

CASE NO. : CR 68/08

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

ROMEO WILLEM JOBS & TWO OTHERS

Accused

CORAM: NDAUENDAPO J. et ANGULA, A.J.

HIGH COURT REVIEW CASE NO. 71/08

Delivered on: 2008.06.12

REVIEW JUDGMENT

ANGULA, A.J.:

This is a review matter.

- [1] The three accused appeared in the magistrate court of Karasburg where they were charged with theft, taking into account the provisions of Stock Theft Act, No.12 of 1990, as amended by Act No. 19 of 2004.

At the end of the proceedings accused no 1 and 3 were found guilty as charged and accused no 2 was found not guilty. The Magistrate referred the matter to the Regional Court for sentencing.

- [2] Having read the records of the proceedings, the Magistrate of the Regional Court appeared to have entertained some doubt whether the proceedings were in accordance with justice, he therefore referred the matter for special review in terms of Section 116 (3)(i) of the Criminal Procedure Act, 1977. He pointed out that:
- (1) *"The Court failed to explain to accused no 1 & 3 the imperative provisions of Section 115(1) of Act 51 of 1977, namely that they would be given an opportunity to make a short statement indicating the basis of their defence. The Court also did not warn them that they were not obliged to make any such statement and to remain silent which is their constitutional right to do so."*
- (2) *"The Public Prosecutor invited the Court to invoke the provisions of Section 115 of Act 51/77 in respect of accused no 1 and 3. It would seem that the Court did apply the said provision. However, it has not been put on record or that such were explained to them as per annexure attached to the case record. This follows as both accused no 1 and 3 gave a plea explanation pursuant to their pleas of not guilty. Vide p. 5 – 6 of court record."*

- [3] I have read the record and find myself in full agreement with the observation of the Magistrate of the Regional Court. It appears from the record that

accused no 1 and 3 pleaded not guilty while accused no 2 pleaded guilty. Then the Public Prosecutor requested that Section 115 be applied in respect of accused 1 and 3 and Section 112 (1) b applied in respect of accused 2. The record then reads as follows:

"Plea explanations:

AD Accused 1

I will remain silent. In fact I plead not guilty because I took no one's property.

Accused 3

I do not know the complainant in this case and I do not know anything about these charges"

A plea of not guilty was entered after accused no 2 was questioned in terms of section 112 (2) b."

It is imperative for the Magistrate to explain to the accused his right in terms of section 115. The warning and explanation by the Magistrate to the accused must be recorded.

See: State v Cachinembo NR 1990 p. 290

State v Stander NR 1990 p. 348

- [4] I am however of the view that what happened in the two cases referred above is distinguishable from the proceedings in the instant matter. In those two

cases apart from the Magistrate's failure to warn and explain to the accused and further failure to record his warning and explanation, additional irregularities occurred. In the instant matter, judging from the plea explanations given by the accused, like the Magistrate of the Regional Court, I also gain the impression that the Magistrate applied the provisions of section 115. My conclusion is fortified further, on reading the record, it is clear that when the accused cross-examined the witnesses and later when they testified they persisted in broad with what they stated in their plea explanations. I am satisfied that the accused have not suffered any prejudice or injustice as a result of the Magistrate's failure or oversight in recording his explanation and warning the accused pursuant to the provisions of section 115.

I am satisfied that even though it does not appear from the record that the Magistrate did explain the provision of Section 115 to the accused, substantially, the proceedings were in accordance with justice.

Accordingly the convictions are confirmed. The matter is referred back to the Magistrate of the Regional Court, Keetmanshoop, for sentencing.

ANGULA, A.J.

I concur.

NDAUENDAPO, J.

