



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

JUDGMENT

CASE NO. CA 62/2011

In the matter between:

PAULY LEONARD

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Leonard v The State* (CA 62/2011) [2013] NAHCNLD 24 (24 April 2013)

Coram: DAMASEB, JP et MILLER, AJ

Heard: 24 April 2013

Delivered: 24 April 2013

Summary: Criminal Law – Appeal against conviction and sentence – Accused convicted of theft – Held that the accused’s explanation not reasonably possibly true that he was not involved in the theft – Accused is the vital link in the States knowledge of the identity of the person in whose possession the stolen property was found – Appeal court held that the inference drawn is consistent with the proved facts and excludes every reasonable inference that accused was not the thief – Conviction and sentence confirmed.

ORDER

The appeal against both conviction and sentence is dismissed.

JUDGMENT

DAMASEB, JP (MILLER, AJ concurring)

[1] The appellant (whom I shall refer to as the 'accused') was convicted by the Magistrate's Court, Ondangwa, on one count of theft of a solar panel valued at N\$ 18 000, the property of or in the lawful possession of Ms Mirjam Johannes. The charge sheet alleged that the theft occurred 'between 5th day of September 2010' at or near Okapya village. The accused now appeals against both conviction and sentence. He was legally unrepresented at his trial. In papers serving before this court he has also elected to represent himself.

Notice of appeal

[2] The accused drafted the notice of appeal personally, and as far as the conviction goes, complains that State witness Reinhold Kaundje under oath gave a different version to the one he gave in his witness statement. The notice of appeal suggests that in the witness statement Kaundje said he had sent the solar panels he received from the accused to a friend in Angola, while at the trial he said he had sold it at the open market. The notice also points out that in the said witness statement Kaundje had said that the accused had approached him in connection with a loan in August 2010 while in his evidence at the trial he said it was in September of that year. The notice also states that the value of the solar panels was not proved; that there was no admissible evidence that he had stolen the solar panels; that he did not have a fair trial as the magistrate relied on hearsay evidence and that the trial court convicted him in respect of

what he refers to as an 'old record which has no relation with the charge which I was facing'.

The State called two witnesses but the accused elected to remain silent

[3] The complainant, Ms Mirjam Johannes, and Mr Reinhold Kaundje (in whose possession the stolen solar panels were found by the complainant and the police) testified for the State. The accused did not testify and did not call any witnesses in his defence. When afforded the opportunity to testify and to give rebuttal evidence, and being alerted to 'the dangers of electing to remain silent...and that the matter will be decided on the evidence led by the State' the accused stated that he had 'said my piece already and I have no witnesses'.

Accused's plea explanation

[4] The accused gave a plea explanation in terms of s 115 of the Criminal Procedure Act, 1977 (Act 51 of 1977). He made it clear that he was not the thief, but for the most part, the plea explanation is irrelevant and does not add much to the probabilities in the case. Its importance lies more in what he did not say as I will show later.

The State's unchallenged evidence

[5] The complainant testified that on 5 September 2010 a report was made to her by her housekeeper that the two solar panels were stolen. She reported the theft to the police on the same day. She had then gone with the police to the accused's place and he denied any involvement in the theft. The accused was the complainant's neighbour and they knew each other very well. According to the complainant, under further police questioning and in her presence, the accused admitted to removing the solar panels and led the police and the complainant to 'Reinhold' (second state witness) who stated that he received the panels from the accused. The complainant described the panels as a set of 'sky blue 50 volts panels'. To the question on cross examination by the accused (in reference to the allegation that he admitted stealing the panels), 'Does It mean I accepted what I did not do?' the complainant answered:

'You accepted it without being threatened or forced. You did it and you knew what you did. Your pick was found close to the scene with the strut that holds up the solar panel. You also admitted and also your friend, Leonard admitted to taking panels from you. You also admitted to my sister.'

She was not challenged further on this version, not even as much as suggesting that it was a fabrication or that any of the statements attributed to the accused were improperly obtained.

[6] The second state witness was Mr Reinhold Kaundje. He testified that the accused was well known to him and that they in fact grew up together. He recounted that the accused visited him sometime in September 2010, well before any police officer approached him, in connection with the subject solar panels. On the September visit, he recounted, the accused asked him for N\$ 1 500 as a child of his had died. Kaundje told the accused that he did not have so much money but the accused kept asking for money. Kaundje then told him that he would only advance money to the accused if he provided some form of security for the loan. The accused promised to bring a DVD player and a tape deck as security but never brought the same. He however subsequently brought a 'big' solar panel with a 'blue-ish silver colour' of about 1 meter in width. As the accused did not repay him the loan as agreed, Kaundje testified, he sold the solar panel to someone else for N\$ 700. He testified that the accused had at the time he brought the solar panel as security said that it belonged to him.

