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REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT**

CASE NO: CA 71/2015

In the matter between:

BARNABAS IIPINGE

APPELLANT

Vs

THE STATE

RESPONDENT

Neutral citation: *Iipinge v S* (CA 71-2015) [2016] NAHCMD 229 (08 August 2016)

Coram: SIBOLEKA J and USIKU J

Heard on: 06 July 2016

Delivered on: 08 August 2016

Flynote: Criminal Law: Conviction – proof must be beyond reasonable doubt.

Summary: The appellant was positively identified as one of the four persons seen by police officers jumping out of Namsov building, but the evidence could not pertinently connect him to any of the housebreaking charges preferred against him.

Held: None of the Housebreaking charges – levelled against the appellant has been proved beyond reasonable doubt against him.

Held: The appeal succeeds, the conviction and sentence are set aside.

ORDER

The appeal succeeds, the conviction and sentence are set aside.

APPEAL JUDGMENT

SIBOLEKA J (USIKU J concurring):

[1] The appellant appeared as accused 2 in the Magistrate's Court Walvis Bay on two counts of Housebreaking with intent to steal and theft. He pleaded not guilty and after trial he was convicted on count 2 and sentenced to thirty six (36) months imprisonment. He now appeals in person against both conviction and sentence.

[2] At the hearing of this matter the appellant was in person and Mr. Nduna

appeared for the respondent.

[3] The appellant did not furnish grounds of appeal in terms of rule 67(1) of the Magistrate Court rules to inform the other parties how the trial Court has misdirected itself if it did. He only stated his conclusion that the trial Court has erred in rejecting his version.

[4] I will now look at the evidence presented by the prosecution on this matter in the trial Court.

[5] Cleopatra Garoes is the complainant on the first count. She testified that she resides at S..... S..... 8..... W..... B..... She knows accused 1. While asleep on the day of the incident she heard a window being opened but ignored it thinking it was her granny that was just coming in. Suddenly she heard a noise from her room door being opened very slowly. He was on the bed facing the wall she turned and put on her cellphone torch and grabbed accused 1 on the hand. He had a knife which cut her on her hand. She held and started beating him with a cellphone. The accused slipped out of her hands and went to another room. She went to the kitchen screaming for her mother to come. While she was still in the kitchen, the accused jumped through the window and ran away. The neighbor's house has a very bright light outside which illuminates the inside of her room. It is always visible and that was how she was able to see very well that accused 1 was the intruder. Accused 1 entered through the sitting room window which he may have opened with a knife. The intruder took her cousin's lotion; wallet; and cellphone.

[6] Sakaria Ipinge testified he is a police officer at the Crime Prevention Unit at Kuisebmond. On 23 April 2014 this officer, Const. Peter, and Ndishishi were on duty patrolling near S..... S..... in K..... They saw two persons and an old woman in front of them. When asked what they were doing in the early

morning hours, they said they were following the footprint of a person who burgled in their house. The police went to the burgled house where it was found that force was used to gain entry to the inside. The officers followed the footprint up to the tarred road and they lost track near Namsov flats. While they were there they saw four guys jumping out of Namsov flats. When the men saw the officers they started running away in different directions. The police screamed at them to stop but they just continued running.

[6.1] This officer and Ndishishi followed the other suspects who ran in the direction of Ushakarino. They met two security guards who showed them the direction they went. Ndishishi called and alerted this officer saying he saw them getting into a certain yard. Ndishishi got inside the yard – they arrested accused 1 and his co-accused ran away. After questioning, accused 1 took the officers to a flat inside Namsov building. Ndishishi knocked at the door, and inside they saw how the flat was broken into. When they looked around they saw that accused 1's footprint matched the footprint that was at the broken-in flat – adidas takkie with three stripes. The shoe had some lines and circles in the print. The officers saw how force was used to damage the door of the flat to gain entry. Accused 1 told the police he was together with Balla, the nickname of the appellant Barnabas lipinge and Sam.

