissed.

ORDER

1. The appeal against sentence is dismissed.

APPEAL JUDGMENT

DIERGAARDT AJ (SALIONGA J concurring);

Introduction

[1] The appellant was charged and convicted of three counts of theft. The conviction followed after the appellant pleaded guilty on all three counts and he was sentenced to 20 months imprisonment. This happened on 30 October 2019 in the Oshakati District Court. Aggrieved by the sentence imposed on him, the appellant is now appealing the sentence.

[2] The appellant is a self-actor and Ms Nghiyoonanye appeared on behalf of the respondent. The grounds of appeal are set out verbatim hereunder:

‘AD THE SENTENCE

Grounds of appeal

The appellant's appeal is based on the following grounds:

- (a) The appellant averred that the sentence induces a sense of shock learned magistrate erred in fact or law by sentencing him to a direct term of imprisonment without suspending a portion of the sentence;
- (b) It was also asserted that the court failed to adequately take into account the personal circumstances of the appellant;
- (c) The appellant further contended that the court failed to attach weight to the mitigating factors and failed to take recognisance of the fact that the appellant was a student taking care of his two small children and his sick mother.'

Reasons by the Magistrate

[3] The personal circumstances of the appellant were taken into consideration and that society must be protected through punishment in order to deter offenders from committing similar offences.

Points in limine

[4] At the hearing the respondent raised a point *in limine* in that the appeal was filed out of time as per the rules and particularly that although the appellant had filed an application for condonation of the late filing of his appeal, it suffers from a lack of sufficient details. Further that the Appellant did not indicate any prospectus of success. The court condoned the non-compliance with Rule 67 of the magistrates' court Rules and proceeded to hear the appeal on its merits.

[5] Appellant argued that the sentence imposed was inappropriate and it induces a sense of shock, because the appellant is a first offender who pleaded guilty to the charge and the goods stolen had been recovered.

[6] On the other hand, counsel for the respondent argued that although the appellant who is a first offender, pleaded guilty to the charge and he stole on three different occasions from three different people including his girlfriend. That he wanted to create the impression that he did not benefit from the theft by explaining to the magistrate that in the first count, he gave the phone to somebody and the person ran away with the phone, in the second count, the phone fell and broke, that displayed a high level of dishonesty.

Applying the applicable law to the facts of the case

[7] In considering whether the sentence of 20 months imprisonment imposed by the court *a quo* induces a sense of shock and whether there has been a material misdirection that warrants the interference by this court, it is important to establish whether the court *a quo* considered a balance as provided for by the triad in *S v Rabie* 1975 (4) SA 855 AT 862 G-H.

[8] The court should not lose sight of the fact that he stole from three different complainants on three different occasions indicating that he 'survives' from stealing. The appellant snatches phones from people who are at places where they feel comfortable and he goes further and stole from his own girlfriend with whom he was in a position of trust. It is questionable how far the appellant will go to achieve his 'survival'. I am of the view that all three counts consist of elements of dishonesty.

[9] Having regard to the reasons given by the magistrate when sentencing, it is evident that the learned magistrate was mindful of all the relevant factors regarding sentencing. She considered the personal circumstances of the appellant, the offence and the interest of society. The learned magistrate weighed the mitigating factors against the aggravating factors and concluded that the mitigating factors had been outweighed by the other factors.

Conclusion

[10] This court is not satisfied that the court *a quo* committed any material irregularity or that it had failed to exercise its discretion judiciously. It follows that the appeal is bound to be dismissed.

[11] In the result, the following order is made:

1. The appeal against sentence is dismissed.

A Diergaardt
Acting Judge

I agree,

JT Salionga
Judge

APPEARANCES:

FOR THE APPELLANT: Mr. F Iyambo - In person
Oluno Correctional Facility
Ondangwa

FOR THE RESPONDENT: Ms. M Nghiyoonanye
Office of the Prosecutor-General
Oshakati