



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGEMENT

Case No.: CA 25/2017

In the matter between:

IIPINGE SEM

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Sem v S* (CA 25-2017) [2017] NAHCNLD 95 (28 September 2017)

Coram: TOMMASI J and JANUARY J

Heard: 03 August 2017

Delivered: 28 September 2017

Flynote: Criminal Procedure – Appeal – Sentence – Theft – Previous conviction proved – Housebreaking with intent to steal and theft – 2 (two) pending cases of robbery also proved – Misdirection – sentence set aside – Proceedings referred back – Section 275 of the CPA - Appellant to be sentenced afresh.

Summary: The appellant was convicted and sentenced for theft to 5 years' imprisonment of which 24 months are suspended for 5 years' on conditions. The State proved a previous conviction of housebreaking with intent to steal and theft. In addition 2 (two) pending cases of robbery charges were also proven. The latter two cases are found to be irrelevant and a misdirection. The magistrate is now retired. Section 275 of the Criminal Procedure Act 51 of 1977 is applied. The sentence is set aside and the matter is referred back to the magistrate's court to impose sentence afresh.

ORDER

1. The sentence is set aside.
2. The matter is referred back to the magistrate's court Eenhana for a magistrate to pass sentence afresh after hearing the appellant on any additional mitigating factors that have been placed on record.
3. The magistrate should take into consideration the time that the appellant has already served from 06 November 2016.

APPEAL JUDGEMENT

JANUARY J (TOMMASI J CONCURRING)

[1] The appellant pleaded guilty on theft in the magistrate's court, Eenhana on 08 December 2016 and was sentenced to 5 years' imprisonment of which 24 months are suspended for 5 years' on condition that accused is not convicted of theft committed during the period of suspension. A previous conviction of housebreaking with intent to steal and theft was proven against the appellant. He was sentenced on 06 November 2014 for this crime to 12 months imprisonment of which 6 months were suspended for a

period of 5 years' on condition that the accused is not convicted for housebreaking with intent to steal and theft committed during the period of suspension.

[2] The appellant was unrepresented in the court a quo but is represented in this court by Mr J Greyling (Jnr) acting *amicus curiae*. The respondent is represented by Mr Mudamburi. The appeal is against sentence only.

[3] The appellant drafted the notice of appeal by himself and/or with the assistance of other inmates in prison. The grounds are not eloquently phrased but I can discern the following grounds: the learned magistrate erred by taking two pending cases into consideration when sentencing the appellant; the learned magistrate erred in law and on fact by imposing the maximum sentence of the court's jurisdiction; the sentence is harsh and shocking; the learned magistrate gave undue weight to the personal circumstances of the appellant; the learned magistrate gave undue weight to mitigating circumstances/factors and did not allow the appellant to place all mitigating factors before court; the learned magistrate erred by only considering a custodial sentence without considering the possibility of a fine; the appellant is still young, was busy with further education and is able to rehabilitate outside prison; the sentence is overshadowed by the two pending cases that are on trial. In other words she considered pending cases and gave undue weight thereto.

[4] Some of the grounds are somewhat repetitive and Mr Greyling capably summarized the grounds into two headings: that the learned magistrate underemphasized the appellant's personal circumstances; and the sentence is shockingly inappropriate. He also made submissions relating to the two pending cases considered by the magistrate when she imposed sentence.

[5] The learned magistrate is now retired and consequently no additional reasons on the notice of appeal were obtained. She provided reasons on the date of sentence as follows:

'I have taken into account that accused is youth (sic) who intent to improve his carrier path (sic) but no proof show, that accused is a student. The aggravating factors are that accused has a tendency of committing offences which dishonest

is an element of the crime. Accused has previous convictions of similar offence. The court also take into account that the sentence of 12 months imprisonment wholly suspended for 5 years on condition accused is of convicted of Housebreaking with intend (sic) to steal and theft did not do him better, as he is now convicted of theft committed during the period of suspension.

