

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 13/2014

In the matter between:

TANGENI LEONARD

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Leonard v S* (CA 13/2014) [2017] NAHCNLD 115 (16 November 2017)

Coram: TOMMASI J and JANUARY J

Heard: 05 July 2017

Delivered: 16 November 2017

Flynote: Criminal Procedure – Appeal – Conviction and Sentence – 2 charges of robbery with aggravating circumstances - Record incomplete in that exhibits of identification parade not traceable – content of exhibits reflect in the record – no

prospects of success on appeal on conviction – Appellant 30 years of age and first offender - Sentence of 15 years' imprisonment on each charge found to be shockingly inappropriate – substituted with 10 years' imprisonment on each charge.

Summary: The appellant was convicted and sentenced on two charges of robbery with aggravating circumstances. The appellant was identified in an identification parade as one of three robbers who robbed a cuca shop on 07 February 2003 and another cuca shop on 12 February 2003. The identification parade was properly held. Two witnesses identified the appellant to be one of the robbers at the respective incidents. This court finds that there are no prospects of success *ad* conviction.

This court finds that the sentence of 15 years imprisonment on each charge, of which 5 years imprisonment are ordered to be served concurrently with the sentence on count 1, to be shockingly inappropriate and excessive. The sentence and order stand to be set aside and substituted with sentences of 10 years' imprisonment on each charge.

ORDER

- 1) The application for condonation is granted;
- 2) The appeal against conviction is dismissed;
- 3) The appeal against sentence is upheld;
- 4) The sentence of 15 years' imprisonment in respect of each of the two charges and the order that 5 years of the sentence of count 2 are to be served concurrently with the sentence on count 1 are set aside;
- 5) The appellant is sentenced;
Charge 1. 10 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition that the accused is not convicted for robbery committed during the period of suspension;
Charge 2. 10 years imprisonment.
- 6) The sentence is ante-dated to 18 April 2007.

APPEAL JUDGMENT

JANUARY J (TOMMASI J CONCURRING)

[1] The appellant was arraigned with two co-accused in the Regional Court Oshakati, sitting at Eenhana, on 2 (two) charges of robbery with aggravating circumstances. The appellant and the co-accused pleaded not guilty to both charges. The appellant was convicted on 17 April 2007 on both charges. He was sentenced on 18 April 2007 to 15 years' imprisonment on each charge respectively. The court *a quo* ordered 5 years' of the sentence on count 2 to be served concurrently with the sentence on count 1. The other 10 years' on count 2 are to be served consecutively after the sentence on count 1. He thus must serve 25 years' imprisonment.

[2] This appeal is against both conviction and sentence. The appellant as a self-actor initially filed his notice of appeal with an application for condonation on 10 October 2012, about 5 months late. These document were only received by the clerk of court on 26 October 2013. The matter could since October 2013 not be entertained because the record is incomplete. A list of items stolen, certain photo plans of two identification parades and certain forms completed pertaining thereto which were handed up in the court *a quo*, cannot be traced.

[3] The presiding magistrate has in the meantime been appointed in another post and is not available to provide additional reasons after the notice of appeal was filed. The appellant in the meantime applied for legal aid. Mr Bondai was appointed in 2016. He realized that the record is incomplete and despite numerous requests the issue could not be resolved. The clerk of the court filed an affidavit that the exhibits are untraceable and could not be found. This court decided to hear the matter on the record as it is.

[4] The appellant was unrepresented in the court *a quo* but is represented in this court by Mr Bondai on instruction of the Directorate Legal Aid. The respondent is represented by Mr Gaweseb.

[5] The appellant filed his notice of appeal out of time and there is an application for condonation. The appellant gave reasons for the delay. Mr Bondai submitted that the record is incomplete. The clerk of the court informed this court that the missing parts of the record being, the photo plan of the identification parade and the notes thereto are nowhere to be traced. Counsel for the appellant submitted that those exhibits are of vital importance in this appeal.

