REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2021/00027

In the matter between:

SAMUEL SHAFOIHUNA SHEEHAMA **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Sheehama v S* (HC-NLD-CRI-APP-CAL-2021/00027) [2022] NAHCNLD 34 (01 April 2022)

Coram: SALIONGA J et KESSLAU AJ
Heard: **21 January 2022**
Delivered: **1 April 2022**

Flynote: Criminal Appeal - procedure – notice of appeal filed late - condonation application – no reasonable and acceptable explanation for delay - no reasonable prospects of success on appeal – appeal struck from the roll.

Summary: The appellant was convicted for Housebreaking with intent to steal and theft. He was sentenced to seven years imprisonment of which three years

were suspended for a period of five years on condition that the appellant is not convicted of the crime of housebreaking with intent to steal and theft committed during the period of suspension. The notice of appeal was filed out of time. An oversight that resulted in a defective initial notice of appeal filed without a power of attorney was cited as the cause of the delay. This resulted in the initial notice being struck to which the appellant responded immediately by filing the current notice of appeal. At trial the State had led evidence that items stolen from Opuwo were recovered in Ondangwa. Appellant and co-accused were in Opuwo on the night of the Housebreaking and transported these items on the same night. Appellant had denied any knowledge of the offence.

Held; that there is no proper and justifiable reason provided for the delay and that there is no prospect of success.

Held further; that the court *a quo* is in an advantageous position to observe witnesses and evaluate evidence.

Held further; that the cumulative effect of all the evidence presented was considered by the magistrate.

Held further; that there is no misdirection in the decision of the magistrate to believe the evidence presented and to reject the version of the appellant.

Held further; that the appellant failed to show that the court *a quo* in sentencing him, misdirected itself; committed any material irregularity; overemphasised the deterrent aspect or seriousness of the crime at the expense of the appellant.

ORDER

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1. The respondent's point *in limine* is upheld;
2. The appeal is struck from the roll and considered finalised.

JUDGMENT

KESSLAU AJ (SALIONGA J concurring):

Introduction

[1] The appellant together with his co-accused were charged with one count of Housebreaking with the intent to steal and theft in that upon or about the 13th day of September 2013 and at or near NDC Park in the district of Opuwo, the said accused did wrongfully and unlawfully break and enter the shop of Fanie Redelinghuys with the intent to steal and did unlawfully steal the under listed goods, the property or in the lawful possession of Fanie Redelinghuys. The stolen goods were listed as: money in cash N$ 65 000, one laptop, two computer screens and one fax machine with a combined value of N$ 53 000. The total value of stolen items was N$ 118 000. The appellant pleaded not guilty to the charge but after a trial was convicted as charged. The co-accused were found not guilty and discharged.

[2] On 30 March 2021, the learned Magistrate sentenced the appellant to seven years imprisonment of which three years were suspended for a period of five years on the condition that the appellant is not convicted of housebreaking with the intent to steal and theft committed during the period of suspension. The appellant, through the office of his counsel, filed a notice of appeal against his conviction and sentence within the prescribed period which was however defective in that no power of attorney was submitted. The initial appeal was withdrawn and subsequently a second notice of appeal was filed including an application for condonation.

[3] The appellant's grounds of appeal against his conviction are as follows:

'1. The Court a quo erred in law and on the facts in finding that the Appellant was present when the crime was committed, he had knowledge of the crime, associated with it

and that the only reasonable conclusion to be drawn is that the Appellant participated in the commission of the housebreaking because:

1.1 The evidence that was led by the State does not link the Appellant to the crime; the only evidence that implicates the Appellant is the fact that his car was seen moving suspiciously.

2. The Court a quo erred in law and on the facts, in the assessment of the evidence, and thus drew a negative inference or inferences against the Appellant, that:

2.1. The 5th state witness told the truth that the Appellant denied being in Opuwo;

2.2. That the Appellant denied at the first opportunity to disclose if he was in Opuwo.'

[4] The appellant's grounds of appeal against his sentence are as follows:

'3 The learned Magistrate grossly misdirected himself and committed material irregularities in relation to the sentence in that:

3.1 The sentence imposed by the learned Magistrate was excessively harsh and induces a sense of shock.

3.2 The learned Magistrate over emphasized the seriousness of the offence and the deterrent effect of the sentence and in so doing the court failed to individualise the sentencing of the Appellant and in the process gave little to no weight of the mitigating factors of the Appellant that:

3.2.1 The Appellant is the sole breadwinner and sole provider for his child who is in the care of her grandmother; his 37 year old sister and her two children aged 8 and 16 years old.