The court being the custodian of justice is bound protect the public interest to gain trust in the justice administration, accused become danger to the community thus he deserve to be removed from the community for a considerable period for the community to rest of his terror and for him to benefit from rehabilitation project for a considerable period so that he can be sufficiently and adequately reform and rehabilitated. [(sic) my emphasis]

Sentence

5 years imprisonment of which 24 months is suspended for 5 years on condition accused is not convicted of theft committed during the suspension period.'

[6] It is significant that the public prosecutor handed two copies of J15 charge sheets reflecting that the appellant stood charged with robbery with aggravating circumstances, robbery and theft respectively. The learned magistrate received same as exhibits and marked them as Exhibits "B" and "C". In my view the abovementioned J15 charge sheets are irrelevant and the magistrate committed an irregularity by receiving same. The record of the previous conviction is marked as Exhibit "A".

[7] I need to mention that the irregularity emanated from the public prosecutor who handed the exhibits up to court and in his address amongst others submitted: 'Accused has previous convictions for similar offence that means accused has a prosperity [(sic) propensity] of committing the offences. Although not convicted accused has two pending cases namely: Robbery with aggravating circumstances CR 53.11.2013 and Robbery CR12.12.2013 which cases are at a trail stage. It is proven that accused has no respect of other people's properties neither he respect the law, he is busy terrorizing people in this district.....' (my emphasis)

[8] It is, in my view, clear that the conduct and address of the public prosecutor strongly influenced the magistrate to commit the irregularity and in meting out the

sentence as she did. I am of the view that it is equally wrong for the prosecutor to submit that the accused has a propensity to commit crimes involving theft or with an element of dishonesty trying to prove it with pending cases against him. An accused remains innocent until proven guilty beyond reasonable doubt. The record of the previous conviction reflects that 6 of the 12 months were suspended on conditions contrary to what the magistrate stated in her reasons that the 12 months imprisonment were wholly suspended. I accept in favour of the appellant that this is another misdirection in the absence of additional reasons.

[9] It is by now established law that sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo*. A court of appeal can only interfere;

- when there was a material irregularity; or
- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;
- or induced a sense of shock; or
- was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;
- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.¹

[10] In my view almost all of the factors mentioned hereinbefore justify interference by this court of appeal. I reiterate that magistrates should not merely adhere to and follow submissions by prosecutors. Magistrates have the judicial discretion to sentence and they should exercise that discretion. Likewise they have the authority to decide what evidence is admissible or not.

[11] This court therefor has the power to interfere with the sentence because of the abovementioned reasons. The appellant amongst others submitted that the magistrate did not allow the appellant to complete all the mitigating factors.

¹ *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G

[12] I have already stated that that the magistrate is now retired. In view of that, section 275 of the Criminal Procedure Act 51 of 1977 is applicable and stipulates that:

'275 Sentence by judicial officer other than judicial officer who convicts

If sentence is not passed upon an accused forthwith upon conviction in a lower court, or if, by reason of any decision or order of a superior court on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a lower court or to pass sentence afresh in such court, any judicial officer of that court may, in the absence of the judicial officer who convicted the accused or passed the sentence, as the case may be, and after consideration of the evidence recorded and in the presence of the accused, pass sentence on the accused or take such other steps as the judicial officer who is absent, could lawfully have taken in the proceedings in question if he had not been absent.'

[13] In the result:

1. The sentence is set aside.
2. The matter is referred back to the magistrate's court Eenhana for a magistrate to pass sentence afresh after hearing the appellant on any additional mitigating factors that are placed on record.
3. The magistrate should take into consideration the time that the appellant has already served from 06 November 2016.

H C JANUARY

JUDGE

I agree

M A TOMMASI

JUDGE

Appearances:

For the Appellant:

Mr Greyling (*Amicus Curiae*)**Of Greyling & Associates**

For the Respondent:

Adv Mudamburi

Of Office of the Prosecutor-General