

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: HC-NLD-CRI-APP-SNA-2019/00048

THE STATE

APPELLANT

v

DONESCKY DELANO GAROSEB

FIRST RESPONDENT

SIEN CHARLES EIBEB

SECOND

RESPONDENT

DOMINGO CHEKO JOHANNES

THIRD

RESPONDENT

Neutral citation: *S v Garoseb* (HC-NLD-CRI-APP-SNA-2019/00048) [2020] NAHCNLD 35 (03 March 2020)

Coram: JANUARY J and NAMWEYA AJ

Heard: 22 October 2019

Delivered: 03 March 2020

Flynote: Criminal Procedure – Appeal against sentence – Interference by Court of appeal – such interference only justified where sentence vitiated by irregularity or misdirection or is startlingly inappropriate – Sentence essentially falling within discretion of trial Court - Reasonable explanation – Prospects of success – Startlingly inappropriate sentence set aside and substituted;

Summary: Appellants 1, and 2 were convicted on three counts of housebreaking with intent to steal and theft whereas appellant 3 was convicted on 2 counts of housebreaking with intent to steal and theft. 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 magistrate simply took all charges together for the purpose of sentence and sentenced the appellants to eight years imprisonment, three years of which are suspended for five years on condition the appellants are not convicted for housebreaking with intent to steal and theft. He did not differentiate between the different crimes and ignored that appellant 3 was only convicted for two crimes. In our view he committed a misdirection.

ORDER

1. The appeal succeeds;
2. The sentence imposed by the magistrate is set aside and substituted by the following sentence;
3. Count 1: Housebreaking with intent to steal and theft; appellants 1, 2 and 3 are sentenced to two years imprisonment;
4. Count 2: Housebreaking with intent to steal and theft; appellants 1, 2 and 3 are sentenced to two years imprisonment;

5. Count 3: Housebreaking with intent to steal and theft; appellants 1 and 2 are sentenced to eight (8) years imprisonment of which three years are suspended for five years on condition that the accused are not convicted of housebreaking with intent to steal and theft committed during the period of suspension;
6. The sentences of appellant 1 and 2 on count one (1) and count two (2) are ordered to run concurrently with sentence on count three (3);
7. The sentences are ante-dated to 13 June 2018.

APPEAL JUDGMENT

NAMWEYA AJ (JANUARY J concurring)

Introduction

[1] The respondents in this matter were convicted on their pleas of guilty for housebreaking with intent to steal and theft as follows:

Count 1: Housebreaking with intent to steal and theft; Accused 1, 2 and 3;

Count 2: Housebreaking with intent to steal and theft; Accused 1, 2 and 3;

Count 3: Housebreaking with intent to steal and theft; Accused 1 and 2.

[2] The record reflects on the reasons for sentencing amongst others as follows:

‘The court decided to base its sentence on one count 3, if I am not mistaken and sentence each accused person as follows. Eight years imprisonment, three years of which is suspended for five years on condition. Accused not (sic) convicted of crime (sic) of housebreaking with intent to steal and theft committed during the period of suspension. Those convicted of more than one counts, all counts are taken together for purpose of sentence.’

[3] Appellant in this matter is the State. It appeals against the sentence of Mr. L. K. Amutse, in the Regional Court, Oshakati, sitting at Tsumeb. The Appellant applied for leave to appeal on 13 July 2018 to the High Court of Namibia against the sentence of eight years imprisonment of which three years were suspended for five years on condition that the respondents are not convicted of housebreaking with intent to steal and theft committed during the period of suspension. The sentence was imposed on the first, second and third respondents on the 13 June 2018. Leave to appeal was granted.

Condonation

[4] The Respondents filed an application for condonation for the late filing of their heads of arguments. The reasons for the late compliance is that the respondents were initially unrepresented up until mid-March 2019. The respondents are currently serving their sentences at Farm Scott Correctional Facility (outside of Tsumeb) and could not consult with their legal Practitioner based in Ondangwa. As an unfortunate result of this predicament, full and final instructions regarding the merits of the heads of argument could not be obtained within the set time periods laid down for filing heads of argument. We found the reasons reasonable and granted condonation.