3.2.2 The court disregarded the fact that the Appellant was youthful when the crime was committed (i.e. 24 years of age) and still rehabilitative and a good candidate for reform.

3.2.3 The learned Magistrate disregarded the fact that the Appellant is a first offender.'

[5] Condonation for the late filing was requested on the basis that the applicant has taken the court in complete confidence, provided a full, detailed and accurate explanation for the entire period of the delay and has excellent prospects of success on appeal. The actual explanation for the defective appeal and failure to file a power

of attorney is stated as a ‘result of an oversight’. No affidavit was filed from the person responsible explaining the said oversight.

Points *in limine*

[6] Respondent submitted that the appellant’s grounds of appeal do not comply with Rule 67(1) of the Magistrates Court Rules in that they are vague and on that basis the appeal should be struck. Reading the ground of appeal there appears to be two main grounds on which the appeal is based. Both the grounds start out with a conclusion by the appellant however the reasons for reaching that conclusion are then added.[1] It is clear which points are in issue that should be addressed in the appeal. I am not in agreement with the respondent that it is too vague to address. This point *in limine* can therefore not be sustained.

[7] Respondent furthermore submitted that regarding the application for condonation, there is no proper reason provided for the delay and secondly that there is no prospect of success. I will return to this point later in my judgment.

[8] Respondent orally added a point *in limine* that the heads of argument of the appellant were not served on their office. In reply counsel for the appellant argued that since filing was done via the ejustice system it was no longer required to be served on the respondent who is a registered user of the e-justice system[2]. No prejudice was suffered by the respondent and this point *in limine* is dismissed.

[9] Appellant in turn offered the point in limine that the respondent’s heads of argument were filed 8 days before the date of hearing and not 10 days as required.[3] The date of appeal hearing was initially 16 of November 2021 and the respondent filed on 4 November 2021. The appeal was however not argued on 16 November 2021 but was remanded to 21 January 2022 for hearing. Counsel for the appellant did not argue that he was prejudiced by this late filing and because the hearing did not take place on the initial date no prejudice was suffered. This point is thus dismissed.

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[1] *S v Gey Van Pittius and another* 1990 NR 35
[2] See High Court Rule 118(3)(a)
[3] High Court Rule 118(7)

Prospects of success on conviction

[10] Turning to the second leg of the test for condonation *to wit* the prospects of success, this court is guided by the following ruling of Ndauendapo J in *S v Gowaseb*[4]: 'The appellant is not absolved from the second requirement regardless of whether a reasonable explanation was furnished or not. The prospect of success on appeal is imperative. If the prospect of success at appeal is non-existent, it matters not whether the first requirement was reasonable or not, the appeal must fail.'

[11] The conviction of the appellant in the court *a quo* was based on circumstantial evidence. The State's evidence was that a vehicle was seen around 03h00 morning hours driving suspiciously in Opuwo. A security guard testified that there were no other cars on the roads and because of the manner in which the vehicle was driven he then reported it to his supervisor. The supervisor found the vehicle at the service station and noted down the registration number. The vehicle was then observed driving in the direction of the father of the complainant's house where it was parked and then disappeared. Upon inspecting the surrounding premises the supervisor/security guard then realised that the shop of the complainant has been broken into. The police and complainant were alerted and a case was opened. The registration number noted down by the security officer led to the contact details of the appellant. Inspector Iyambo testified that after he identified the owner of the vehicle via the offices of NATIS, he called the appellant. The officer testified that he introduced himself and informed the appellant that he is investigating a case of Housebreaking in Opuwo reported on the night of the 13 September 2013. According to Inspector Iyambo the appellant denied that his vehicle was in Opuwo saying instead that the car is a taxi and that it was parked at his house.

