



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no. : CA 43/2016

In the matter between:

JOSEF IITHETE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Iithete v The State* (CA 43/2016 [2017] NAHCNLD 44

(02 June 2017)

Coram: JANUARY J

Heard: 25 April 2017

Delivered: 02 June 2017

Flynote: Criminal Procedure – Appeal — Condonation – Appellant filed Notice of appeal timely – Legal representative *amicus curiae* – Withdraws original notice – Filed new amended notices out of time – Condonation granted - Conviction and sentence - Plea of not guilty — Circumstantial evidence – Testimony of appellant – Version reasonably possibly true – Conviction and sentence set aside

Summary: The appellant was convicted on housebreaking with intent to steal and theft. He filed his notice of appeal timely. Subsequently counsel agreed to appear *amicus curiae*. Counsel withdrew the initial notice of appeal and filed two new amended Notices of appeal. She applied for condonation. Condonation was granted.

The appellant denied the allegation of housebreaking with intent to steal and theft. He put his version to witnesses that his cell phone got lost when it was on charging at his girlfriend's place. He testified in his defence. The only circumstantial evidence is that his cell phone was picked up about 200 meters from the premises that was broken into. He was linked to the crime with printouts from MTC indicating that calls were made from his cell phone on the night of the incident. It was not testified to whom the calls were made. The conclusion that he was linked to the crime was based on opinion evidence and speculation. This court finds that his version in the circumstances is reasonably possibly true. The conviction and sentence are set aside.

ORDER

1. Condonation is granted;
2. The appeal against conviction and sentence is upheld;
3. The conviction and sentence are set aside.

APPEAL JUDGMENT

JANUARY J; TOMMASI J (CONCURRING)

[1] This is an appeal against conviction and sentence of the magistrate, Tsumeb. The appellant was charged with housebreaking with intent to steal and theft; 'In that upon or about the 7th / 8th day of February 2014 and at or near Agra in the district of Tsumeb the said

accused did unlawfully and intentionally break and enter shop (sic) of Muller Corne/Agra with intent to steal and did unlawfully steal the property or (sic) in the lawful possession of Muller Corne/Agra to wit: Goods to the value of N\$50 088.43.' The appellant pleaded not guilty and a trial ensued. He defended himself in the trial. I will not deal with the appeal against sentence in view of the conclusion of the appeal.

[2] The appellant is represented by Ms Samuel and the respondent by Ms Amupolo. Ms Amupolo raised a *point in limine* in that there is no application for condonation filed. It is to be mentioned that the appellant was sentenced on 23 June 2016. His notice of appeal is dated 30 June 2016, date stamped by the Ministry of Safety and Security on 30 June 2016 and by the clerk of court, Tsumeb on 01 July 2016. It was well within time in accordance with the rules of court. Ms Samuel is appearing *amicus curiae*. She filed a notice of withdrawal of the previous notice of appeal and an amended notice of appeal with proof of a fax to the magistrate. The new notice was only filed on 03 April 2017 on the same date as the Heads of Argument. The magistrate responded and indicated that he has nothing more to add to his reasons in the judgment.

[3] On perusal of the court record and judgment of the magistrate I am of the view that the appellant has prospects of success on appeal. Ms Samuel filed an application for condonation with a supporting affidavit explaining that she agreed to represent the appellant *amicus curiae* on 23 August 2016. After perusal of the record, her opinion was to amend the notice of appeal drafted by the appellant as a lay person. She needed to consult with the appellant before filing of the new notice. After consultation she eventually filed an amended notice on 08 November 2016 and another amended notice on 27 March 2017. The appellant did not file a confirmatory affidavit. From the affidavit of Ms Samuel I am however convinced that the subsequent delays are not his fault. In view that I find that there are prospects of success, condonation is granted.

[4] The ground for the appeal are as follows:

'AD CONVICTION

The Magistrate erred in fact and law in convicting the appellant on the charge of housebreaking with intent to steal and theft in that:

1. No evidence led by the state proves beyond a reasonable doubt nor does it suggest that the appellant did in fact break or hence displaced and parts of the property to make way to enter Agra unlawfully and intentionally. The state thus did not discharge the onus of proving beyond reasonable doubt that appellant is guilty of housebreaking with intent to steal and theft, in that:
 - 1.1 There is no evidence that actually places the accused at Agra. The only evidence is that the accused's cell phone was found at a place, the police officer opines that whoever was stealing at Agra was resting there.
 - 1.2 There is no evidence linking the Appellant to the stolen goods, despite the fact that the Appellant premises were thoroughly searched without a search warrant by the police officers. The Appellant was further not found with any items from Agra.
 - 1.3 Thus the only evidence relied upon by the learned magistrate in convicting the Appellant was circumstantial.
2. The learned Magistrate erred in fact by finding the Appellant guilty without evidence of Nekundi, who was the main reason the state is convinced that the Appellant did not lose his phone, and was therefore concluded that Appellant had been at the place where the phone was found. In light thereof there was therefore no evidence that the Appellant was in possession of the phone at the time of the commission of the offence.
3. The learned Magistrate erred by rejecting the evidence of the Appellant, that his phone got stolen and he did not block his card, however, the Magistrate did not indicate, what inference, if any, he drew from the testimony.
4. The learned Magistrate gave too much weight to the testimony of the state thereby failing to assess the strength of the evidence against the Appellant on the charge.
5. The learned magistrate misdirected himself by coming to the most extreme conclusion on the basis of circumstantial evidence.
6. For purposes of conviction, the Magistrate has failed to inquire on the outcome of the finger prints that were taken from Agra as same was mentioned in evidence by the State witnesses, especially that the appellant was a self-actor. No evidence was led on the finger prints collected from the scene of crime.'

