



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 74/2013

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

And

**LOURENS BENNIE UXAM
ANDREW KANDUME
IGENASIS UXAM**

**ACCUSED 1
ACCUSED 2
ACCUSED 3**

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 1593/2013)

Neutral citation: S v Uxam (CR 74/2013)[2013]NAHCMD 326 (8 November 2013)

CORAM: SMUTS, J et UNENGU, AJ

Delivered on: 8 November 2013

ORDER

1. The conviction and sentence in respect of accused1 are set aside.
2. The convictions and sentences in respect of accused 2 and 3 are however confirmed.

JUDGMENT

SMUTS, J.: [1] This matter has come before me by way of a special review. When preparing the record of proceedings for purpose of review under the Criminal Procedure Act, 51 of 1977, (the Act) the presiding magistrate picked up an irregularity with regard to the proceedings relating to accused 1. The presiding magistrate accordingly referred the matter for a special review and set out the circumstances which he regarded to constitute an irregularity concerning accused 1.

[2] The proceedings concerned a criminal trial in the magistrate's court for the district of Outjo in which three accused were charged with the statutory offence of stock theft. They were charged with the theft of a donkey valued at N\$900 which allegedly occurred on 5 June 2013.

[3] When the accused appeared for the purpose of plea on 17 July 2013, accused 1 indicated that he was not ready to proceed and that he wished to apply for legal aid. The presiding magistrate correctly did not require him to plead. The other two accused, namely accused 2 and 3, indicated that they would conduct their own defences and both proceeded to plead guilty after the State put the charge to them.

[4] After appropriate questions in terms of s112(1)(b) of the Act were put to accused 2 and 3, pleas of not guilty were entered in terms of s113, given the fact that both accused had not admitted who the owner of the donkey was. The matter was then remanded to 17 October 2013 for trial in respect of accused 2

and 3 and for the purpose of accused 1 to apply for legal aid (and a possible separation).

[5] On 17 October 2013 the matter however proceeded to trial in respect of all three accused without the presiding magistrate addressing the position of accused 1, by enquiring about legal aid and, if need be, separating his trial or requiring him to plead, if he did not persist with his application for legal aid.

[6] After hearing the evidence of the complainant, and affording all three accused the opportunity to cross-examine the complainant and to give evidence (with each of the accused declining to do so), the court convicted all three accused. After according all three accused their rights with regard to mitigation, the court sentenced all three accused to three years imprisonment with one year suspended.

[7] The presiding magistrate in preparing the record realised that accused 1 had not pleaded to the charge as he had indicated that he wished to apply for legal aid. Yet the trial proceeded against him and he was convicted and sentenced.

[8] The presiding magistrate correctly acknowledged that an irregularity occurred in respect of accused 1 and thus referred the proceedings by way of a special review. Accused 1 had not pleaded to the charge because he had expressed an intention to apply for legal aid. Upon resumption, this issue was not addressed. Nor was he required to plead. To have proceeded with the trial in respect of him in those circumstances clearly constitutes an irregularity.

[9] It follows that the conviction and sentence in respect of accused 1 are set aside. The convictions and sentences in respect of accused 2 and 3 are however confirmed.

DF Smuts
Judge

I agree

EP Unengu, AJ