[7] Ingeborg Touros is the complainant on the second count. She testified that she first saw accused 1 two or three weeks before the break-in. He came to her residence at her flat at the back of Namsov Kindergarten in Kuisebmond asking to use the toilet and she allowed him to do so. He later came out with one of the teachers who told her the accused was checking around the school. The second time she saw accused 1 was on 23 April 2014 in the night between 04h30 – 05h00 in the early hours of the morning when the security at Namsov Kindergarten called her. She came and found the police with accused 1 in her flat. The police asked her to look around and see what was missing. She found that her iPhone cellphone, MTC touch screen cellphone and a pair of all-star

shoes totally to N\$9 000 were missing. The intruder came through the flat's window that he forced open. The locks of the burglar door were also cut open. She did not recover any of her stolen items. She had some sweets in the jar inside her room. Some of these sweets were found in accused 1's pocket.

[8] Paulus Abel Ndishishi testified he is a police officer at Kuisebmond. He corroborates the evidence of Sakaria lipinge and other officers regarding the arrest of accused 1 on 23 April 2014, as well as the version of Ingeborg Touros.

[9] Pieter Nelson also corroborates the evidence of Sakaria lipinge and other police officers. He added that among the four suspects who suddenly jumped out of the yard in front of them just nearby while they were following the tracks of burglars he recognized the appellant whose name he did not know at that time. He was dressed in a black jersey and black trouser. According to this officer he used to see the appellant reporting himself at Kuisebmond Police Station. The said appellant drew out a knife and threatened him such that he had to give way and then fired a warning shot but they just continued running away.

[10] Further investigations showed that the suspect who threatened Pieter Nelson with a knife was the appellant, Barnabas lipinge. The visibility was clear, illumination came from the street lights when the officer saw four suspects jumping the wall. During investigations accused 1 told him he was with the appellant Balla – also known as Barnabas lipinge and Tsotsi known as Sam. They found sweets in accused 1's pocket. After the arrest of accused 1 at Tutaleni his cellphone rang and registered the name of the caller as 'Tsotsi'. The phone was put on loudspeaker and the officers heard Tsotsi telling accused 1 they should meet at Etosha Bar. Some officers took off their uniform and went there to arrest him, but the evidence of the arresting officer on this aspect was not placed on record.

[10.1] Briefly the content of the evidence placed before the trial Court was that

the police officers saw four persons jumping out of Namsov building and running away, accused 1 was caught there and then. He had some sweets in his pocket which he took from the jar inside Ingeborg's flat. He took the officers to the burgled flat behind the Kindergarten at Namsov building where his shoeprint was still clearly visible. Ingeborg, a resident at the flat identified him as the person who was there previously asking to use the toilet.

[11] In Court Cleopatra Garoes immediately identified accused 1 as the person who broke into her house during the night. Clear illumination lighted in her room such that she clearly saw accused 1. She grabbed him on the hand, and a fight ensued. The accused had a knife and he cut her on the hand. Accused 1 was therefore again appropriately identified as the one who also broke into house 833/24 Stonefish Street. Accused 1 has been connected to the charges in both counts beyond reasonable doubt and has thus been correctly convicted.

[11.1] The version of the police officers that accused 1 told them he was together with Balla the nickname of Barnabas lipinge, the appellant before Court during the breaking in, was not repeated, confirmed and placed on record by him during his evidence in chief. All the allegations regarding the appellant on this matter were brought to a dead end by this eventuality. He has therefore not been positively connected to any of the housebreakings at the flat or at property 833/24 Stonefish Street. The evidence that he was positively seen among the four suspects jumping out of Namsov building alone does not connect him to any of the said burglaries there.

[12] In the light of the above the conviction and sentence of the appellant cannot be allowed to stand.

[13] In the result I make the following order:

The appeal succeeds, the conviction and sentence are set aside.

A M SIBOLEKA
Judge

D N USIKU
Judge

APPEARANCES

APPELLANT : In Person

RESPONDENT: Mr. S. Nduna

Office of the Prosecutor-General, Windhoek