

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



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

**JUDGMENT**

Case no: CR28 /2012

In the matter between:

**THE STATE**

and

**STEPHANUS UIXAB**

**FIRST ACCUSED**

**RONNY SOMSEB**

**SECOND ACCUSED**

**High Court NLD Review Case Ref No.: 204/2012**

**Neutral citation:** *The State v Uixab* (CR 28/2012) [2012] NAHCNLD 12  
(05 December 2012)

**Coram:** LIEBENBERG J and MILLER AJ

**Delivered:** 05 December 2012

**Flynote:**

**Criminal procedure** – Review in terms of s 116(3) of Act 51 of 1977 – Trial – Accused has right to call witnesses – Such right to be considered in the circumstances of the case.

**Summary:** The two accused persons were convicted on a charge of stock theft in the magistrate's court and committed for sentence by the regional court. The regional court was of the opinion that the proceedings were not in accordance with justice in that one of the accused was refused a remand of the proceedings in order to call a witness. For that reason the conviction was set aside on review and the case remitted to the trial court for continuation of the trial. Accused was thereafter afforded more than two months to secure the presence of his witness at court, but without success. He informed the court that the witness disappeared without the accused knowing his whereabouts. There appears to be no prospects of tracing the witness within a reasonable time. The rights of co-accused are one of the factors to be taken into consideration when court considers an application for further postponement. In the circumstances of the case the accused's rights were not infringed.

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**ORDER**

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The matter is remitted to the regional court with the direction to proceed with sentence.

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**JUDGMENT**

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LIEBENBERG J (MILLER AJ concurring):

[1] This matter came before me by way of review in terms of s 116(3) of the Criminal Procedure Act 51 of 1997 for the second time and on each occasion the regional court magistrate, sitting at Tsumeb, recorded the reasons for his opinion that the proceedings are not in accordance with justice. This evolved around the trial court's refusal to grant the second accused's request for a postponement of the trial in order to afford him the opportunity to secure the presence of a witness, whom he intended calling, to give evidence on his behalf.

[2] This court on review found that in the circumstances of the case (at that stage), the second accused should be allowed to call the witness he intended calling, and after setting aside the conviction of both the accused, the appropriate order was made.

[3] Upon their subsequent appearance before the trial court on a date not apparent from the record of proceedings, the accused were duly informed of the outcome of the review proceedings. The court correctly made enquiries into the whereabouts of the witness the accused intended calling, and was informed that the person was at Arandis. He further explained that he only had a contact number of this person and up until then, he was unable to establish contact with him. It was pointed out to the second accused that he was on bail and that he was under a duty to secure the presence of his witness at court. He was further advised to travel to Arandis in order to try and find this witness, whereafter proceedings were postponed to 24 November 2011.

[4] On that day the second accused told the court that he managed to speak to his witness but that the person was in ill health and therefore could not attend court proceedings. Once again the matter was postponed and this time, to the 31<sup>st</sup> of January 2012, allowing more than two months for the witness to be called. However, when proceedings continued on that day, the

accused informed the court that he could not get hold of this person and that he *did not know where this person was residing*. The court, upon receiving this information refused any further remand of the case and after both accused were again convicted as charged, they were remitted for sentence by the regional court.

[5] It must be pointed out that the circumstances that prevailed at the time when the court refused a further remand on the last occasion, are completely different from what it was when the court refused the initial application. Not only was the second accused afforded two more occasions over a period of more than two months to secure the presence of this witness, but it turned out that he had lost track of the person, not knowing where to find him. Thus, on his own version, the chances of establishing contact with this person within a reasonable time period, are not good.

[6] However, another compelling factor was that, due to the difficulties the second accused experienced and the delay caused in attempting to bring the witness to court, all this had a detrimental impact on the right of the first accused to have the trial heard within a reasonable time. It is therefore not strange that, with their subsequent appearance before court and after the matter was remitted, the first accused objected to a further postponement stating that he was remanded in custody throughout. It is now more than two years later and the accused persons still have not been sentenced.

[7] Though mindful of the right of an accused person to call witnesses at his or her trial, this right cannot be considered in a vacuum; regard must equally be had to the circumstances of the case where the court is required to determine whether an accused person's right had been infringed when the court refuses any further postponement of the matter. The magistrate in the present instance, when considering a further remand, was entitled to take into account the period of more than two months already afforded to the accused to trace his witness and to bring him to court; furthermore, that it turned out that this person thereafter disappears without the accused knowing where to

even start looking for him and the prospects of finding him within a reasonable period of time, seemingly, not being good. Add thereto the circumstances of the first accused who was in custody throughout, opposed to the second accused who was committed to bail.

[8] After due consideration of all the facts, I am satisfied that justice was done to the second accused and that he was not entitled to a further remand of the case. Accordingly, the matter is remitted to the regional court with the direction to proceed to sentence.

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JC LIEBENBERG  
JUDGE

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PJ MILLER  
ACTING JUDGE