

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2021/00024

In the matter between:

HAPPINES UIXAB

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Uixab v S* (HC-NLD-CRI-APP-CAL-2021/00024) [2022]
NAHCNLD 33 (01 April 2022)

Coram: MUNSU AJ *et* KESSLAU AJ

Heard: 4 February 2022

Delivered: 1 April 2022

Flynote: Criminal Appeal - procedure – notice of appeal filed late - condonation application – no reasonable and acceptable explanation for delay - no reasonable prospects of success on appeal – appeal struck from the roll.

Summary: The appellant was convicted for Housebreaking with intent to steal and theft. He was sentenced to four years imprisonment. He had two relevant

previous convictions. He only appeals against his sentence. The notice of appeal was filed out of time. His application for condonation states that the Magistrate failed to explain the appeal rights to him.

Held; that there was no reasonable and acceptable explanation for the delay as the record indicates that the appeal rights were explained to the appellant and he indicated that he understood.

Held further; that the appellant failed to show that the court *a quo* in sentencing him, misdirected itself; committed any material irregularity; overemphasised the deterrent aspect or seriousness of the crime at the expense of the appellant.

Held further; that factors and facts not mentioned in the court *a quo* cannot be considered.

Held further; that the fact that some factors were not specifically mentioned in the Magistrate's ruling does not necessarily mean that they were ignore by the Magistrate.

Held further; that the sentence imposed by the trial court does not induce a sense of shock and that there is no disparity from the sentence that this court would impose in similar circumstances.

ORDER

1. The Respondent's point *in limine* is upheld.
2. The appeal is struck from the roll and considered finalised.

JUDGMENT

KESSLAU AJ (MUNSU AJ concurring):

Introduction

[1] The appellant was convicted in the Magistrates Court of Tsumeb on a charge of Housebreaking with the intent to steal and theft. On 5 February 2021 the learned Magistrate sentenced the appellant, who had two previous convictions, to four years imprisonment.

[2] The appellant's notice of appeal together with an application for condonation for the late filing thereof was received at the Tsumeb Magistrates court on 21 June 2021. The appellant, who is a self-actor, indicated his reason for the delay was that the Magistrate failed to explain the rights to appeal to him and that he was only made aware of it by co-inmates. This appeal lies against sentence only.

[3] The appellants' grounds of appeal against the sentence imposed, which was written in laymen's terms, can be summarized as follows:

Firstly that the sentence is excessively harsh and shockingly disproportionate to the offence committed. Secondly that the Magistrate over emphasised the seriousness of the offence and the aim of deterrence. Thirdly, the learned Magistrate failed to consider the mitigating factors presented by the appellant and thus did not individualize the sentence.¹ In the heads of argument filed by the appellant he introduced new grounds of appeal however no amended notice of appeal was filed and as such these will not be considered².

[4] The respondent submitted that the sentence *in casu* is similar to other sentences imposed upon convictions on the charge of housebreaking with the intent to steal and theft³.

¹ Page 297 of appeal record.

² *S v PV* 2016 (1) NR 77 (HC).

³ *S v Erickson* 2007 (1) NR 164 (HC); *S v Imene* 2007 (2) NR 770 (HC); *S v Kasita* 2007 (1) NR 190 (HC).

Point in limine

[5] Respondent submitted as a point in limine that the notice of appeal was filed out of time and that the appellant's explanation fails to meet the requirements of reasonableness, furthermore that there is no prospect of success on appeal against the imposed sentence.

[6] Considering the application for the condonation of the late filing, the requirements are as submitted by the Respondent twofold consisting in deciding on the reasonableness of the explanation and secondly the prospects of success on the merits. Gibson J in *S v Nakapela and Another*⁴ stated the following:

'In my opinion, proper condonation will be granted if a reasonable and acceptable explanation for the failure to comply with the sub-rule is given; and where the appellant has shown that he has good prospects of success on the merits of the appeal. In my opinion, these requirements must be satisfied in turn. Thus if the appellant fails on the first requirement, the appellant is out of court.'

The appellant's reason for late filing

[7] The appellants submitted that his right to appeal was not explained to him by the Magistrate after he was sentenced. He furthermore stated that he only became aware of this right from fellow inmates and that a further delay was caused as he 'did not get the right person to write the appeal'. When reading the record of proceedings from the court a quo it is apparent that the Magistrate kept a full and proper record of proceedings and furthermore the record is very clear on this point that the right to appeal was explained by the Magistrate and the appellant indicated that he understood the explanation⁵. On this point alone the appeal should be struck from the roll. This court will however extend the appellant, being a self-actor, some leniency and consider the second leg of condonation to wit the prospects of success⁶.

