



CASE NO.: CR 34/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

JUSTIN TJIVELA

(HIGH COURT REVIEW CASE NO.: 725/2011)

LAZARUS GAROEB

(HIGH COURT REVIEW CASE NO.: 726/2011)

MAGDALENA GERTZE

(HIGH COURT REVIEW CASE NO.: 727/2011)

TITUS KANTETU

(HIGH COURT REVIEW CASE NO.: 728/2011)

CORAM: MULLER, J et SWANEPOEL, J

Delivered on: 13 April 2011

REVIEW JUDGMENT

MULLER, J.: [1] All four of the abovementioned matters submitted for review were dealt with by the same presiding magistrate and the same reviewable issues pertain to all of them. They are consequently dealt with together in this judgment.

[2] In the light of the decision as set out hereunder and not to waste anytime, I did not consider it necessary to first obtain the response of the presiding magistrate before reviewing these matters.

[3] In all four matters the offences that the respective accused were charged with are offences that should not have been dealt with in terms of S 112(1)(a) of the Criminal Procedure Act, no. 51 of 1977 (CPA). In three of the matters the particular offences are theft and in the fourth the offence is possession of suspected stolen property.

[4] It is apparent from these and several other matters submitted for review since the increase of the penalties after promulgation of the Criminal Procedure Amendment Act, no. 13 of 2010, that magistrates regard that increase as an easy way to conduct trials on pleas of guilty according to the provisions of S 112(1)(a) of the CPA and to avoid the sometimes cumbersome process of questioning in terms of S 112(1)(b) of the CPA.

[5] In *S v Shakale Onesmus and Others*, an unreported judgment by Liebenberg J and Damaseb JP, case no. CR 08/2011, delivered on 30 March 2011 the High Court has thoroughly discussed this practice and provided clear guidance to prosecutors and magistrates of how and when to apply the applicable provisions of the CPA, as amended. Magistrates should take cognisance of that judgment and follow it. A copy of that judgment is attached hereto for the convenience of the magistrate.

[6] In the light of the abovementioned decision, it is evident that the procedures followed by the magistrate in all four of the abovementioned cases were not conducted in accordance with justice and the convictions and

sentences must be set aside. The matters will be referred back to the magistrate to deal with each of these cases after the plea of guilty. In the light of the abovementioned judgment on *S v Shikale Onesmus and Others* none of these matters ought to have been dealt with in terms of S 112(1)(a) of the CPA.

[7] In the result the following orders are made:

1. The convictions and sentences in all four of the above mentioned matters are set aside, and
2. All four of the abovementioned matters are referred back to the magistrate in order to properly conduct the hearings in terms of the CPA and the provisions set out in *S v Shikale Onesmus and Others*.

MULLER, J

I agree

SWANEPOEL, J