[2] In his plea explanation the appellant said; 'I did not break into Agra. I don't do such things.'

[3] The prosecution did not present evidence that directly connects the appellant with the housebreaking. Evidence was presented by the complainant, Muller Corne an

employee of Agra, Tsumeb that the store room of Agra, the office and the shopping department were broken into. A lot of things and papers were found lying on the floor everywhere in the office and shop. A safety gate between the office and the shop was broken and lying on the ground. A cash drawer was broken and lying on the ground. A heap of maize meal was on the floor with the 50kg maize meal bag removed, suspected to have been used to carry items stolen. One of the receiving doors was cut and another lock of a door leading to the outside bush was also cut.

[4] On the outside of the premises two tracks of wheelbarrows, suspected to be stolen from the shop, were identified with a lot of foot prints. The complainant contacted Rubicon Security who followed the tracks and discovered 1 (one) wheelbarrow, groceries, GPS systems, tomato sauce, a cell phone and animal medicine about 200 m from Agra. The items had Agra price codes and Agra codes. A Willard car battery, only sold at Agra was also found. Rubicon Security contacted the police who continued to search further. A tekkie shoe print was found on the dumped maize meal inside the premises and also in the bush outside.

[5] On further investigation it was found that the complex's alarm was damaged and that the suspects gained entrance through the roof as it was also damaged and had a hole in it. The transmitter box to the alarm was damaged. At the office the roof was also cut open. The items stolen was valued at about N\$50 000. Recovered property was about N\$7651.00.

[6] The only circumstantial evidence was a cell phone that was found by a security officer of Rubicon Security. The security officer investigated after he was called to Agra premises. He followed foot prints with other security officers and discovered a lot of items in the bush and about 200 meters from Agra found a Nokia cell phone on the ground. They were following two sets of foot prints. No other item was found at the place where the cell phone was picked. The only other observation was that something must have been placed on the ground. The cell phone was switched off.

[7] The other witnesses who testified are a former police officer employed at Dundee Precious Metals who was the investigating officer in the matter, another police officer who

assisted the former investigating officer to investigate the matter and an employee of MTC from Windhoek. The police officers confirmed that Agra was broken into. The investigating officer circulated the Nokia cell phone number to MTC with a search warrant. One person David, the employee of MTC, provided the print outs of the cell phone with three different numbers being called frequently from the cell phone.

[8] The duration of print outs were from 01 February 2014 to the end of February 2014. The cell phone numbers are reflected on the printout as +264 813113219, +264 816209887 with IMEI 35284905306361. The cell phone was last used on 07 February 2014 at 22h57 and on 08 February 2014 at 00h23. Neither the MTC employee nor any of the other witnesses did testified to whom the called numbers belonged.

[9] The brother, of the appellant, one Nekundi directed the police to the appellant as he identified the cell phone belonging to the appellant. The brother however did not testify whether the appellant phoned him on the night of the housebreaking at Agra or on the next day. The appellant admitted that the recovered cell phone belonged to him. He however stated that the cell phone was stolen at his girlfriend's place when the phone was on a charger. He also conveyed this to the police when he was arrested.

[10] The appellant opted to testify in his defence and stated that he knows nothing of the housebreaking. He stated that he gave his cell phone to his girlfriend to charge. He does not know how it came about that the cell phone went missing. His girlfriend told him that the cell phone went missing from the charger. The girlfriend is now late but she also informed the police on his arrest that she lost the phone. The cell phone was not switched off when it got lost. The appellant could not remember when the phone got lost. According to him the person who stole it must have phoned his brother between 07 and 08 February 2014, the night of the housebreaking at Agra.

[11] The learned magistrate found that Agra was broken into as testified to by the witnesses. He, correctly so, found that there was no direct evidence and only circumstantial evidence. The magistrate considered the totality of the evidence and applied the often quoted applicable test asking whether the inference sought to be drawn

is consistent with all proven facts. The proven facts should be such that they exclude every reasonable inference from them save the one to be drawn.¹

[12] The magistrate found that the cell phone was linked to the housebreaking at Agra based on opinion evidence of a security card of Rubicon Security that he found the cell phone at a place where it seems something was placed on the ground. Nothing else was however found where the cell phone was picked up. The investigating officer testified that he was phoned by the security who informed him that a cell phone was picked at a place where they thought the suspects were resting. This is again opinion evidence which in my view does not carry any weight. The magistrate further did not find a possibility that the cell phone might have been left at the place it was found on an occasion unrelated to the housebreaking. He speculated, with respect, that it would either have been picked due to frequency of people's movements. This speculation is based on the security guard who testified that they could not follow prints as they were destroyed by movement of people in the early hours of the morning.

[13] In my view the prosecution never proved that the suspects rested somewhere or that something was placed on the ground where the cell phone was picked up. It is trite that it is on the prosecution to prove its case beyond reasonable doubt. Where an accused provides evidence which is reasonably possibly true, even if false, he deserves the benefit of the doubt. The magistrate misdirected himself in the circumstances by not finding the version of the appellant that his cell phone was stolen as reasonably possibly true. The conviction and sentence therefore stands to be set aside.

[14] In the result:

1. Condonation is granted;
2. The appeal against conviction and sentence is upheld;
3. The conviction and sentence are set aside.

¹ See: *S v HN* 2010 (2) NR 429 (HC); *R v Blom* 1939 AD 188 at 202-3.

**H C JANUARY
JUDGE**

I Agree

**M A TOMMASI
JUDGE**

APPEARANCES

FOR APPELLANT

Ms Samuel (*amicus curiae*)

Of Samuel Legal Practitioners

FOR THE RESPONDENT

Ms Amupolo

Of Prosecutor-General's Office