REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no::CA 14/2009

In the matter between:

TJIRJONJAM MUHARUKUA **1st APPELLANT**

UETUETERA KUTUKA **2ND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Muharukua v The State* (CA 14/2009) [2003] NAHCNLD 29 (20 May 2013)

Coram: LIEBENBERG J and TOMMASI J

Heard: **5 April 2013**

Delivered: **20 May 2013**

Flynote: Evidence – admissions and confessions – duty on judicial officer to evaluate evidence and to consider admissibility of evidence adduced at the end of trial even in cases where the accused was legally represented and did not object to the admissibility thereof – Appeal – Where irregularities found it must be evident that it vitiated the entire trial before the conviction will be set aside on appeal.

Summary: The two appellants were convicted of stock theft read with the provisions of the Stock Theft Act, 12 of 1990 in the district court and sentenced to 20 years imprisonment in the regional court. On appeal they challenged inter alia the court's reliance on inadmissible evidence to convict. No evidence was adduced that second appellant, when he was found in possession of stock, was cautioned by the police officer in terms of the Judge's Rules before he was questioned despite the fact that he was a suspect at the time. Two witnesses testified that first appellant in their presence admitted to having stolen their cattle in an interview by a police officer who was questioning the appellants at the time. No evidence was adduced that first appellant was cautioned before the interview was conducted. The court found that the confession was inadmissible. Despite the fact that the appellant was represented at the time, the magistrate had a duty to consider the admissibility of evidence when he evaluated the evidence at the end of the trial. The conviction and sentence of first appellant are accordingly set aside. In respect of second appellant it was found that where an irregularity occurred the nature thereof was not such as to taint the entire proceedings to warrant the setting aside of the conviction. It was found that the court a quo adequately explained those rights relevant to the appeal, to the second appellant. The remaining evidence supports a conviction of second appellant of having contravened s2 of the Stock Theft Act. His conviction and sentence are set aside and substituted with a sentence of 1 year's imprisonment, suspended on the usual conditions.

ORDER

---

1. Condonation is granted to both appellants for the late noting of their appeal;
2. The appeal of first appellant is upheld and the second appellant partially succeeds on appeal;
3. The conviction and sentence of accused 1 (first appellant) of both counts are set aside;
4. The conviction and sentence of accused 2 (second appellant) of both counts are set aside and is substituted with the following:

   Accused 2 is convicted of having contravened s2 of the Stock Theft Act, 12 of 1990, as amended, and is sentenced to one year'

imprisonment, wholly suspended for five years on condition that the accused is not convicted of the offence of being found in possession of suspected stolen stock in contravention of s2 of the Stock Theft Act, 12 of 1990, as amended, committed during the period of suspension.

JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1] The two appellants were charged with two counts of theft, read with the provisions of the Stock Theft Act, 12 of 1990 as amended. Both appellants pleaded not guilty but were convicted as charged in the district court. On 31 March 2008 the appellants were committed to the regional court for sentence. On 19 May 2008 the appellants were sentenced to 20 years imprisonment on each count, which were ordered to run concurrently. The appellants now appeal against both conviction and sentence.

[2] On 20 May 2008 the appellants filed their notices of appeal against both conviction and sentence. These notices were withdrawn on 5 June 2012 and fresh notices were filed together with a notice of motion praying for condonation. On 20 March 2013 the district court magistrate's response to the new grounds of appeal were lodged with this court and on 27 March 2013 the regional court magistrate's reasons for sentence were received.

[3] Mr Greyling (Junior) appeared on behalf of first appellant on the instructions of the Directorate Legal Aid and Mr Greyling (Senior) appeared *amicus curiae* for second appellant. Mr Shileka appeared for the respondent. The court is indebted to counsel for the industry in filing comprehensive heads of arguments. Mr Shileka conceded that there were prospects of success against conviction and sentence. Condonation is accordingly granted.

[4] First appellant's first ground of appeal against conviction reads as follow:

"The learned magistrate erred and/or misdirected himself in law by accepting the purported admissions made by the appellants to the state witnesses notwithstanding the inadmissibility of such purported admissions in that:

1.1 The State has failed to prove that the purported submissions were made freely and voluntarily and that the judge's rules have been duly explained to appellants prior to making the purported admissions.

1.2. The purported admissions made by second appellant incriminating first appellant constitute inadmissible hearsay evidence."

