

REPUBLIC OF NAMIBIA

OT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 26/2013

In the matter between:

ELIA U KAMBAMBI

1st APPELLANT

LEONARD PETRUS

2nd APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Kambambi v S* (CA 26/2013) [2017] NAHCNLD 52 (20 June 2017)

Coram: JANUARY, J and TOMMASI, J

Heard: 31 March 2017 and 07 April 2017

Delivered: 20 June 2017

Flynote: Criminal Procedure – Appeal against sentence – Interference by Court of appeal – Such interference only justified where sentence vitiated by irregularity or

misdirection – Sentence essentially falling within discretion of trial Court. – Court not in position to determine period of pre-trial incarceration – Matter remitted for sentence afresh.

Summary: The two appellants in this matter are appealing against their sentence. The magistrate gave very brief reasons in his *ex tempore* judgment with little indication what he considered in mitigation and aggravation. It is difficult for this court to determine what he considered. The ‘most weighty factor’ pre-trial and pre-sentence incarceration in relation to this case cannot be determined from the record. Matter remitted for the magistrate to sentence afresh considering various factors.

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.

ORDER

1. The appeal is upheld;
2. The sentence of 10 years’ imprisonment is set aside;
3. The matter is remitted to the magistrate to trace the missing parts of the pre-trial proceedings and/or establish with certainty the period the appellants were incarcerated trial awaiting before sentence, establish with certainty if the appellants have previous convictions and sentence the appellants afresh considering the period that they have thus far served in prison.

JUDGMENT

JANUARY J, (TOMMASI, J CONCURRING)

[1] This appeal is against sentence only. The appellants initially appealed against both conviction and sentence but later on indicated to the court that they are abandoning the appeal against conviction. They filed their notices of appeal late. An application for condonation was filed and heard by this court. We granted condonation and leave to appeal against sentence only. This court found that the issues raised Mr Greyling JNR, acting *amicus curiae* for both appellants, have merit. The appellant initially did not raise proper grounds against sentence. We afforded Mr Pienaar, who is representing the respondent time to respond to the issues of appeal raised and the magistrate an opportunity to respond. Mr Wamambo initially represented the respondent and filed heads of argument and supplementary heads.

[2] Both appellants were convicted for Robbery with aggravating circumstances: In that during 26th to 27th April 2008 and at or near Okakango village, Ehafo Cuca shop in the district of Outapi the accused did unlawfully and with the intention of forcing her into submission assaulted Hemelita Aangala by threatening to kill her with knives and tying her face with a cloth, blindfolding her and unlawfully and with intent to steal, took from her 1x cell phone valued N\$400, 6x packets of recharge vouchers valued N\$600 and money in cash of N\$6599.05, the total value of N\$7599.05, the property of or in the lawful possession of the said Hemelita Aangala; and that aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused and/or accomplice were, before, after or during the commission of the crime in possession of a dangerous weapon namely knives.

[3] The appellants pleaded not guilty and the State called various witnesses including the complainant. The evidence in brief is; that in the middle of the night of 26th April 2008, the complainant was asleep in a room at Ehafo Cuca shop in Okakango;

She heard voices of two men at the entrance of her sleeping room instructing her to open otherwise they will kill her; She opened the door and each of the men grabbed her on an arm; Both were having knives in their other hands; The two men dragged her to the entrance of the Cuca shop and instructed her to open the door; She opened and all of them entered; The men asked for money upon which she showed them the money; Before they took the money they blindfolded her with a T-shirt; One took the money while the other one was with the complainant knocking her on the head; The men instructed her not to scream otherwise they will kill her;

[4] Thereafter the blindfold was removed and she was pushed back to the sleeping room; The complainant could not identify the men as it was very dark; N\$6595.50 in cash, 6 x recharge vouchers valued N\$600 and her cell phone in the sleeping room, valued N\$400 were taken by the men; The men instructed her not to leave the room; After a while she managed to go out of the room and reported the incident to her neighbour. After some time the neighbour took the complainant to a cattle post. She returned with the people at the cattle post to the Cuca shop. The other villagers were called; At 07h00 the following morning shoe prints of two persons were observed and followed; The shoe prints led to a borehole about 50 meters from the Cuca shop; the shoe prints came from the borehole to the sleeping room/Cuca shop and back. At the borehole two horse tracks were observed; the horse tracks led to and from the borehole; the horses came from a Western direction and returned in the same direction; The villages in the Western direction are Omtambo-Omawe, Ombonde, Uutsathima and Efitu villages.

[5] The horse tracks led to Uutsathima village about 48 -50 km away where the horses were left at a Cuca shop; Two shoeprints led from there about three meters to a certain house and again to another house but the appellants were not there. The horses were red brownish, a stallion and a mare; The horses were tired and sweating; The appellants are both residents of Uutsathima village; They are staying in neighbouring houses and grew up together; On the 26th of April 2008 the two appellants were observed catching two horses in an open premises/yard. The Names of the horses are Mariana with a red-brown colour with a white spot on the forehead and Richeo is

brownish with a white mark on the hind leg; The two appellants were seen riding those horses at about 16h00 to 17h00 in the direction of Okakango where the complainant was robbed;

[6] On the 27th of April 2008 the first appellant was arrested and searched; He was found in possession of N\$2160; The second appellant was also arrested on the same date and found in possession of N\$50; Both appellants are known by a police officer who arrested them; They are unemployed and do not have any other source of income.