[6] The appellant submits that the magistrate erred in convicting him in that the weapons found and the stolen items were not found in his possession.

[7] The conviction followed primarily because of the identification of the appellant at the identification parade by Phillip Nghishililwa and Lucina Ngashikau, witnesses who were at the scenes of crimes.

[8] The charges are as follows:

- '1. That: On or about the 07th day of February 2003 and at or near Okahenge No. 2 in the district of Eenhana the accused did unlawfully and with the intention of forcing him into submission by force used violence or by threats of violence against Lavinia Shombe by holding her at gun point and unlawfully and with intent to steal took from her And take certain goods to with (sic) cash to the amount of three hundred Namibia dollars N\$300.00 the property of or in the lawful possession of the said Lavinia Shombe.,And that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused and/or an accomplice was/were, before, after or during the commission of the crime, in possession of a dangerous weapon, namely, a [(n)(sic)] AK47 rifle.
2. On or about the 12th day of February 2003 and at or near Omusati Cuca Shop in the district of Eenhana the accused did unlawfully and with the intention of forcing him/her into submission threaten to assault against (sic)

Katrina Makili by holding her at gun point with an AK 47 rifle and unlawfully and with intent to steal took from her 20 (sic) to wit seven (7) everready radio N\$129-00 (sic), Lungage bag (sic) N\$59.00 totally valued N\$ 4 133.00 the property of or in the lawful possession of the said Katrina Makili and Omusati cuca shop'.

[9] Civilian witnesses were at the cuca shops or in the vicinity of the shops at the time of the alleged robberies.

[10] The facts are that on 07 February 2003 and on 12 February 2003, respectively, two cuca shops were robbed. The issue in the matter is the identity of who the perpetrators are and if it was proven beyond reasonable doubt.

[11] The witnesses sequentially testified: Katrina Makili stated that she was the sales lady at the shop/bar at Mr Haukongo Julius's shop which is a supermarket. On 12th February 2003 she was at the supermarket. She knows accused 1 who was a co-accused to the appellant. He was one of the accused who came into the supermarket and searched behind the counter for money. This accused earlier in the morning was at the shop with the co-accused and the appellant who remained outside under a tree. One of the persons under the tree then went and got tombo from another cuca shop.

[12] Thereafter the two accused who were outside joined in and also entered the shop. One of the intruders was having a fire arm and demanded money or otherwise he will take the life of the witness. When accused 1 entered the cuca shop, he enquired who the owner was. They ordered a cool drink. Two of the accused went behind the counter and searched for money and took N\$300 from the money box. The perpetrators commented that the money was not enough and demanded more money from the witness. One of them kicked the witness on the chest with shoed feet once. One of them was having a fire-arm. The witness was grabbed but she managed to free herself and ran away to another cuca shop of an old lady who is Selma Matheus.

[13] The appellant chased this witness to the shop of Selma Matheus and when he reached there ordered all persons present not to move. He returned to the other co-accused. Thereafter the co-accused and appellant in this charge assisted each other in

packing items from the cuca shop in a new bag from the shop. When the perpetrators left this witness went to her shop with old ladies, closed the shop and waited for the owner. The owner arrived the following day and together with this witness found the items listed in the charge to be stolen.

[14] This witness initially identified accused 2 in the trial as the one who was wielding and firing the fire-arm. The witness later on realized that it was not accused 2 but accused 3, who is the appellant, that she identified in the dock as one of the robbers and she corrected it. He fired the fire-arm chasing a girl from another nearby cuca shop. She firstly heard this girl screaming and then saw the appellant with the fire-arm chasing her and firing the shot or shots. The first accused wielded a knife and chased one Andreas Kasheshe with it. Members of the community threw bottles at this accused and Andreas managed to fire shots with a fire-arm to the accused. The accused including the appellant all ran away.

[15] This witness could not identify the appellant at an identification parade but was adamant in court that he was one of the accused in the matter. It amounts to dock identification and I am alerted to treat it with caution. She pointed out accused 1 on the identification parade.

