

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT**

Case no: CR 14/2016

In the matter between:

THE STATE

and

NANGHENDA SIMON PLOTA

ACCUSED

Neutral citation: *The State v Plotra* (CR 14/2016) [2016] NAHCNLD 93
(21 November 2016)

Coram: TOMMASI, J and JANUARY, J

Heard: 11 November 2016

Delivered: 21 November 2016

Released: 24 November 2016

Flynote: Review — Judge's certificate — Judge confirming matter on review — Accused appealed and withdrew appeal opting to apply for Judge to set aside the certificate — Certificate erroneously granted and application to withdraw the certificate granted — Matter considered afresh — Conviction and sentence set aside.

Summary: The matter was confirmed on review. The accused applied to the court to have the certificate withdrawn in light of certain material irregularity which occurred during the proceedings such as the magistrate admitting and relying on inadmissible hearsay evidence and failure to assist the unrepresented accused to secure witnesses crucial to his defence. The court held that these irregularities vitiated the proceedings and rendered the proceedings not in accordance with justice. The court consequently withdrew the certificate and set aside the conviction and sentence.

ORDER

1. The certificate by the reviewing Judge that the proceedings are in accordance with justice is withdrawn; and
 2. The conviction and sentence are hereby set aside.
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JUDGMENT

TOMMASI, J (JANUARY, J concurring):

[1] The matter came before this court on automatic review and the judge issued a certificate that the proceedings are in accordance with justice. The accused noted an appeal in person. At the hearing of the appeal, Mr Nsundano, counsel for the appellant/accused, withdrew the appeal and applied to the court to withdraw the certificate that the proceedings are in accordance with justice. The appeal was struck from the roll and the court heard submissions by both Mr Nsundano and Mr Pienaar, counsel for the State, as to whether the court may withdraw the certificate so issued and if so whether the court should do so.

[2] The accused in this matter was convicted in the district court of housebreaking with the intent to steal and theft. He was sentenced to 30 months' imprisonment. Mr Nsundano stated that the conviction of the accused was not in accordance with justice for the following reasons:

- (a) the trial magistrate not only admitted into evidence inadmissible hearsay evidence, but also relied thereon to convict the accused;
- (b) the trial magistrate failed to properly assist the accused with obtaining witnesses for the defence; and
- (c) the trial magistrate relied on unreliable "footprints" evidence.

[3] The accused was initially charged with another co-accused. They both pleaded not guilty. Accused 1 explained in terms of section 115 of the Criminal Procedure Act that he did not break into the premises of the complainant as he does not stay in Oshakati but in Ongwediva. Accused 2, the accused before this court, explained that when the goods were brought to his house he was not there. He explained that the items belonged to Shivute and Tom and that he informed police officer Mamweulu thus. He further indicated that he was not present when they found the items and that there are four people living at the house in question.

[4] The State adduced evidence of two sisters who testified that the house they were living in, was broken into and that the following items were stolen: Acer Laptop in its bag, an Apple Mac notebook, a back pack or conference bag; a hard drive, bank card, passport; a staff card, keys; a hymn book; white horse whisky and some food items (chicken "braaipack"). The stolen items were recovered and identified by the owner.

[5] The State called a police officer who arrived at the house of the accused. She testified that her colleagues followed shoeprints from the scene of the crime to the house. These colleagues did not testify. The footprint evidence was thus inadmissible hearsay. It is therefore not necessary to consider whether such evidence is unreliable.

[6] This witness testified that she spoke to the girlfriend of the accused whom they found at the house and she informed them that the shoepoint was

that of her boyfriend and his friend. She further informed her that the accused left with a black bag; chicken and a laptop. She also pointed them to a black bag with a passport and other things inside which, according to her, the accused left behind. The girlfriend of the accused was not called to confirm these facts and what she told the Police Officer constituted inadmissible hearsay evidence.

[7] The police officer further testified that she contacted the other police officers and they arrested the accused whilst he was trying to sell the laptop on the streets. The officers who arrested the accused and found him selling the laptop were not called to testify. This evidence amounts to inadmissible hearsay evidence.

[8] The State called no further witnesses and closed its case.

[9] The Accused testified that Shivute who was renting a room from him called him to bring a laptop to him. He was arrested whilst being in possession of the laptop. He gave the officers the number of Shivute and Thomas.

[10] The learned magistrate concluded that it was not in dispute that the shoe prints led the police to the accused's shack. The State however did not call the officers who followed the shoepoint and the testimony of the police officer thus amounted to inadmissible hearsay evidence. It remains legally impermissible for a court to rely on such evidence even though the accused did not dispute it.