[7] Mr Greyling raised issues amongst others flowing from the brief *ex tempore* reasons for sentence by the magistrate: the failure to mention that he considered the personal circumstances of the appellants; failure to mention the fact that the appellants were first offenders and the weight he attached thereto; the import and relevance of subsequent convictions of first appellant and pending criminal case of second appellant; failure to *mention* the weight he attached to the fact that second appellant was a youthful offender. It was further not clear whether the State was afforded the opportunity to prove previous convictions against the appellants. Both appellants were unrepresented in the court *a quo*.

[8] The issue of youthfulness of the second appellant can easily be disposed of. Both appellants testified under oath in mitigation, the learned magistrate posed questions to them in assistance and they were cross-examined by the prosecutor. Second appellant testified that he was 18 years old and he went to school. In cross-examination he stated that he was born in 1973. The date of sentence is 09th April 2010. By a simple calculation from his year of birth to the date of sentence, one comes to his age being 37 years of age. There is nothing else, except his *ipse dixit*, gainsaying this.

[9] The personal circumstances of the first respondent reflects on the record that he is living with an old lady, who is his grandmother, and one young girl. He is the elder and assisted the old lady. The grandmother is receiving pension grant with which she is assisting people at home including the children of first appellants. He requested for a lenient sentence. Upon questions from the magistrate it emerged that he was 34 years

old, not married and has 4 children. He is unemployed. He survives by doing odd jobs, assisting villagers.

[10] The second appellant testified that he is an orphan as his mother passed away. He is staying with his grandmother and takes care of school fees of his younger siblings. He was responsible of ploughing for his grandmother. He stated that he is suffering from an illness. He requested for a lenient sentence even coupled with a fine. He stated that he owns stock which he suspected to be scattered at the time. Upon questioning by the magistrate he stated that he is 18 years old; that he was schooling for some time; that he is surviving by selling stock i.e. goat or a beast. He has no children. Apparently the illness that attacks him is that he develops things like pimples on the body.

[11] The second appellant called a witness who appears to be the uncle of the second appellant. He is the son of the grandmother that second appellant referred to. This witness does not stay in the same house as second respondent but in the same area. He testified that he is assisting his mother and sometimes sends his children to assist in the absence of second appellant. This witness does not know of any illness that second appellant is suffering from.

[12] It is a fact that no judgment is all-encompassing and perfect in all respects. The fact that a presiding officer does not mention facts does not necessarily mean that he/she has not considered same.¹

[13] I agree with the learned magistrate that the offence is indeed very serious and prevalent. There is indeed also no indication of remorse. The magistrate considered the time in custody for both appellants in relation to cases not relevant to this matter. In my view, other cases pending are not relevant for mitigation in this case. In my view this constitutes a misdirection. The Criminal Procedure Act 51 of 1977 makes provision that other cases wherein an accused is sentenced are only relevant for the court to consider the cumulative effect of sentences. And only in so far as the court may consider to order sentences to be served concurrently or consecutively. The record is also silent if the

¹ *S v Kauzuu* 2006(1) NR 225 (HC) at 232 D-F.

State was afforded the opportunity to prove previous conviction or not. There is no indication if he considered the period in custody trial awaiting for this matter.

[14] The record reflects that both appellants were arrested on 27 April 2008. I could detect from the record that both appellants pleaded in terms of section 119 of the Criminal Procedure Act 51 of 1977 on 01 September 2008 whereupon they were remanded in custody to 29 October 2008. The record reflects that the prosecutor in the magistrates' court conceded to bail of N\$1000 on 11 July 2008. It remains a guess if bail was paid or not. The proceedings thereafter in relation to the case are not in the record that I perused. I cannot find in the record when the appellants were transferred to the Regional court. They appeared in the Regional Court for the first time on 30 September 2009. There is no indication whether they were in custody or not.

[15] In his reasons, the learned magistrate mentioned that he will be lenient towards the appellants. The sentence imposed is in my view not a reflection of lenience. 10 years in custody is a long time.