[16] T Kashowa is a police officer who took photos at an identification parade inside a cell next to a kitchen at the police station. The witness identified a photo plan that he compiled. He read the photo plan into the record. The record reflects that photos 1 and 2 depicts the formation of the parade from the right and left sides respectively. Photo 3 and 4 depicts where the appellant was pointed out by a witness Phillipus Nghishililwa. There was a mistake on the photo plan indicating the witness who did the identification was a Lukas Shea but officer Kashawa corrected it to read that the witness was Phillipus Nghishililwa. Photos 5 and 6 depicts where a witness Lucina Nashikua identified the appellant. Photos 4 and 6 were taken after the appellant was afforded the opportunity to change position at the parade. The parade commander was Warrant Officer Gaiko.

[17] In cross-examination the appellant admitted that he was pointed out. The appellant claimed that he was at position 6 in the parade but from questions by the magistrate it is clear that the appellant was never in position no. 6. He was in position no. 9 on one photo and no. 5 on another picture.

[18] Paulus Nandega is a police officer who partook in the investigation of the case. He visited the scene of crime on 07th February 2003 after having received the report of the incident. He found the complainant Lavinia Shombe in a state of shock and with a cut wound on her hand. He found a spot where allegedly a bullet struck the ground in front of the cuca shop at the entrance. Some police officers arrived before this witness at the scene and followed shoe prints. Nobody was arrested on the scene that day.

[19] On 12th February 2003 another report of armed robbery was received. Officer Nandega drove to the scene and found the complainant present. The complainant gave a description of the persons. This witness concluded that it must have been the same person who committed the robbery earlier on the 07th of February 2003 as in both cases a brown jacket allegedly worn by one of the persons and a fire-arm featured. There were no suspects at the time.

[20] On 17th February 2017 an informer provided information about a person who talked about the robbery at Okahenge. Officer Nandega collected the informer and traced the person who was later accused 1. Upon information from accused 1 he was arrested and the day thereafter accused 2 was arrested. After a few days the witness received information from Ondangwa that the appellant was arrested in Ondangwa. He interviewed the appellant but he denied the allegations. The witness arranged an identification parade and invited witnesses of both crimes to it. The ID parade was held on 25th February 2003. The appellant was pointed out by witnesses upon which he was charged.

[21] Given Gaiko Palauna is a police officer who was in charge of the identification parade on 25th February 2003 at Eenhana Police Station. He completed certain forms at the parade and read those into the record. The names of the suspects were given to him and the appellant was suspect number 3. Sergeant Mbeha was the officer who took

the witnesses to the parade. The officer in charge of the witnesses before they were taken to the parade is Sergeant Hamunyela. Constable Sheehala took the witnesses away from the parade. Everything was done in Oshiwambo language and no interpreters were present. The suspects were informed of the purpose of the ID parade and had no requests in relation thereto. Sergeant Kashowa was taking photographs.

[22] There were 12 persons in the line-up of the ID parade. The first witness was the complainant in count 2. She pointed out the first accused. The accused were afforded opportunity to change positions which they did before the second witness was collected to the ID parade. The second witness did not point out anybody. The accused was again afforded the opportunity to change positions. They did change positions. The third witness was Nghishililwa Phillipus. He pointed out the appellant. That was the end of the first ID parade.

[23] The persons were again requested to change positions. The suspects were satisfied with the parade before the fourth witness was called in. She is Lucina Nashikaua. The witness pointed out the appellant as one of the robbers. Positions were again changed before the fifth witness was called in. The fifth witness did not point out anybody. Positions were not changed before the sixth witness was called. This witness was the complainant in count 1. She did not point out anybody.

[24] A third identification parade was held on the same date. The suspects were satisfied with the line up before witnesses were called to identify the suspects. The seventh witness pointed out persons who were not suspects. The eighth witness could also not identify anybody. The officer in charge of the ID parades in all three instances signed the forms and it was co-signed by another police officer.