[5] Second appellant raises a similar ground of appeal against his conviction which reads as follow:

"The Learned Magistrate erred and/or misdirected himself in fact and in law by:

1. Allowing evidence to be presented regarding the contents of alleged admissions in circumstances where the State has failed to prove such admission was made freely, voluntarily and after the Judges Rules has been complied with.
2. Not informing second appellant of his rights pertaining to the duty of the State in this regard and not granting him the opportunity to oppose such proof in a trial-within-a-trial.
3. Failing to assist second appellant in this regard but in particular at these stage when second appellant denied the making of some of the admissions during cross-examination.
4. Accepting the purported admissions made by first appellants to the first witness to the effect that the cattle belonged to first and second appellant, the manner in which the cattle was acquired and that they have stolen the cattle given paragraph 1-3 above.
5. Accepting the purported admissions of first and second appellants purportedly made in the presence of second witness when
   5.1 the first witness testified that the purported admissions were made on the day of the arrest of both appellants. However according to the second witness the admissions were made on the subsequent day.

[6] The magistrate in his response to this ground of appeal stated the following:

"No evidence of improperly obtained admissions was led in court nor was such improperly obtained admissions accepted by the court. As indicated in my reasons for judgment both accused made informal admissions to various people at various occasions. The record is self explanatory in that regard. The admissions by the second appellant were taken into account against him and those by first appellant were taken into account only as

against him and not vice-versa. In the context of this case and from evidence led, nothing arose to justify or necessitate the holding of a trial-within-a-trial"

[7] First appellant was represented and second appellant unrepresented during the trial in the court *a quo.* Both appellants pleaded not guilty. First appellant did not give a statement in terms of section 115. Second appellant's plea explanation was that he was employed by first appellant to look after the cattle by first appellant.

[8] The first State witness was Constable Mutambo who was also a nephew of first appellant. His testimony may be summarized as follow: On 10 February 2006 he went to the auction pens with another police officer. They had received a report the previous evening of cattle which were suspected to have been stolen. He met his uncle under a tree and they had a brief conversation. According to him first appellant was coming from the auction pens. They parted ways and he proceeded to the auction pen. Upon their arrival they were shown five cattle which were outside the pen. They found second appellant with the cattle and they asked him who the cattle belonged to. Second appellant informed them that the cattle belonged to him and first appellant. During cross-examination by second appellant he testified that although the other police officer questioned him, he was also present at the time. At this stage the second appellant, being in control of the cattle, was a suspect and he should have been cautioned in terms of the Judge's Rules. No evidence to this effect was tendered.

[9] Constable Mutambo left the auction pens in pursuit of first appellant. He informed first appellant that there were cattle at the auction pen and that his name was mentioned in connection with stolen cattle. He requested him to accompany him to the office and first appellant agreed. At the office he informed his supervisor that first appellant was suspected of having stolen five cattle. He waited for the cattle to be brought. The cattle and second appellant were brought to the police station. The cattle were put in a camp and first appellant was taken to the cattle. First appellant then informed him that the cattle belonged to them. When he asked first appellant where he got the cattle from, first appellant informed him that he got it from Etaka village. Contable Mutambo was aware that first appellant was a suspect at this point and should have cautioned him in terms of the Judge's Rules but failed to testify that he did so.

[10] He testified that Tjirazo, the person who was in control of the cattle, on behalf of its owners, came to identify the cattle the same day. He testified that he only saw Tjirazo talking to first appellant but was somehow able to inform the court that first appellant had changed his version and now agreed that the cattle belonged to Tjirazo; that he got the cattle from Uatjana village; and that he admitted having stolen the cattle. He later learnt that the second complainant identified the cattle but he was not present at the time. Tjirazo contradicted Mutambo's testimony, denying that Constable Mutambo or the first appellant was present when he identified his cattle later that same day. He only met with first appellant the next day. The court a quo found that Constable Mutambo made a mistake as both Thirazo and the second complainant testified that Constable Mutambo was not present when they identified the cattle and both only saw the first appellant the next day.

[11] Tjirazo and Rapewani Muharuka testified that they were related to both appellants and that they, after having identified their cattle, returned to the police station the next day where the appellants were already detained. Both testified that the appellants were interviewed by a police officer in their presence. This officer was not called to testify. Both testified that first appellant admitted that he stole due to financial problems. Both testified that second appellant denied driving the cattle but admitted that first appellant gave him the cattle in Opuwo to look after.

[12] Second appellant was found in possession of the five head of cattle and when confronted by the police, incriminated first appellant. This admission, according to the magistrate, was not considered as evidence against first appellant.