⁴ *S v Nakapela and Another* 1997 NR 184 (HC) at para 185G-H.

⁵ Page 294 of appeal record.

⁶ *S v Ashimbanga* 2014 (1) NR 242 (HC)

Prospects of success

[8] It is trite law that sentencing is primarily at the discretion of the trial court⁷. In *S v Tjiho* 1991 NR 361 HC at 366 A-B, Levy J stated that:

'The appeal court is entitled to interfere with a sentence if:

- (i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentencing proceedings;
- (iii) the trial court failed to take into account material facts or overemphasized the importance of other facts;
- (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by any court of appeal.⁸

[9] It is important to aim for consistency in sentencing to promote legal certainty, install a sense of fairness and improve the respect for the judicial system⁹. While the uniformity of sentence is paramount to the public's confidence in the judicial system, at the same time the court must endeavour to individualise the sentence taking into consideration the particular offender's personal circumstances. Sentencing is thus a balancing act which is not an exact science and not an easy task by any means¹⁰.

[10] The crime of Housebreaking with intent to steal and theft is seen in our courts as a serious offence, generally inviting a direct term of imprisonment. The crime is invasive in nature as it consist of entering the property/dwelling/home and invading the privacy of another and then stealing whatever items so desired. Additionally to the loss of property, often parts of the structure will be damaged by the offender in his quest to get his hands on the loot. The respondent referred to the case of *S v Drotsky*¹¹ where Maritz J (as he then was) stated: 'It is said that a man's home is his castle. If there is one place where a person should feel safe and secure it is in his home.' The Judge also remarked that the trail Magistrate is normally acquainted with the local circumstances such as the prevalence of the particular crime and the

⁷ *S v Ndikwetepo and Others* 1993 NR 319 (SC)

⁸ *S v Tjiho* 1991 361 (HC) at 366 A-B.

⁹ *S v Skrywer* 2005 NR 288 (HC) at page 289

¹⁰ *S v Strauss* 1990 NR 71 (HC)

¹¹ *S v Drotsky* 2005 NR 487 (HC) at page 489

interest of society and would therefore be in the best position to impose an appropriate sentence. It is in these circumstances where a crime is prevalent and serious in nature that the aims of punishment would outweigh the personal circumstances of an accused¹².

[11] Upon the conviction of the appellant, the State proved two previous convictions against him which the appellant confirmed. These convictions were on charges of Robbery, convicted 19 March 2014, and Housebreaking with the intent to steal and theft, convicted 19 December 2014. The following was said by Silungwe J and Maritz J in the matter of *S v Stuurman*¹³ : 'Previous convictions are invariably regarded as aggravating factors, provided, of course, adequate weight can be attached to them. Such weight must be determined by the sentencer, taking into account such factors as: the nature, the number and the extent of similar previous convictions, as well as the lapse of time between them and the present offence.'

[12] Applying the above principles to the current case this court cannot find that the Magistrate in sentencing the appellant misdirected himself; committed any material irregularity; overemphasized the deterrent aspect or seriousness of the crime at the expense of the appellant. The sentence imposed by the trial court does not induce a sense of shock and there is no disparity from the sentence that this court would impose in similar circumstances. It appears from the record and subsequent sentence that the Magistrate exercised his sentencing discretion judicially. There is no prospect of success on appeal against sentence.

[13] In the result it is ordered that;

1. The Respondent's point *in limine* is upheld.
2. The appeal is struck from the roll and considered finalised.

¹² *Iiyambo v State* (CA 68/2012) [2013] NAHCMD 42 (8 February 2013) at par [6]; *Ndaumbwa v S* (CC 11/2010) [2017] NAHCNLD 73 (31 July 2017) at par [10].

¹³ *S v Stuurman* 2005 NR 396 (HC) at page 397.

E. E. KESSLAU
ACTING JUDGE

I agree,

D. C. MUNSU
ACTING JUDGE

APPEARANCES

APPELLANT

Mr. H. Uixab (In Person)
Oluno Correctional Facility, Ondangwa

RESPONDENT

Mr. L. Matota
Of the Office of the Prosecutor-General, Oshakati