[25] Lucina Nghashikau is a bar attendant of Kaewa Kasheshe's bar at Ongobe village. She testified that she knows the accused from 07th February 2003 at Okahenge no 2. This witness was working at a different bar than the complainant in charge 1. The co-accused and the appellant came to a bar where the witness entered. The appellant also entered the bar but the 2 co-accused were standing under a tree. She did not speak to any of them. The appellant just came to the entrance, looked around in the bar

and went out to the tree where the other 2 were. The witness also exited the bar and went to the tree where the co-accused and the appellant were. After some time the witness went to the cuca shop where she was employed. The three accused passed by that cuca shop and went to the cuca shop of the complainant in charge 1.

[26] Two of the accused went into that cuca shop and one remained outside. She heard sounds from the cuca shop. One person went to look at what was going on and shortly thereafter came running back shouting; 'Lavinia is going to be killed.' Lavinia was also screaming from her cuca shop. The witness with other person ran to Lavinia's cuca shop. Before they could enter shots were fired by one of the accused. The persons ran away. Later the people started chasing the accused when it appeared that they had no bullets left. A person from the people following the accused had a fire arm and shot at the accused. The witness pointed out the appellant as one of the robbers at the identification parade.

[27] Julia Johannes is a sales lady at one of the cuca shops where the complainant in charge 2 also sells in in a cuca shop. This witness was not sure about the identities of the accused. She testified that on 12th February 2003 she saw 3 persons at the cuca shops. Two of the persons entered the cuca shop where the witness was helping out and ordered tombo from her. She served them with three jugs of tombo. The persons drank the tombo. Thereafter they left to the cuca shop where the complainant in count 2 was.

[28] After a short while the complainant in count 2 came running followed by one of the persons. They were the same persons who were at her cuca shop. One of the persons who was the tallest amongst them produced a fire arm from under his jacket and ordered all persons to sit down and not move. It seemed like an AK 47 rifle. In the meantime the other 2 were in the cuca shop of the complainant in charge 2. The witness saw them coming out of the cuca shop with a radio and travelling bags from the cuca shop. They left with the bags and the radio.

[29] Justus Rehabeam is a police officer but only testified about the 2 co-accused and does not know the appellant.

[30] The state then closed their case. The trials were separated on the next date to which the case was postponed because the appellant was not before court. He eventually was arrested and conducted his defence in person.

[31] The appellant testified and denied the allegations. He stated that he knows nothing about the case and claimed that he was either in custody on another matter or was at a place called Oshidombe on the dates that the crimes were committed. He stated that he does not know the co-accused and that they also do not know him. He admitted that he was identified at an identification parade but claims that he was assaulted before and had a wound on his fore head. He suggested that the witnesses who identified him were foretold to identify him. He was allegedly assaulted to admit the charges in this case. According to him the wound on the forehead was swollen.

[32] In cross-examination the appellant was no longer sure if he was in custody on the date the crimes were committed. He was confronted with photos taken on the date of the ID parade. It can be gleaned from the record that the photos do not reflect a wound or a swollen face. When he was confronted with this fact, the appellant changed the position of the wound from the forehead to one of the temples claiming that the wound was on a temple which was not visible on the photos. The appellant claimed that the witnesses who pointed him out at the ID parade were foretold to do that. He further claimed that the witnesses pointed him out because the person they saw could have been his look alike.

[33] The grounds of appeal are;

'The trial court erred in fact and/or law in convicting the appellant of two counts of robbery (with aggravating circumstances) in the absence of conclusive evidence that the appellant committed the offences. Further the trial court misdirected itself in accepting the evidence of state witness to convict the appellant when such evidence was contradictory, unreliable and not credible.

The trial court erred and misdirected itself when it imposed a startlingly excessive sentence in the circumstances.'