[13] The only other "admissions" found to have been made by first and second appellant took place the next day during the interview with a police officer. The first appellant during this interview did not only make admissions, but confessed to having stolen the cattle. It was an unequivocal admission of guilt. The interview was conducted by a police officer in the presence of Tjirazo and Rapewani. Tjirazo testified that when he arrived the next morning the accused were taken out of their cells and they were questioned by a lady detective. Rapewani testified that it was the police who questioned first appellant in her presence. In terms of s217 (1) (a) a confession taken by a peace officer shall not be admissible unless confirmed and

reduced to writing in the presence of a magistrate or justice. The State, I believe, in an attempt to circumvent the requirements of s217 did not call the police officer but relied on the two witnesses who were present during this interview. The question is whether the fact that they were present during an interview by the police makes the confession of first appellant, which would otherwise be inadmissible, admissible.

[14] In R v DE SOUZA 1955 (1) SA 32 (T), page 34 E-G, Blackwell J reasoned as follow:

"Two points of some interest have been raised by Mr. Phillips. In the first instance he says that a confession was made to Mr. Botha in the presence of the police. That may well be so, and for the purpose of the present point I am going to assume that the police were present. But the confession was made not to the police - the confession (if it can be called a confession - as I think it was) was made to the accused's employer, Mr. Botha. He used words to Mr. Botha which amounted to this: 'Yes, I did it, and I don't know why I did it'. If that confession had been made to the police then, in terms of sec. 273 of the Code, evidence of that confession could not be received by a court. What is the position if a confession is made to an employer in the presence of the police? If a servant is charged with stealing from his master and the police are called in and, when interrogated by the master, the servant says to the master in the presence of the police 'Yes, I did steal; I am guilty', it seems to me that in such a case the confession is made not to the police but to the master, and the mischief which sec. 273 was intended to prevent so far as confessions to the police are concerned did not occur."

[15] In R v DE WAAL 1958 (2) SA 109 (GW) a police officer took an accused, after he was warned and had denied any knowledge of the offence, to the complainant where he made the confession. The police officer was present in the house at the time the confession was made. DIEMONT J on page 111 of that judgment expressed strong disapproval for what appeared to have become practice in that division as he was of the view that: "it is in conflict with the spirit of the enactment referred to and because it so obviously lends itself to abuse."

[16] In Rex v Young 1949 (3) SA 1169 (E) that court admitted into evidence a confession made in a general conversation in vehicle in between a witness, the accused and a police officer. The court, at 172 of this judgment differentiated the facts of the case before it and the facts in Rex v du Toit (1947 (1), S.A.L.R. 184) as follow: "In that case the statement or confession made to a third party in the presence of a

gaoler was held to be inadmissible, and I should think rightly so, if I may say so, because in that case it is quite clear that the warder took part. A question was actually addressed to him if he did not actually put questions himself, and DE BEER, J., held that the evidence is not admissible."

[17] In this case no evidence was led by the police officer who questioned the appellants and the court could not have been certain of the circumstances that surrounded the confession. Whether or not the court a quo was of the view that it was admissions and not a confession, the court had to be satisfied that the evidence on which the conviction was founded was admissible. In this case there is clear evidence that the confession was made to the police and not to the witnesses. There was no evidence adduced that the accused were informed of their right not to incriminate themselves and their right to legal representation at any stage after their arrest. In S v Malumo and Others (2) 2007 (1) NR 1998 the court held that a fair trial include the entire process of bringing an accused to trial and the trial itself; and that the Judges' Rules, though they were administrative directives to be observed by the police, were not completely without effect: a breach of a rule may influence eg the determination whether an incriminating statement had been made voluntarily or not.

[18] First appellant testified that he was able to read and write and that he had completed grade 9. This however does not mean that the appellant was a person who would have known his constitutional rights before he made a full confession or "admissions". The fact that the appellant was in police custody and questioned by a police officer necessitated that he be cautioned and advised of his right to legal representation. In view of all these facts and in the absence of any evidence what transpired before the first appellant made the admission, the court a quo could not have been satisfied that it was made freely and voluntarily. The State bears the onus to prove this and failed to do so.

[19] The same is applicable to the admission made by second appellant that the cattle belong to him and the first appellant. Mr Shileka, counsel for the respondent conceded that second appellant, who was a suspect at the time as he was found in possession of stock which the officers suspected to have been stolen, was not cautioned in terms of the Judge's Rules. In S v Malumo and Others, *supra*, it was held, that it was correct that the Namibian Constitution did not expressly provide for

the right of an accused person or suspect to be informed of a constitutional right, but that a court of law in giving effect to constitutional rights of such a person, would interpret those constitutional provisions meaningfully.