[16] I agree respectfully with Van Niekerk J (as she then was) where she stated in *S v Kauzuu* 2006 (1) NR 225 (HC) at 232 D-F;

' The record reflects that appellant's representative in the court a quo pertinently mentioned in mitigation of sentence the fact and period of appellant's pre-trial custody. The learned magistrate does not refer to this fact at all in his judgment and one does not know whether he took it into consideration. Mr Sibeya submitted that the magistrate in all probability did bear it in mind because it was mentioned just before he passed sentence. If this is so, I find it strange that he does not mention one word about the most weighty mitigating factor advanced on behalf of appellant. I accept Mr Sibeya's submission that no judgment is all-encompassing and perfect in all respects, but the judgment is so brief that I have the impression that the magistrate decided to ignore this fact. If the magistrate overlooked or ignored this fact, he erred. Countless authorities indicate that time spent in custody awaiting trial or sentence is an important mitigating factor giving cause for a reduction in the sentence a court would normally have imposed. (See eg *S v G Sikweza* 1974 (4) SA 732 (A) at 737; *S v Mnguni* 1977 (3) SA 63 (N

at 65; S v Mgijima 1982 (1) SA 886 (E) at 893; S v Bacela 1988 (2) SA 665 (E) at 676; S v Banda and Others 1991 (2) SA 352 (BG) at 365; S v Gqamana 2001 (2) SACR 28 (C) at 37; S v Matwa 2002 (2) SACR 350 (E) at 359; S v Njikelana 2003 (2) SACR 166 (C) at 171.'

[17] In fairness to the magistrate I find it appropriate to restate his judgment on sentencing in full to indicate why this court comes to its conclusion that follows. I quote:

'Accused it is indeed so that you had been convicted of a very serious offence. It is also so as indicated by the State that this also is a prevalent offence. It is quite clear that during the trial you did not show any sign of remorse. However, the court will be lenient towards you today. Lenient in the sense Accused No.1 is a serving prisoner at Oluno as he testified under oath for assault with intent to do grievous bodily harm. And also as Accused No. 2 stated or it was pointed out by the Prosecutor under cross-examination that Accused No.2 is currently having a pending case whereby he had been in custody for more than a year. So this is a clear indication that your liberty has already been infringed and in the light thereof the court will be lenient towards you. So Accused you are therefore sentenced each to TEN YEARS DIRECT IMPRISONMENT. Accused if you are not satisfied with the conviction or whether with regard to the sentence you may note an appeal with the clerk of Court within fourteen days from today. Do you understand? As the court also explained to you during the handing up of the Exhibit that if you are found guilty the money, the Exhibit will be handed over to the lawful owner in this case. If you are found not guilty the money will be handed back to you as it was found in your possession. The money that was therefor used in this case Exhibit 1 it is ordered that this money, this two thousand two hundred and ten Namibian Dollars (N\$2210.00) be returned to the lawful owner at Ehafo Cuca Shop in Outapi District. Do you understand?

BOTH ACCUSED: We do, Your Worship.

COURT: Thank you. You may step down.

COURT ADJOURNS '

[18] The magistrate filed additional reasons wherein he state that it is practise when considering sentence the court considers the offence, the personal circumstances of the

convict and the interest of society. According to the magistrate he did that. Further the magistrate stated that he considered the period of incarceration of both appellant to decide the period of sentence to impose. According to the magistrate he did not overemphasize the seriousness of the offence, but pointed out that the seriousness outweighs the personal circumstances of the offenders. He further states that he did not hold the fact that appellant showed no remorse against them referring to the judgment wherein he stated: 'However, the court will be lenient towards you today.' The magistrate stated in the additional reasons that it was only fair to make the order that the money should be returned to the lawful owner.

[19] Lastly, the magistrate is of the view that the sentence was just in that the court took into consideration the seriousness of the offence *viz a viz* the personal circumstances of the offenders.

[20] I have re-stated the sentencing judgment to indicate respectfully that almost everything that the learned magistrate referred to in his additional reasons are not reflected in the judgment. In the circumstances it is doubtful what the learned magistrate considered. I therefore find merit in the grounds of appeal and/or, issues indicating that there were misdirections raised by Mr Greyling. These misdirections vitiate the sentence. In the circumstances the appeal against sentence stands to be set aside. I agree with the learned magistrate that it is only fair that the money should be returned to the lawful owner. I will thus not interfere with that order.

[21] I have hereinbefore referred to the fact that what Van Niekerk J labelled as 'most weighty mitigating factor', i.e. the period appellants spent incarcerated trial awaiting cannot be determined by this court as the pre-trial record is incomplete. This court is thus not in a position to impose an appropriate sentence.

[22] It is trite law that sentencing is primarily a matter for the discretion of the trial court. A court of appeal can only interfere in limited circumstances. In my view it is best in the circumstances of this case that the matter is remitted for the magistrate to impose sentence afresh considering the reasons advanced in this judgment with emphasis on the period that the appellants were incarcerated trial awaiting before sentence, whether

they have previous convictions and considering the period that they have thus far served in prison.

[23] In the result:

1. The appeal is upheld;
2. The sentence of 10 years' imprisonment is set aside;
3. The matter is remitted to the magistrate to trace the missing parts of the pre-trial proceedings and/or establish with certainty the period the appellants were incarcerated trial awaiting before sentence, establish with certainty if the appellants have previous convictions and sentence the appellants afresh considering the period that they have thus far served in prison.

H C JANUARY

JUDGE

I agree

M A TOMMASI

JUDGE

Appearances:

For the Appellant:

Mr Jan Greyling Jnr.

Of Greyling & Associates

For the Respondent:

Adv Pienaar

Of Office of the Prosecutor-General