[12] A friend to the appellant, Mr. Timoteus, testified that after the appellant received a phone call the appellant informed him that he was called 'by police officers from Opuwo with regards to a case of housebreaking' and that 'they were

[4] *S v Gowaseb* 2019 (1) NR 110 at par 4 page 112; See also *S v Umub* 2019(1) NR 201 and *S v Murangi* [2013] NAHCMD 50 (CA 88/2013; 14 February 2014) paras 7-9

people who were coming to arrest him'. Officer Iyambo's evidence was that the next day, after the arrest of the appellant and his co-accused the appellant admitted to being in Opuwo on the night in question. The explanation given then by the appellant was that he was called by a certain Zuma to come and collect him in Opuwo. Furthermore the version was that the appellant in the company of two of his family members then travelled to Opuwo. They spent some time consuming liquor at two establishments and then, after loading the property of Zuma, travelled back to Outapi. On the way Zuma changed the destination and they offloaded the items in Ondangwa at a certain house. When asked by the officer where they offloaded appellant first mentioned a certain service station but when taken to Ondangwa the items were recovered from a house with the assistance of the appellant and co-accused. The complainant identified the stolen items as his property. Apart for the cash of N$ 65 000, the other items were recovered and returned to the complainant. The person called Zuma could never be traced or arrested by the police.

[13] The version of the appellant in evidence in chief was that he is a mechanic staying in Outapi and also the owner of a taxi. On 12 September 2013 the appellant was called by a certain Zuma to come and collect him in Opuwo and transport him to Outapi. The appellant in the company of two of his family members then left Outapi at around 19h00 and arrived in Opuwo at 21h40. They spend from 21h40 to 22h30 drinking with Zuma and his friend at 'Champs' bar. The whole group then moved to another establishment called Okalunga. At 23h30 or 24h00 the appellant told his company it is getting late and they should leave. The luggage of Zuma was picked up from what he assumed was Zuma's house. The appellant then drove to the fuelling station, put in fuel of N$ 400 and they left Opuwo between 24h00 to 01h00 to return to Outapi. On the way to Zuma changed the destination and they offloaded the items in Ondangwa at a certain house. The time when they arrived in Ondangwa was between 05h00 and 06h00 in the morning. The appellant testified that he received a call from a private number at 15h45 on 13 September 2013. This unidentified caller asked him if he is Sam Sheehama, the owner of a vehicle with registration number N 1132 Outapi. The appellant confirmed the above after which the caller asked 'where he is' and he then replied that he is in Outapi. The unidentified caller then terminated the call.

[14] The bail application proceedings, handed in by agreement[5], also formed a part of the record and were thus considered by the magistrate during judgment. The appellant was at all times represented by legal counsel.

[15] When considering the law applicable this court is alive to what was stated in *S v Hadebe and others*[6] to *wit*:

'Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.'

It should not be ignored that the trial Magistrate in the court a quo is in the advantageous position to observe and evaluate the demeanour of the witnesses and accused during trial proceedings[7].

[16] In the matter of *R v Blom* 1939 AD 188 two rules were formulated when a court is required to draw inferences from circumstantial evidence being:

'(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct'.

[17] This court will also keep in mind that common sense should prevail when considering circumstantial evidence and furthermore the cumulative effect of all the evidence presented should be considered[8]. It is clear from case law that the 'mosaic' of evidence should be considered as a whole[9].

[18] There might possibly be two inferences to be drawn from the proven facts. Firstly that the applicant, as taxi owner/driver, drove to Opuwo to pick up a client. That he was unaware of the housebreaking or the content of the luggage that was loaded into his car and simply drove back to Ondangwa and dropped the luggage;

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[5] Section 235 of Act 51 of 1977.
[6] *S v Hadebe and others* 1998(1) SACR 422 at page 426 par a
[7] *S v Ameb* 2014(4) NR 1134 (HC)
[8] *S v HN* 2010 (2) HR 429;
[9] *Moshepi and Others v R* (1980-1984) LAC 57; S v *Hadebe and Others* (supra)

then drove with Zuma to Outapi. Secondly the version drawn by the magistrate that led to the conviction was that the appellant was aware of the housebreaking being committed and was acting with common purpose with the perpetrators. In other words, that the appellant had knowledge of the crime, associated with the unlawful activity and actively played a part in removing the loot from the scene.