[11] The learned magistrate found that it was proven that the accused was found in possession of the stolen laptop. This fact was admitted to by the accused and it may be accepted as proven. The fact that the items were found in the room occupied by the accused however was disputed by the accused and the only recorded evidence is the testimony of the accused that he rented the place to Thomas and Shivute. The learned magistrate remarked that the officer did not find any evidence that Shivute and Thomas lived there. This evidence is not borne out of the record.

[12] The learned magistrate rejected the accused's explanation for his possession of the laptop i.e. that he was requested by Shivute to bring him the laptop, as false or improbable. The learned magistrate found that the accused contradicted himself by first testifying that Thomas (Shivute) called him to bring the laptop but during cross-examination testified that Thomas (Shivute) left for Swakopmund. The learned magistrate concluded that the accused did not "remove himself from the offence as was even arrested while carrying the stolen laptop."

[13] Although it is not evident from the judgment it appears that the learned magistrate relied on the doctrine of recent possession. It is trite law that this is "... simply a common-sense observation on the proof of facts by inference."¹ or that 'When an accused is proved to have been found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, the court is entitled to infer that he stole them, or, in a proper case, that he is guilty of some other offence such as housebreaking, or receiving stolen property knowing it to be stolen.'²

[14] In order for the court a quo to reject the version of the accused as false the court had to evaluate the evidence in its entirety inclusive of the failure by the State to call the girlfriend of the accused. Moreover the witnesses for the accused were crucial for the proper conduct of his defence.

[15] The accused informed the court that he wanted to call his girlfriend, Shivute and Thomas as witnesses. The court ordered the State to assist the accused in calling the defence witnesses and postponed the matter. On the next court date the matter was merely postponed to another date. On this date the State prosecutor informed the court that the investigating officer tried to locate the witnesses without any success. The court informed the accused that the State tried to help him to find his witnesses but that his witnesses could not be found. Accused then abandoned the witnesses.

¹ S v Parrow 1973 (1) SA 603 (A) (at 604E)

² Hoffmann and Zeffertt say (at 605 - 606):

[16] Section 179 of the Act provides the accused with the following procedure to secure the attendance of his/her witnesses. It reads as follow:

- "(2) Where an accused desires to have any witness subpoenaed, a sum of money sufficient to cover the costs of serving the subpoena shall be deposited with the prescribed officer of the court.
- (3) (a) Where an accused desires to have any witness subpoenaed and he satisfies the prescribed officer of the court-
 - (i) that he is unable to pay the necessary costs and fees; and
 - (ii) that such witness is necessary and material for his defence,
such officer shall subpoena such witness.
 (b) in any case where the prescribed officer of the court is not so satisfied, he shall,
upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his decision until he has heard other evidence in the case.
- (4) For the purposes of this section "prescribed officer of the court" means the registrar, assistant registrar, clerk of the court or any officer prescribed by the rules of court."

[17] Section 180 (2) provides further that: " A return by the person empowered to serve a subpoena in criminal proceedings, that the service thereof has been duly effected, may, upon the failure of a witness to attend the relevant proceedings, be handed in at such proceedings and shall be *prima facie* proof of such service."

[18] It is not sufficient for the learned magistrate to merely accept the *ipse dixit* of the State prosecutor that the investigating officer was unable to locate the witnesses. The court must be apprised of the reasons why the investigating officer was unable to serve the subpoena and what attempts were made to trace the witnesses, particularly the girlfriend of the accused. The failure by the magistrate in this case to enquire into the reasons for non-service resulted in a miscarriage of justice given the importance of these witnesses for the defence.

[19] *S v Linyando 1999 NR 300 (HC)* the Court held that it was competent to withdraw the judge's certificate and consider the matter afresh. I respectfully agree with the court's decision and the review certificate stands to

be withdrawn. A fresh look at the evidence adduced, the evaluation thereof by the magistrate and the failure by the magistrate to assist the accused to secure his witnesses leads this court to the conclusion that the proceedings are not in accordance with justice.

[20] In the result the following order is made:

1. The certification by the reviewing Judge that the proceedings were in accordance with justice is withdrawn; and
2. The conviction and sentence are hereby set aside.

M A TOMMASI
JUDGE

H C JANUARY
JUDGE

APPEARANCES

APPELLANT: Mr Nsundano
Legal Aid – Oshakati High Court

RESPONDENT: Adv Pienaar
Office of the Prosecutor-General