[20] It was submitted by counsel for the respondent that first appellant was represented and his counsel did not object. First appellant's counsel referred this court to S v Nkosi 1980 (3) SA 829 (A) p 845 B-C Botha AJA stated the following:

> *"*Ultimately, however, whether or not counsel for the State follows the correct procedure, it remains the overriding duty of the trial Judge to satisfy himself that an admission was properly established to have been admissible in evidence, before reliance is placed upon it in convicting the accused*."* [my emphasis]

[21] Under normal circumstances the court relies on counsel to object to the admissibility of evidence. It is however the duty of the judicial officer at the end of the trial to evaluate all the evidence. It is at this stage when the court has to re-consider evidence which was tendered and to deliberate whether, in law, it is indeed admissible in order to rely on it to convict. The court *a quo* in this instance simply accepted the confession of first appellant that he stole and the admission of second appellant that the cattle belonged to him and first appellant without re-considering the admissibility of this evidence.

[22] Without the inadmissible evidence there is no evidence against the first appellant and his appeal against conviction on this ground alone cannot stand. Having concluded thus, it becomes unnecessary to deal with the other grounds of appeal of first appellant.

[23] A further ground of second appellant's appeal against conviction was that the magistrate erred and /or misdirected himself in law by convicting him on two counts of theft in that it amounted to a duplication of conviction. Mr Shileka correctly conceded that the magistrate erred in this regard although the magistrate felt that there was no improper splitting of the charges or duplication of convictions. In S v Gaseb 2000 NR 139 (SC) O'Linn AJA stated the following at 149E:

> "The most commonly used tests are the single intent test and the same evidence test. Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. See R v Sabuyi 1905 TS

170 at 171. This is the single intent test. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate criminal offences. See Landsdown and Campbell South African Criminal Law and Procedure vol V at 229, 230 and the cases cited. This is the same evidence test."

[24] All five cattle were found in possession of the second appellant and no evidence was adduced in respect of the circumstances under which they were stolen. No evidence was adduced that the second appellant had formed a separate intent in respect of the cattle belonging to each one of the complainants. Given the misdirection by the magistrate in this regard one of the convictions stands to be set aside.

[25] 2nd Appellant raised a number of grounds in respect of irregularities committed by the magistrate and Mr Greyling submitted that second appellant's right to a fair trial have been infringed. What follows are the grounds relating to the irregularities.

Disclosure

[26] The first of these grounds is that the magistrate failed to inform second appellant of his right to have full disclosure of the police docket, alternatively, failed to enquire from second appellant whether he received disclosure of the police docket. Mr Greyling referred the court to S v Scholtz 1998 NR 208 and S v Kahevita, an unreported judgment, case no CR11/2011 delivered on 11 February 2011. Whereas Mr Shileka conceded that the magistrate failed to inform second appellant of his right to have full disclosure of the police docket or failed to enquire if he had received disclosure he referred the court to Simon Kafunya and Another v The State (unreported judgment, case no CA40/2011 delivered on 10 August 2012) where this court confirmed that "It is well established that not all constitutional irregularities are so fundamental that there is no trial at all". Each case has to be considered to determine whether the irregularity was of a fundamental nature or less fundamental but taints the conviction.

[1]

[1] S v Shikunga & Others 1997 NR 156 SC at page 171 B-D

[27] This was a serious matter but not complex. The entire case rested on the evidence of witnesses to whom second appellant made certain admissions and or confessions. First appellant's counsel clearly received disclosure and cross-examined the witnesses on their statements. The court a quo was thus in a position to evaluate the evidence inclusive of what was pointed out to have been discrepancies between their prior statement to the police and their evidence in court. I am not persuaded that the irregularity is of such a nature that it taints the entire proceedings. There is therefore no merit in this ground of appeal.

Failure to inform 2nd appellant of competent verdicts in terms of section 11 of the Stock Theft Act.

[28] It is indeed so that the magistrate failed to inform second appellant of the competent verdicts in terms of s11 of the Act of 1990. The magistrate in this regard however correctly pointed out that the question of competent verdicts did not arise in this case as second appellant was not convicted of any such competent verdict. I find no merit in this ground. I in any event am of the view that second appellant would not have conducted his defence differently and such failure did not lead to any prejudice to second appellant.

Explanation in terms of section 115 of the Criminal Procedure Act, 51 of 1977

[29] The appellant in this ground of appeal raised issue with the fact that the magistrate failed to explain to him the effect of his statement and failed to make a formal recording thereof as he was obliged to do. The fact that the magistrate did not enquire from the appellant whether his admission about cattle left in his care should be recorded as a formal admission in terms of s220, was to the advantage of the second appellant. If indeed it was recorded as a formal admission in terms of s220, it would not have been necessary for the State to have proven this fact. As it turned out, the appellant denied this fact when he testified under oath. Although this may have been an irregularity, I fail to see any prejudice suffered by the second appellant as a result thereof.