[19] When comparing the record of bail proceedings with the evidence presented there are contradictions in the first version of the appellant to the version he presented at the trial. There was evidence at the bail hearing that after the Okulonga bar they went into the direction of the service station but then turned around on Zuma's request to first pick up the luggage. The first trip to the service station was not mentioned during the trial. The telephone call from Inspector Iyambo was described that the officer gave his rank, asked him details about the car, his location and then switched of the phone. An affidavit from the appellant also formed part of the bail proceedings in which the description of the telephone call was described as follows:

'On 13 September 2013 around between 15:00 and 16:00 hours I received a telephone call from a person who introduced himself as Inspector Iyambo from the Opuwo police station. He asked me whether I own a vehicle and whether my vehicle was in Opuwo on the previous day, being the 12th of September 2013. I answered his question in the affirmative after which he cut the telephone call.'

[20] The same incident was described in part by the appellant in his evidence during the trial as follows:

'At 15h45 I received a call from a private number; Was on 13 September 2013, the person only inquired if I am Sam Shafihuna and he asked if I am the owner of a car reg N 1132 Outapi and I then confirmed. He ask where I was, I said I was in Outapi, the person cut the call.'

Appellant denied being asked if he was in Opuwo at the night in question. It is clear why the version of the appellant was rejected by the magistrate due to the contradictions and the evidence of Officer Iyambo received as the truth. The Magistrate relying on case law[10] found that the behaviour of an accused before or after the incident can signal intent.

[10] *S v David* (CC13/2018) [2019] NAHCMD 377 (30 September 2019)

[21] The undisputed evidence of the State witness, Timotheus T. Ndeshipanda, was that the appellant informed him, after receiving the phone call from Inspector Iyambo that he is going to be arrested for housebreaking. The immediate conclusion of arrest drawn by the appellant after the call is an indication of his state of mind and a guilty conscious.

[22] The appellant's first ground of appeal is that the Magistrate drew the wrong inference from the proven facts as the accused is not linked to the crime and that the only evidence implicating him is that his car was seen moving suspiciously. The movement of the car must have been quite something for a security officer to report same to his supervisor. That is also not the only link to the crime as the crime was discovered and reported shortly after the vehicle of the appellant vanished. Furthermore it is undisputed that the appellant transported all the items (except for the cash) in his car to its destination where it was later recovered. Appellant's version is that he drove as a taxi driver to Opuwo to pick up a client. The behaviour of the appellant was however not consistent with that of a taxi driver since instead of selling seats in his car to paying customers or attempt to do so, he took two family members with him. The client was not picked up but they enjoyed some time in bars before leaving. The appellant's first reaction when he was confronted by Officer Iyambo was to try and hide his presence in Opuwo and immediately anticipated arrest on the specific crime of housebreaking.

[23] The second ground of appeal, that the Magistrate misdirected himself by believing the evidence of Officer Iyambo when he testified that the appellant lied about his whereabouts when confronted at first, does not hold water. The appellant gave at least three versions of this conversation between him and the Officer and I can find no misdirection in the decision of the Magistrate to believe the evidence presented and to reject the version of the appellant.

[24] It appears that the learned Magistrate after considering the totality of the circumstantial evidence could only come to the conclusion that the only reasonable inference supported by the proven evidence is of the guilty of the accused. In the absence of a clear misdirection this court will not interfere with the conviction. There is no change of success on appeal against conviction.

Prospects of success regarding sentence

[25] It is trite law that sentencing is primarily at the discretion of the trial court[11]. In *S v Tjiho* 1991 NR 361 HC at 366 A-B, Levy J stated that:

'The appeal court is entitled to interfere with a sentence if:

(i) the trial court misdirected itself on the facts or on the law;

(ii) an irregularity which was material occurred during the sentencing proceedings;

(iii) the trial court failed to take into account material facts or overemphasized the importance of other facts;

(iv) 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 any court of appeal.'[12]

In *S v Tjiho* the Judge also noted that Courts of appeal are careful not to erode the discretion accorded to the trial courts as such erosion could undermine the administration of justice.[13] Interference in sentence should thus only be done if there was a serious misdirection by the trial court.[14]

[26] From the multitude of grounds of appeal against sentence it appears that there are in fact only two grounds of appeal; firstly that there was a misdirection by the Magistrate in that the sentence imposed was excessively harsh and induces a sense of shock and secondly that the Magistrate over emphasized the seriousness of the offence and the aim of deterrence by not giving sufficient weight to the personal circumstances of the accused, in particular that he was the sole breadwinner, youthful and a first offender.