[7] In cross-examination of Kaundje, the accused never denied that he led the police and the complainant to the witness. He rather feebly denied giving the solar panel to Kaundje and put to the witness that it was a DVD player that he gave to the witness as security for the loan. Kaundje replied to that suggestion as follows:

'That is laughable. You are lying. I have no cause to lie. You gave me a solar panel'

In fact, it was clear from the accused's cross-examination of Kaundje that the latter had actually advanced him a loan. He also suggested that what he had said to the police was that he had given a DVD player to Kaundje. There is no explanation whatsoever why he led the police to Kaundje if the subject of the loan transaction was a DVD and not the solar panel.

[8] The State had proved beyond a reasonable doubt, not only that the subject solar panels were stolen, but that the accused led the complainant and police to the person in whose possession they were found. The accused is therefore the vital link in the State's knowledge of the identity of the person in whose possession the stolen property was found. The accused's explanation, that he did not give the solar panels to Kaundje but only a DVD player, is not reasonably possibly true and was correctly rejected by the trial court in favour of the version that he gave the panels to Kaundje. The only reasonable inference to be drawn from the nexus provided by the accused between the stolen panels and Kaundje – absent any explanation how the accused became aware of the fact that the panels were in Kaundje's possession (taken together with the unchallenged version of Kaundje's that the accused gave him the panels as security for a loan) – is that the accused was the thief. That conclusion is supported by the test for inferential reasoning settled in *R v Blom*¹ as follows:

- '(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[9] The accused's plea explanation is so inadequate as to raise any other reasonable inference that he was not the thief. The one thing – perhaps the most important one – that he does not explain in his plea explanation is how it came about that he led the complainant and the police to the one person in whose possession the stolen solar panels were found. The State's evidence is clear that it was the accused who led the complainant and the police to Kaundje and it was in Kaundje's possession that the stolen property was found. Not only that, the complainant testified that the accused admitted that he had removed the solar panels from her house. There is no suggestion in anything said by the accused, either in the plea explanation or his cross-examination of the State witnesses, that any admission on his part was the result of any improper inducement by any person associated with a person in authority. Even if I were

¹ 1939 AD 188 at 202-3.

to accept that there is substance to the suggestion that Kaundje had made a previous extra-curial statement which turned out to be inconsistent with the version under oath, the gravamen of Kaundje's version that the accused brought the solar panels to him as security for a loan, is sufficiently and beyond reasonable doubt corroborated by the evidence that the accused, even on his own admission, led the police to Kaundje. Absent any explanation how else Kaundje could have come into possession of the stolen property and the accused's election to remain silent in the face of very strong evidence implicating him in the theft, the only inference that can be drawn from the proved facts is that the accused was the thief.

[10] The accused was properly convicted of the theft of the solar panels and his objection to the propriety of the conviction stands to be rejected.

Sentence

[11] The appeal against the sentence of four years is premised on the argument that the Magistrate allegedly improperly imposed a custodial sentence without the option of a fine and disregarded the accused's personal circumstances - mainly the fact that he suffers from HIV/AIDS and requires medical attention; and that he has three children without mothers. He also complains that the Magistrate improperly took into account his previous conviction for illegal possession of a firearm, and that the value of the solar panels had not been proved. I have considered the reasons given by the Magistrate for the sentence. He justified his conclusion in every respect, in particular why he took into account the previous conviction as being too proximate to the present conviction – thus demonstrating the accused's bad character and his failure to learn from past wrongdoings; the fact that treatment for the accused's disease is possible even if he is in prison and that the prison authorities are under an obligation to take care of his medical needs ; and the inappropriateness of a fine in the circumstances of the case. As for the value of the solar panels, nothing really turns on it. The evidence shows clearly that they were not valueless: The accused was prepared to pawn it for a debt of N\$ 1000. He derived a financial benefit from the crime which was motivated by greed. Theft is a prevalent offence which must be discouraged through deterrent sentences. Besides, the accused is a man who had not shown any remorse for his actions and despite his own previous admission he was the thief, proceeded to deny the charge in

court. The stolen panels had also not been recovered and the complainant had suffered an actual loss.

No misdirection in sentencing procedure

[12] The Magistrate had therefore not misdirected himself in the way he approached the sentence. The sentence imposed was pre-eminently a matter in the discretion of the trial court. Even if I would have imposed a different sentence (which is by no means certain as I perceive the sentence to be in line with sentences approved by this court in similar cases) that is no warrant for appellate intervention. I am not satisfied that the sentence of four years for the theft of solar panels where there has been an actual loss (in the face of the prevalence of the offence of theft) induces a sense of shock. The appeal against sentence too is therefore without merit and must fail.

Order

[13] In the result, the appeal against both conviction and sentence is dismissed.

P T Damaseb
Judge President

I agree.

P J Miller
Acting Judge

APPEARANCE

APPELLANT

IN PERSON

RESPONDENT

D M LISULO

Of

Office of the Prosecutor-General, Oshakati