[5] The court in considering the arguments advanced in this appeal agrees with the sentiments of Gibson J where she stated as follows in *S v Nakamela and Another* 1997 NR 184 at 185 F-H:

'However, the Court has a discretion in terms of Rule 27(1) of the Rules of the High Court whether to condone the noncompliance with the rules. In my opinion, proper condonation will be granted if a reasonable and acceptable explanation for the failure to comply with the sub-rule is given; and where the appellant has shown that he has good prospects of success on the merits in the appeal; and where the appellant has a reasonable and acceptable explanation. In my opinion these requirements must be satisfied in turn. Thus if the appellant fails on the first requirement, the appellant is out of Court. In determining what is a reasonable and acceptable explanation for the failure to comply with the rules of Court is, the Court makes a value judgment on the particular circumstances of the case. This of necessity will vary according to each case.'

The grounds of appeal

[6] The grounds of appeal against sentence filed by the appellant are as follows;

Ad sentence

1. 'The learned magistrate erred or misdirected himself on the facts and or on the law by imposing a sentence that is shockingly lenient and in appropriate when compared with sentences imposed for the same offence.
2. The learned magistrate erred or misdirected himself on the facts and or on the law by failing to consider and or attached little weight to the following facts; that:-
 - 2.1. The first and second respondents were convicted of three counts of housebreaking with intent to steal and theft;
 - 2.2. The third respondent was convicted of two counts of housebreaking with intent to steal and theft;
 - 2.3. The total value of the stolen properties in all three counts was substantial and this is an aggravating factor;
 - 2.4. That looking at the nature of items that were stolen in those respective counts, these crimes were motivated by greed, which is an aggravating factor.
3. The learned magistrate erred and or misdirected himself on facts and or in law when he stated during sentencing proceedings that he based the sentence which he imposed on the first, second and third respondents merely on the basis of count 3 of housebreaking with intent to steal and theft instead of considering each and every count on which the respondents were convicted, in an appropriate sentence.
4. The learned magistrate erred and or misdirected himself on facts and or in law when he took all counts together on which the first, second and third respondents, were convicted, for purpose of sentencing, thereby underemphasizing the seriousness of the crime of house breaking with intent to steal and theft.

The law

[7] The case of *State v Tjiho* 1991 NR 361 (HC) is applicable where Levy J sets out the following circumstances in which an appeal court may interfere with the sentence at 366 A-C:

1. The trial court misdirected itself on the facts or on the law;
2. An irregularity which was material occurred during the sentence proceedings;
3. The trial court failed to take into account material facts or over-emphasized the importance of other factors;
4. The sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.'

[8] It was further stated by Levy J in *S v Tjiho* that the appeal court has described the discretion as follows:

'This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial Court fail to do so; the appeal Court is entitled to not oblige to interfere with the sentence. Where justice requires it, Appeal Court will interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial Court as such erosion could undermine the administration of justice. Conscious of the duty to respect the trial Court's discretion, appeal Courts have over the years laid down guidelines which will justify such interferences'.

[9] In *Matota v The State* (CA 11-2015) [2016] NAHCNLD 57 (8 July 2016) at para 12, to which I respectfully agree, January J stated:

'Housebreaking with intent to steal is indeed a serious offense and has always been viewed by the courts as such for which heavy sentences are imposed. The crime with disrespect invades the privacy of others, sometimes damages property, and offenders help themselves to hard-earned property of others. The innocent and vulnerable society deserves the right to be protected against such criminals and the courts need to send a stern warning to other potential offenders.'

Submissions

[10] Mr Matota submitted that the sentence imposed on the crime of Housebreaking with intent to steal and theft is shockingly lenient and that the seriousness of the crime of housebreaking with intent to steal and theft has been reiterated in numerous decisions of this honorable court.¹

[11] He further made in his submissions that the magistrate failed to consider the number of counts, total value of stolen properties and motive for greed. He submitted that in crimes of housebreaking with intent to steal and theft, the following factors are regarded as determining factors when it comes to sentencing, namely; excessive force used to gain entrance, value of goods, motive of greed, and prevalence of the offence/crime.

[12] In further submissions he stated that although sentencing is a prerogative of the trial court, the trial magistrate committed a serious irregularity by simply basing the sentence imposed on a single count (count three) with the highest value of stolen properties and totally disregarding counts one and two. Alternatively failing to punish the respondents in respect of counts one and two and or by taking all counts one to three together for purpose of sentence.

