CASE NO.: CR 77 /2010

IN THE HIGH COURT OF NAMBIA

In the matter between:

THE STATE

versus

FILLIMON HITILAVALI MBWALE & HEROLD GEINGOB

(*HIGH COURT REVIEW CASE NO.: 1025/2010)*

CORAM: LIEBENBERG J *et* UEITELE, AJ

DELIVERED ON: 27 October 2010

REVIEW JUDGMENT

UEITELE, A J

[1] The two accused persons were arraigned in the Karibib Magistrate's Court; Accused No. 1, (Fillimon Hitilavali Mbwale) was charged with contravening Section 6 of the General Law Amendment Ordinance, 1956 (Ordinance 12 of 1956) and Accused No. 2 (Herold Geingob) was charged with housebreaking with intent to steal and theft. Both accused persons were unrepresented.

[2] The record indicates that on 16 February 2010 the accused persons appeared before the learned magistrate for purposes of pleading. Accused No. 1 pleaded guilty to the charge of contravening Section 6 of the General Law Amendment Ordinance, 1956 and Accused No 2 pleaded not guilty to the charge of housebreaking with intent to steal and theft.

[3] The court *a quo* proceeded and asked Accused No 2 whether he was prepared to disclose the basis of his defence as contemplated in section 115(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977) (I will in this judgment refer to it as "the Act"). Accused No. 2 disclosed the basis of his defence which was a denial of breaking into the school (i.e. the Karibib Junior Secondary School).

[4] The record of proceedings furthermore shows that after Accused No. 2 disclosed the basis of his defence the court proceeded to deal with Accused No. 1 and applied Section 112(1)(b) of the Act. Accused No. 1 was convicted on the basis of his plea of guilty. That part of the record reads as follows:

"Crt: Why do you plead guilty?

Acc: I unlawfully had in my possession the calculators.

Crt: When was it?

Acc: 05/10/2009

Crt: Where were you found in possession of this calculators?

Acc: At my home in Karibib, Usab

Crt: What is it that you were found in possession with?

Acc: Five (5) Casio calculators

Crt: The state is alleging that the value of the calculators was N$500-00 do you admit or dispute that?

Acc: I admit that.

Crt: What makes you say that you had unlawfully in your possession the said calculators?

Acc: Because the owner or the person who gave them to me had no ownership papers.

Crt: Did you then knew that been found in possession with suspected stolen property was unlawful wrongful and punishable by law?

Acc: Yes I knew.

Court is satisfied that you admit guilty to all the allegations on the charge sheet."

[5] Accused No.1 was consequently sentenced as follows:

> "To a fine of N$ 2000-00 or ten months imprisonment wholly suspended for a period of 5 years on condition that accused is not convicted of contravening Section 6 of Ordinance, 12 of 1956 committed during the period of suspension".

[6] When this matter came up for review I directed the following query to the magistrate. "*How does the court convict if no questions were asked to establish whether the accused knew or believed the goods to be stolen*?" The learned magistrate conceded that she "*failed to question the accused person specifically as to his suspicion at the time he had been found in possession of the calculators, and requested to be guided, 'on this one*.'"

[7] I am of the view that the concession is correctly made in view of the provisions of Section 6 of the General Law Amendment Ordinance, 1956 (Ordinance 12 of 1956) which reads as follows:

> "Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Law Amendment Ordinance, 1935 (Ordinance 11 of 1935), in regard to where there is a reasonable suspicion that they may have been stolen and is

unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

[8] Snyman CR "**Criminal Law**" 2nd Edition at page 498 opines that, "The requirements for a conviction of contravening the section (i.e. Section 6 of Ordinance 12 of 1956) are:

"(a) The 'goods';

(b) X must be found in possession;

(c) There must be reasonable suspicion that the goods have been stolen; and

(d) X must be unable to give a satisfactory explanation of the possession."

[9] Snyman further argues at page 499, that the reasonable suspicion must arise at virtually the same moment that the goods are found in X's possession. See: ***S v Mokoesa*** 1957 (1) SA 398; ***S v Reddy*** 1962 (2) SA 343 and ***S v Ismail*** 1958 (1) SA 206.

[10] The learned magistrate in her reply to my query asked to be guided 'on this one'. I will attempt in what follows. Tommasi J with Liebenberg J concurring said the following in the unreported Review Judgment of ***State v Albius Mweti*** *CR 68 /2010;*

"Common sense dictates that the accused can admit that he was found in possession of items as this falls within his own knowledge. Whether his explanation was satisfactory or not and whether there was a reasonable suspicion that the goods were stolen falls outside his knowledge."

[11] In the present case the learned magistrate apart from failing to ask questions to ascertain whether the accused admitted "*having been found in possession*" of

"*suspected stolen property*" the learned magistrate also elicited admissions in respect of facts that fell outside of the accused person's knowledge.