[27] The heads of argument of the appellant referred this court to various cases[15] arguing that there is a striking disparity between the sentence imposed and the one that should have been imposed given the principle of uniformity. When comparing the cited cases with the case before court, there are significant factual differences.

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[11] *S v Ndikwetepo and Others* 1993 NR 319 (SC)
[12] *S v Tjiho* 1991 361 (HC) at 366 A-B.
[13] Supra at 364 par G-H
[14] *S v Shapumba* 1999 NR 342 (SC).
[15] *Simon Mesag v S* (HC-NLD-CRI-APP-CAL-2017/0000) (2019) NAHCNLD 11; *S v Jason* (CR-10-2016) NAHCNLD 72; *Mwaamenange v S* (CA 33/2017) (2018) NAHCNLD 38; *Akawa v S* (CA 29/2016) (2017) NAHCNLD 84

The first of which is the glaring difference in the value involved. The value of the stolen property in this matter is substantial at N$118 000 whilst none of the listed matters have any value close to that. Additionally in the matters of *S v Jason*[16] and *Akawa v S*[17] the accused pleaded guilty which normally is a mitigating factor taken into account for purposes of sentence as a sign of remorse.

[28] The respondent submitted that the sentence is similar to other sentences imposed upon conviction on the charge of housebreaking with the intent to steal and theft[18].

[29] It is important to aim for consistency in sentencing to promote legal certainty, install a sense of fairness and improve the respect for the judicial system[19]. It should however not be a 'one size fits all' approach in that the court at the same time will endeavour to individualise sentences[20]. Sentencing is thus a balancing act which is not an exact science and not an easy task by any means[21].

[30] The *modus operandi* suggests a pre-planned crime. The stolen property had a substantial value, of which N$ 65 000 in cash was not recovered. The complainant thus suffered a huge financial loss. This court cannot find that the sentence imposed is startlingly inappropriate, induces a sense of shock or that this court would have imposed a different sentence.

[31] Sentencing is done by weighing all the aims of punishment against the personal circumstances of the offender. A sentence should be individualized as far as possible. Often an aim of punishment can outweigh the personal circumstances of the accused and this is not necessarily misdirection by the sentencing court.

[32] The personal circumstances were all put before the court *a quo* in mitigation and in this court's opinion were considered by the learned Magistrate when

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[16] Supra at footnote 14.
[17] Supra at footnote 14.
[18] *Hainana v State* (CA 69/2015) [2016] NAHCMD 281 (26 September 2016*); Matota v The State* (CA 11/2015) [2016] NAHCNLD 57 (8 July 2016); Kompeli v S (CA 47/2016) [2016] NAHCMD 284 (26 September 2016); *Mwaala v State* (CA 85/2016) [2016] NAHCMD 387 (9 December 2016).
[19] *S v Skrywer* 2005 NR 288 (HC) at page 289
[20] *State v Valombola (*CC18/2019) [2021] NAHCMD 562 (2 December 2021)
[21] *S v Strauss* 1990 NR 71 (HC) at page 72.

imposing the sentence. Three years of the seven years imprisonment were suspended which is an indication that the Magistrate showed mercy. This court cannot find that the Magistrate in sentencing the appellant over emphasized the deterrent aspect or seriousness of the crime at the expense of the accused. It appears from the record and subsequent sentence that the Magistrate exercised his sentencing discretion judicially. There is no prospect of success on appeal against sentence.

[33] Returning to the point in lime by the respondent that regarding the application for condonation, there is no proper and justifiable reason provided for the delay and secondly that there is no prospect of success, I have to agree. The reason being stated as an 'oversight', without providing details is to say the least unsatisfactory. Taking into account that this court found that there are no prospects of success on appeal against the conviction and sentence the point in limine by the respondent is upheld.

[34] In the result it is ordered:

1. The Respondent's point *in limine* is upheld.
2. The appeal is struck from the roll and considered finalised.

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E. E. KESSLAU

ACTING JUDGE

I agree,

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J. T. SALIONGA

JUDGE

APPEARANCES

APPELLANT	Ms. T. Shailemo Shailemo & Associates, Ongwediva
RESPONDENT	Ms. D. Khama Of the Office of the Prosecutor-General, Oshakati