

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

APPEAL JUDGMENT

Case No.: HC-NLD-CRI-APP-CAL-2018/00037

In the matter between:

**SAM TULELA IPINGE**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Ipinge v S* (HC-NLD-CRI-APP-CAL-2018/00037) [2019] NAHCNLD 81  
(20 August 2019)

**Coram:** JANUARY J and TOMMASI J

**Heard:** 29 January 2019

**Delivered:** 20 August 2019

**Flynote:** Criminal Procedure – Appeal – Sentence – Robbery with aggravating circumstances – Five years' imprisonment – Condonation – Sentence set aside – sentenced afresh – Four years imprisonment of which two years are suspended on conditions.

**Summary:** The appellant appeals against sentence. He was sentenced to five years imprisonment for robbery with aggravating circumstances. The magistrate

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overemphasized so called previous convictions for crimes committed after the robbery in this case. The crimes committed after this robbery reflects on the character of the appellant and should not be ignored. The sentence is found to be excessive and interference by this court is justified. The appellant is sentenced afresh to four years imprisonment of which two years are suspended on conditions.

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### **ORDER**

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1. The sentence of five years imprisonment to run consecutively with the sentence of 36 months imprisonment imposed on 08 December 2016 in case A181/2016 is set aside and substituted with a sentence of:
2. Four years imprisonment of which two years are suspended for a period of four years on condition that the appellant is not convicted of a crime where dishonesty is an element, committed during the period of suspension.
3. The sentence is ante dated to 30 May 2017.

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### **APPEAL JUDGMENT**

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**JANUARY J** (TOMMASI J concurring):

#### **Introduction**

[1] The appellant was convicted for robbery with aggravating circumstances and sentenced to 5 years imprisonment. He robbed a lady at knife point. The appellant first filed the appeal against conviction but is now only appealing against sentence. The record reflects that he was sentenced on 30 May 2017. His first notice of appeal against conviction reflects 2 June 2017, well within time of the court rules. The appellant withdrew his notice of appeal against conviction and filed a new notice appealing only against sentence on 23 October 2018. It appears that the appellant as a lay person filed

his first notice of appeal by himself. He, in the meantime, amended that first notice. And applied for legal aid.

[2] The charge is: 'In that upon or between the 27<sup>th</sup> day of November 2013 and at or near Eenhana Town in the district of Eenhana the said accused did unlawfully and with intention of forcing her into submission, assault/threaten Padella Stephanus by pointing her with a knife wanting to stab her demanding her handbag and cell phone and unlawfully and with intent to steal took from her an orange handbag containing cash in the amount of R435.00, Namibian Identity card, Clicks Club card, Standard Bank debit card, FNB Visa electronic card, Jet Thank U card, Edgars Cash Card, Cape Peninsula University Student Identification card and a Polytechnic Professional Tutorial Services card, the property or in the lawful possession of the said Padella Stephanus.

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 knife.'

[3] The accused was charged together with another accused who was acquitted.

[4] Ms Amupolo is representing the appellant in this appeal and the respondent is represented by Mr Pienaar.

### **Point in limine**

[5] Mr Pienaar submitted that there is no application for condonation and further submitted that the appellant filed his notice of appeal late. Ms Amupolo countered the point *in limine* by submitting that the appellant was within time when he first gave notice to appeal. She further submitted that the court must in the circumstances exercise its discretion in favour of the appellant. She argued the matter on the heads of argument of the appellant.

[6] Mr Pienaar further submitted that there are no prospects of success on appeal that the matter should be struck from the roll.

## The law

[7] It has crystalized over the years that sentencing/punishment is pre-eminently a matter for the discretion of the trial judge. On an appeal against sentence an enquiry into the appropriateness of a sentence is not whether the sentence is right or wrong but whether the presiding officer exercised his sentencing discretion properly and judicially.<sup>1</sup>

[8] In the determination of sentence the court ought to exercise its sentencing discretion “judicially and properly” a Court of appeal will enquire whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate and induces a sense of shock.<sup>2</sup>

[9] The accused should primarily be punished for the offence he committed and not so much for his previous convictions for which he has already been sentenced. In *S v Baartman*<sup>3</sup> at 305B-E it is stated thus: ‘But the period of imprisonment must be reasonable in relation to the seriousness of the offence. Otherwise it inevitably overemphasises the interests of society at the expense of the interests of justice and the interest of the offender. If it does this, it cannot be a just sentence.’

## The facts

[10] The appellant is 24 years old. He committed the crime when he was 20 years old. The accused was busy trying to complete his grade 12 schooling career at the time of his arrest. The accused is not a first offender. He committed this offence in 2013 and the other 2 offences of housebreaking with intent to steal and theft and theft respectively in 2014 and 2016. The magistrate acknowledged in her judgment that the previous convictions are two different crimes committed on two different occasions she further continues that it means that the appellant is not rehabilitated enough. In my view she considered the so-called previous convictions as aggravating attaching too much weight to them.

[11] It is not wrong to attach some weight to them because they reflect on the accused’s character.<sup>4</sup> In my view it was an irregularity to accept the crimes as genuine

<sup>1</sup> *S v Van Wyk* 1992 (1) SARC 147 (Nm) at 165 E-G

<sup>2</sup> *S v Mathews Matheus* (CA 74/2000) delivered 21 December 2001

<sup>3</sup> 1997(1) SACR 304 (E).

<sup>4</sup> *S v Smullion* (Sullivan) 1977 (3) SA 1001 (RA)

previous convictions. Further I find that the learned magistrate imposed a shockingly harsh sentence. The magistrate is now retired and no additional reasons could be obtained from her. Previous convictions must be restrictively interpreted.<sup>5</sup> I further find that the magistrate did not properly consider the value of the cash and that the other property was recovered. In these circumstances, this court can interfere with the sentence.

[12] In the result:

1. The sentence of five years imprisonment to run consecutively with the sentence of 36 months imprisonment imposed on 08 December 2016 in case A181/2016 is set aside and substituted with a sentence of:
2. Four years imprisonment of which two years are suspended for a period of four years on condition that the appellant is not convicted of crime where dishonesty is an element committed during the period of suspension.
3. The sentence is ante dated to 30 May 2017.

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H C JANUARY  
JUDGE

I agree,

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M A TOMMASI  
JUDGE

**Appearances:**

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<sup>5</sup> *S v Smullion* (supra)

For the Appellant: Mr S T Ipinge  
**Of Oluno Correctional Facility, Ondangwa**

For the Respondent: Mr J Pienaar  
**Of Office of the Prosecutor-General, Oshakati**