Respondents Submissions

[13] Mr Ngula submitted that it is trite law that punishment or sentencing falls within the discretion of the trial court. The trial court must exercise that discretion judiciously, properly and not unreasonably. A court of appeal will only interfere when the sentence is vitiated by a misdirection or irregularity or when it is shockingly inappropriate. A trial court will also consider sentences imposed in similar cases due allowances being made for factual differences.

¹ See *S v Drotsky* 2005 NR 487. See also *Marius Bezuidenhout & 2 others versus The State* Case No: CA 58/1999, delivered on 2001/05/19 (unreported) at page 4.

[14] He further submitted that what must be considered at the trial is the crime, the offender (personal circumstances and mitigating factors) and the interests of society. According to him, all these circumstances were considered by the magistrate during sentencing:²

'In terms of the mitigating circumstances reflected in the record,³ accused no.1 was 20 years old, a first-time offender, pleaded guilty (did not waste the court's time) and was remorseful for his actions (apologized and asked for forgiveness).⁴ Further he was kept in custody for about 2 and a half years before being sentenced.

Accused no.2 was 18 years old a first-time offender, pleaded guilty (did not waste the court's time) and was remorseful for his actions (apologized and asked for forgiveness).⁵ Further he was kept in custody for about 2 and a half years before being sentenced.

Accused no.3 was 20 years old a first-time offender, pleaded guilty (did not waste the court's time) and was remorseful for his actions (apologized and asked for forgiveness).⁶ Further he was kept in custody for about 2 and a half years before being sentenced.'

[15] Mr Matota submitted that the sentence imposed on the crime of housebreaking with intent to steal and theft is shockingly lenient and that the seriousness of the crime of housebreaking with intent to steal and theft has been reiterated in numerous decisions of this honorable court. The respondents were sentenced to 8 years imprisonment 3 years of which were suspended on the usual conditions.

[16] On the above submissions of Mr Matota, Mr Ngula argued in reply that the magistrate considered that the respondents are first time offenders, all pleaded guilty and they spent two and half years before they were sentenced. He further argued that for the magistrate to consider count three and put the counts together for the purpose of sentencing means other counts were not disregarded. He further argued that the learned magistrate's sentence is in line with the norms of sentencing in Namibia when considering sentencing in totality.

² *S v Zinn* 1969 (2) SA 537 (A).

³ Pages 151-166

⁴ Page 151.

⁵ Page 152.

⁶ Page 153.

[17] The court a quo in my view, to have meted out an appropriate sentence could have invoked the provision of section 280 of the CPA,⁷ which reads as follow;

‘Cumulative or concurrent sentences;

(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.’

[18] We are of the view that the magistrate committed an irregularity by simply taking only count 3 into consideration for purposes of sentence. The third appellant was not convicted on this charge. It is therefore irrelevant for purposes of his sentence. The crime of housebreaking is indeed serious. It calls for a custodial sentence. The effect of the substituted sentences is that appellants 1 and 2 are sentenced to 12 years imprisonment whereas accused 3 is sentenced to 8 years imprisonment. This, in our view effectively differentiates between them. Considering their pre-trial incarceration of about two and a half years imprisonment, justifies us to ameliorate the cumulative effect by having first and second appellant serve the sentences concurrently.

[19] As a result:

1. The appeal succeeds;
2. The sentence imposed by the magistrate is set aside and substituted with the following sentences;
3. Count one; Housebreaking with intent to steal and theft; appellants 1, 2 and 3 are sentenced to two years imprisonment;
4. Count two; Housebreaking with intent to steal and theft; appellants 1, 2 and 3 are sentenced to two years imprisonment;
5. Count three: Housebreaking with intent to steal and theft; appellants 1 and 2 are sentenced to eight (8) years imprisonment of which three years are suspended

⁷ Section 280 of Act 51 of 1977

for five years on condition that they are not convicted of housebreaking with intent to steal and theft committed during the period of suspension;

6. The sentences of appellant 1 and 2 on count one (1) and count two (2) are ordered to run concurrently with the sentence on count three (3);
7. The sentences are ante-dated to 13 June 2018.

M NAMWEYA
ACTING JUDGE

I agree

H C JANUARY
JUDGE

APPEARANCES:

FOR THE APPELLANT: Mr L Matota
Of Office of the Prosecutor General, Oshakati

FOR THE RESPONDENTS: Mr N Ngula
Nicky Ngula Attorneys, Ondangwa