REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 20/2016

In the matter between:

KONDJASHILI KAXUXWENA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kaxuxwena v State* (CA 20/2016) [2016] NAHCNLD 87 (17 October 2016)

Coram: JANUARY J, TOMMASI, J (CONCURRING)

Heard: 25 July 2016

Delivered: 17 October 2016

Released: 23 November 2016

Flynote: Criminal Procedure ─ Appeal against ─ Interference by Court of appeal ─ Such interference only justified where sentence vitiated by irregularity or misdirection ─ Sentence essentially falling within discretion of trial Court ─ No prospects of success.

Summary: It is a settled rule of practice that punishment falls within the discretion of the Court of trial. As long as that discretion is judicially, properly or reasonably exercised, an appellate Court ought not to interfere with the sentence imposed. The discretion may be

said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection. In this appeal there is no prospects of success on appeal. The matter is struck from the roll and considered finalized.

ORDER

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1. Application for condonation is refused; and
2. The appeal is struck of the roll.

JUDGMENT

JANUARY, J TOMMASI, J (CONCURRING)

[1] This appeal is against sentence. The appellant pleaded guilty on 23 March 2015 in two separate cases of housebreaking with intention to steal and theft before the same magistrate at Ohangwena. One of the cases stems from a housebreaking of a house committed on 09 July 2014 where the appellant stole clothes and blankets worth N$7000.00 (case no. 571/2014). The other case stems from a housebreaking into a shebeen where the appellant stole items worth N$8375.00 committed on 19 November 2014 (case no.1012/2014). It seems that both the magistrate and the prosecutor did not realize that the cases were for the same accused at the time.

[2] The appellant was sentenced to 9 (nine) months imprisonment on the housebreaking of the house and to 18 (eighteen) months imprisonment for the housebreaking of the shebeen. It seems from the case records that the cases were not disposed of in sequence to the dates when the crimes were committed. The case where the appellant was sentenced to 18 months imprisonment was first disposed of. The appellant informed the court in the second case that he had pleaded guilty on another

matter, that he had another conviction and requested the court that the sentences should run concurrently.

[3] Mr. Matota is representing the respondent in this court and Mr Tjiteere appeared a*micus curiae* for the appellant. The appellant was unrepresented in the court *a quo.* He filed his notice of appeal late but Mr. Matota did not take issue with that. He contended that there are no prospects of success on appeal.

[4] Mr. Tjiteere submitted that the magistrate erred by not ordering that the sentences should be served concurrently. He conceded that the sentences should not be interfered with unless it is shockingly inappropriate. He conceded further that it is inescapable that the appellant must serve imprisonment. In this appeal, however he submitted that justice is not served in this matter and that 18 (eighteen) months imprisonment or less would be satisfactory.

[5] Mr. Matota submitted that the charges should have been joined. This was not done by the public prosecutor nor was the magistrate alerted to the fact that both cases were in respect of the same accused. Mr. Matota submitted that in the circumstances the cumulative effect of the sentences is not excessive or out of proportion to the gravity of the crimes.

[6] It is trite law that punishment falls within the discretion of the trial court. A court of appeal can only interfere with sentence and the discretion exercised by the trial court in certain limited instances.

> “It is, indeed, a settled rule of practice that punishment falls within the discretion of the Court of trial. As long as that discretion is judicially, properly or reasonably exercised, an appellate Court ought not to interfere with the sentence imposed. This principle emerges from a chain of authorities, but for our purposes it suffices to refer only to two of them.
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> In *S v Rabie* 1975 (4) SA 855 (A) at 857D there occurs the following passage:
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> > 'In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion; hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".'

It is explained in the same judgment that the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection.

Another case in point is *S v Ivanisevic and Another* 1967 (4) SA 572 (A) in which Holmes JA stated at 575F-G that

`. . . it has more than once been pointed out that the power of a Court of appeal to ameliorate sentences is a limited one; see Ex parte Neethling and Another 1951 (4) SA 331 (A) at 335H; R v Lindsay 1957 (2) SA 235 (N); S v De Jager and Another 1965 (2) SA 616 (A) at 629. This is because the trial Court has a judicial discretion and the appeal is not to the discretion of the Court of appeal: on the contrary, in the latter Court the enquiry is whether it can be said that the trial Court exercised its discretion improperly.'

Another test applied by appellate Courts entertaining appeals against sentence which is said to be on the oppressive side is whether such sentence is so manifestly excessive that it induces a sense of shock in the mind of the Court. See *R v Lindsay* 1957 (2) SA 235 (N). If it does, the inference can be drawn that the discretion had not been properly exercised."[1]

[7] The magistrate conceded in his additional reasons that had he been aware that the two cases related to the same accused, he would have ordered the sentences to run concurrently. This concession is an afterthought and I am not convinced that this court should adhere to it. This court needs to consider whether or not the sentences are appropriate and just in the circumstances.

[1] S v Ndikwetepo and Others 1993 NR 319 (SC) at 322F-323C

[8] Section 280 of the Criminal Procedure Act, Act 51 of 1977 provides as follows;

> **"280 Cumulative or concurrent sentences**
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> (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
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> (2) Subject to section 99(2) of the Correctional Service Act, 2012 (Act 9 of 2012) punishments referred to in subsection (1), when consisting of imprisonment, commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment must run concurrently.
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> [Sub-sec (2) substituted by sec 134 of Act 9 of 2012.]"

Section 99(3) of the Correctional Service Act, Act 9 of 2012 provides;

> "(3) Where a person receives more than one sentence of imprisonment or receives additional sentences while serving a term of imprisonment, each such sentence must be served the one after the expiration, setting aside or remission of the other, unless the court specifically directs otherwise or unless the court directs that such sentences must run concurrently"

[9] I agree with what was quoted with approval by Chomba AJA in *S v Ndikwetepo and Others* 1993 NR 319 at 325;

> "In deciding whether a sentence is manifestly excessive, this Court must be guided mainly by the sentences sanctioned or imposed by this Court in similar cases, due allowance being made, of course, for factual differences."

[10] I fully associate myself with what was stated by Maritz J in *S v Drotsky* 2005 NR 487 at 490F-J and 491A;

> "The crime of housebreaking with intent to steal and theft is - as the magistrate has observed - a prevalent and serious one. It is regarded by
>
> the law and society as a particularly insidious form of theft. 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. Housebreaking with intent to steal and theft strike at and destroy the sense of safety and security which the occupants are entitled to enjoy. It constitutes an unlawful invasion of the complainant's privacy and an illegal misappropriation of his or her possessions - sometimes commercially irreplaceable goods of great sentimental value.
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> For these reasons society has a particular interest that the commission of this crime should be discouraged by an appropriate judicial response. Perpetrators should know that the norm is imprisonment without the option of a fine unless the circumstances of a particular case justify the imposition of a lesser sentence."

[11] The crimes are not related to the same place and were committed about three months apart. I also do not find the cumulative sentences oppressive or inappropriate to induce a sense of shock.

[12] There is in my view no prospect of success on appeal.

[13] In the result;

1. Application for condonation is refused; and
2. The appeal is struck of the roll.

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HC JANUARY, J

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MA TOMMASI, J

APPEARANCES:

APPELLANT:	Mr Tjiteere
	Dr. Weder, Kauta & Hoveka Inc.
FOR THE STATE:	Adv. Pienaar
	Office of the Prosecutor-General