[34] The appellant filed his notice of appeal late. He advanced reasons for the delay to be that he is a layman and does not know the law and court proceedings. He does not know how to file a notice of appeal and does not know to read and write in the official language. He was informed by co-inmates how to file a notice of appeal and had to search for someone to write and draft the notice of appeal. I need to mention that the learned magistrate crisply explained the right to appeal to the appellant. There is no indication on record if he understood or not. In the circumstances I give the appellant the benefit of the doubt and accept the explanation as reasonable.

[35] I have hereinbefore summarized the evidence. The learned magistrate accepted dock identification from witnesses who could not identify the appellant at an identification parade. He evaluated the evidence as a whole and came to the conclusion of convicting the appellant. I do not find an error or misdirection of the evaluation but for the fact that he did not treat the dock identification with caution because of the factor of suggestibility. In my view this is a misdirection. I however find that it is one that does not vitiate the proceedings *ad* conviction. No criticism was levelled against the manner and proceedings of the identification parade and I find no fault with it. It was only submitted that the photo plan thereof and notes of the officer in charge are material and crucial for the just adjudication of this appeal. It was submitted that in the absence thereof the appeal should succeed. In my view the record sufficiently reflects what was contained in those exhibits as summarized above.

[36] The identification parade was, in my view, properly held with all the requirements complied with. I find that the respondent proved beyond reasonable doubt that the appellant was one of the robbers at both incidents respectively. Accordingly there are no prospects of success on appeal *ad* conviction.

[37] The learned magistrate convicted one of the co-accused on one charge of robbery. That accused was sentenced to 10 years' imprisonment of which 2 years' are suspended for a period of 5 years' on condition that the accused is not convicted of robbery committed during the period of suspension.

[38] The Appellant was convicted on one charge which is the same for which the co-accused was sentenced to 10 years imprisonment of which 2 years are suspended. The magistrate found the appellant to be of above average intelligence although he stated that he only went to school in Sub A. I agree with the learned magistrate that the appellant conducted his case in a very capable manner including his cross-examination of witnesses. The magistrate properly considered the personal circumstances of the appellant, the object of punishment and the factors to be considered. The learned magistrate considered as aggravating that the appellant absconded, thereby delaying the finalization of the case, after the state closed its case. I find that to be a misdirection. The appellant escaped from lawful custody and he will in all probability be charged for escaping and if convicted, sentenced on that charge.

[39] It is true that sentences should be individualized. It is in this case not clear, apart from the absconding, what was more aggravating against the appellant to impose a heavier sentence for the charge on which the co-accused that was convicted and sentenced to 10 years' imprisonment part of which is suspended. The appellant was convicted on two charges of robbery with aggravating circumstances and deserves to be sentenced on both charges. He is a first offender and was sentenced to 15 years' imprisonment on each charge. (Five) 5 years of the sentence on count 2 was ordered to run concurrently with the sentence on count 1. Effectively the appellant is to serve 25 years imprisonment.

[40] I find the sentence to be shockingly inappropriate for a first offender who was 30 years old at the time. I agree that the crimes are indeed serious and that aggravating circumstances are present in that a fire arm was wielded and fired at one of the crime scenes. Further the appellant showed no contrition. It is inescapable that he should serve a custodial sentence. In my view justice will be served with a sentence of 10 years imprisonment on each count.

[41] In the result:

- 1) The application for condonation is granted;
- 2) The appeal against conviction is dismissed;

- 3) The appeal against sentence is upheld;
- 4) The sentence of 15 years' imprisonment in respect of each of the two charges and the order that 5 years of the sentence of count 2 are to be served concurrently with the sentence on count 1 are set aside;
- 5) The appellant is sentenced;
- Charge 1. 10 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition that the accused is not convicted for robbery committed during the period of suspension;
- Charge 2. 10 years imprisonment.
- 6) The sentence is ante-dated to 18 April 2007.

H C JANUARY

JUDGE

I Agree

M A TOMMASI

JUDGE

Appearances:

For the Appellant:

Mr Bondai

Of Legal Aid – Ondangwa Magistrates Court

For the Respondent:

Adv Gaweseb

Of Office of the Prosecutor-General