[30] The magistrate in his response stated that s115 of the Criminal Procedure Act was properly explained to the second appellant who indicated that he understood. Mr Shileka submitted that the explanation given to second appellant gave full meaning

and effect to the appellant's right not to incriminate himself. I have no reason to believe that the explanation the magistrate gave to second appellant,
was insufficient. I am satisfied that second appellant was adequately informed of his constitutional right not to incriminate himself.

Right to cross-examination

[31] Second appellant in this ground submitted that the magistrate failed to explain his rights to cross-examination; alternatively, did not explain it properly. The magistrate in his response stated that he properly explained his right to cross-examination and second appellant confirmed that he understood the explanation. Mr Shileka correctly pointed out that second appellant demonstrated during his cross-examination that he understood his right. Second appellant failed to dispute the fact that he was found in possession of the cattle. The reason for this is evident from his explanation in terms of section 115. He did not initially dispute this fact and he only denied this fact when he testified. I am satisfied that the magistrate properly explained second appellant's right to cross-examine and this ground accordingly also fails.

[32] A further ground was that the magistrate erred in his evaluation of the evidence in that he failed to consider the conflicting evidence by the complainants in respect of the identity of the cattle and its value; and various contradictions of the dates and times of occurrences, contents of the admissions and the persons who were present at the time of making the alleged admissions.

[33] I have already dealt with the evidence relating to the admissions above. Second appellant did not dispute during the trial the identity of the cattle and the date on which he was found in possession of the cattle. I can see no reason why this should now be considered on appeal. It is not an irregularity if the accused is convicted without the value of the stock having been proved as the value of the stock is not an element of the offence. It would be a factor which would impact on the sentence the court may impose.[2]

[34] The remaining admissible evidence against second appellant is the fact that he had been found in possession of the cattle. Second appellant, although he initially

[2] See S v UNDARI 2010 (2) NR 695 (HC)

admitted this fact when he gave a statement in terms of section 115, denied it when he testified. He intimated to the court that if he had informed the court that he was looking after the cattle for first appellant then he had lied about it. No evidence was adduced as to when the cattle have been stolen. It appears as if the complainants were not even aware that the cattle have been stolen. In view of this, the doctrine of recent possession cannot, on the facts hereof, be applied.

[35] The remaining evidence supports a conviction of having contravened s2 of the Stock Theft Act i.e having been found in possession of stock in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, which is a competent verdict on a charge of theft of stock in terms of s11(1)(b) of the Stock Theft Act. As already pointed out above, I am of the view that second appellant would not be prejudiced despite the fact that it was not explained to him by the magistrate.

[36] Second appellant testified under oath that he was married has two children and earns a living by taking care of livestock. He is 23 years old and no previous convictions were proved against him. The cattle were recovered, albeit as a result of vigilant members of the community. The second appellant was found at the auction pens. The intention was clearly to sell the cattle and to benefit from it. Second appellant was found with five cattle and although conflicting evidence was given regarding the value thereof, it is a fact that subsistence farmers depend on stock for their livelihood. A loss of five cattle would be considerable. In considering an appropriate sentence this court has to consider the period of imprisonment the second appellant has already served, which is just over five years. Under these circumstances an appropriate sentence would be one year’s imprisonment, wholly suspended on the usual conditions.

[37] In the result the following order is made

1. Condonation is granted to both appellants for the late noting of their appeal;
2. The appeal of first appellant is upheld and the second appellant partially succeeds on appeal;
3. The conviction and sentence of accused 1 (first appellant) of both counts are set aside;

4. The conviction and sentence of accused 2 (second appellant) of both counts are set aside and is substituted with the following:

Accused 2 is convicted of having contravened s2 of the Stock Theft Act, 12 of 1990, as amended, and is sentenced to one year' imprisonment, wholly suspended for five years on condition that the accused is not convicted of the offence of being found in possession of suspected stolen stock in contravention of s2 of the Stock Theft Act, 12 of 1990, as amended, committed during the period of suspension.

M A Tommasi

J C Liebenberg

APPEARANCES

FIRST APPELLANT :	P J Greyling (Junior) Of Jan Greyling & Associates, Oshakati .
SECOND APPELLANT :	P J Greyling (Senior) Of Jan Greyling & Associates, Oshakati.
RESPONDENT:	R Shileka Of Office of the Prosecutor- General, Oshakati