[12] Tommasi J *(supra)* quoting with approval from ***Hiemstra's: Criminal Procedure*** said:

> "There are incriminating facts which cannot be within the accused's knowledge, such as the suspicion of the finder of stolen property. The accused cannot know what "reasonable suspicion" there was in the mind of the finder, as contemplated in section 36 of the General Law Amendment Act 62 of 1955 (*the provisions hereof are similar to the s6 of Ordinance 12 of 1956).* In the result the court in *S v Shabala 1982 (2) SA 123 (T)* held that the accused *cannot* admit it. This is only the case however, when the accused is unrepresented…"

and after surveying the decisions in ***S v Naidoo*** *1985 (2)* SA 32 (N); ***S v Mahlasela*** *2005 (1) SACR 269 (N) and* ***S v Thomas*** *1990 NR 352 (HC)* remarked that

> "… appropriate questioning relating to the surrounding circumstances can, even in a charge such as the one under discussion (i.e. contravening Section 6 of the General Law Amendment Ordinance, 1956 (Ordinance 12 of 1956)), cover all of the elements of the offence concerning both the accused's conscious admission and the existence of the *factum probandum*. This would depend on the facts of every individual case.
>
> The above manner in which the accused was questioned in the court *a quo* hardly qualifies as appropriate. No questions were posed to the accused in respect of the circumstances under which the goods were found and what explanation the accused gave."

[13] In the light of the learned magistrate's concession that she failed to question the accused person as to his suspicion at the time that he had been found in possession of the calculators, I am of the opinion that the learned magistrate could not have been satisfied that the accused is guilty of the offence he was charged with.

[14] The learned magistrate should have further questioned Accused No. 1 in respect of the circumstances he was found in possession of the calculators and also on the explanation that he gave. In view of this, I find that the proceedings were not in accordance with justice.

Accused No.2

[15] I now turn to deal with the purported separation of the trial of Accused No. 1 and Accused No. 2. The record of proceedings further indicates that after Accused No.1 was convicted on his plea of guilty the State Prosecutor applied for the separation of Accused No. 1's trial from that of Accused No 2. The court ruled in favour of the separation and returned to Accused No.1 and proceeded to hear evidence in mitigation. After Accused No. 1 was convicted and sentenced the learned magistrate proceeded with Accused No.2's trial during which proceedings. Accused No. 1 became a State witness. Accused No. 2 was then convicted as charged and sentenced as follows:

> "To 12 months imprisonment wholly suspended for a period of 5 years on condition that accused is not convicted of housebreaking with intends *(sic)* to steal and theft committed during the period of suspension"

[16] I am of the view that after the learned magistrate ruled that the trial of Accused No.2 must be separated from the trial of Accused No. 2 she committed an error by not actually separating the trials and that error amounts to an irregularity. I hold that view in the light of the provisions of section 157 of the Act.

[17] Section 157 (2) of the Act reads as follows:-

> "(2) Where two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, upon the application of

> the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused."

[18} The procedure which must be followed after the Court has ruled in favour of separation of trials is that those who pleaded not guilty stand down and the ones who pleaded guilty are first taken through the section 112 procedure. See ***Hiemstra's Criminal Procedure*** page 22-36 paragraph 9.

[19] The process in respect of those who pleaded guilty must then start *de novo* and the accused has to plead again, even if the charge remains unchanged. The accused also has to go through the process of plea explanation. ***Hiemstra's Criminal Procedure. (****Supra*)

[20] It means that a new charge sheet (even if the charge remains unchanged) has to be drawn up and a new case number allocated to the matter. But it does not necessarily mean that different judicial officers have to sit in the separated matters. The same judicial officer may sit in both trials. See ***R v T*** 1953 (2) SA 479. The determining factor as to whether a presiding officer may or may not sit in both the separated trials is the prejudice that the accused person may suffer. See ***S v Somciza*** 1990 (1) SA 361 (A).

[21] In the present case the learned magistrate did not follow the procedures that I have outlined above in paragraphs 18 and 19 meaning that an irregularity which renders the proceedings to be not in accordance with justice occurred. Both the conviction and sentence need to be set aside. The only question which remains to be considered is whether the matter must be remitted for rehearing before the same Magistrate.

[22] The learned magistrate, in delivering judgment, rejected the accused's (i.e. accused No. 2) version of events. It is highly undesirable that an accused who has been found guilty by a particular magistrate and whose conviction and sentence have been set aside should be retried, before the same magistrate, where, as occurred in this case, that magistrate has made findings in which she has accepted the evidence tendered by the prosecution. See ***R v Nqubuka*** 1950(2) SA 363(T) at 365; ***S v Siphambo*** 1963(1) SA 174(N) at 175.

[23] In the result, the following orders are made:

IN RESPECT OF ACCUSED NO.1

1. The conviction and sentence are set aside.

2. In terms of section 312(1) of the Criminal Procedure Act, 51 of 1977, the matter is remitted to the trial court with the direction that it complies with the provisions of section 112(1)(b) of that Act and further to deal with the accused according to law.

IN RESPECT OF ACCUSED NO.2

3 The conviction and sentence are set aside.

4 Accused No 2 must be dealt with in terms of section 324 read with section 313 of the Criminal Procedure Act, 1977 (51 of 1977).

_____

UEITELE, AJ

I agree

_____

LIEBENBERG, J