

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

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| <b>Case Title:</b><br><i>The State v Sakeus Shafashile</i>   | CR: 29/2023<br>Oshakati: OSH-CRM-5903/2023           |
|  | <b>Division of Court:</b><br>Northern Local Division |
| <b>Heard before:</b><br>Honourable Lady Justice Salionga J et<br>Honourable Mr Justice Kessler J   | <b>Delivered on:</b><br>15 August 2023               |
| <b>Neutral citation:</b> <i>S v Shafashile</i> (CR 29/2023) [2023] NAHCNLD 84 (15 August 2023)   |  |
| <b>It is hereby ordered that:</b><br><br><ol style="list-style-type: none"><li>1. Both the conviction and sentence on count 1 are confirmed.</li><li>2. Both the conviction and sentence on count 2 are set aside.</li><li>3. In terms of section 312 of the Criminal Procedure Act 51 of 1977 the matter is remitted to the Magistrate's Court of Oshakati for the magistrate to enter a plea of not guilty in terms of section 113 of the CPA and bring this matter to its natural conclusion.</li></ol> |  |
| <b>Reasons for the order:</b>  |  |
| KESSLAU J (SALIONGA J concurring)  |  |
| [1] The matter came to this court on review in terms of Section 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA). The accused persons were charged in the Magistrates Court of Oshakati on a count of theft of stock (read with the provisions of  |  |

the Stock Theft Act 12 of 1990 as amended) and secondly a contravention of section 4 (a) (i) of the Prevention of Organised Crime Act 29 of 2004 (POCA): Disguising the unlawful origin of property by entering in an arrangement or transaction. The accused pleaded guilty to both counts and was questioned in terms of section 112(1) (b) of the CPA. Thereafter he was convicted and sentenced on both counts.

[2] The conviction and sentencing on the first count of theft of stock appears to be in accordance with justice and will thus be confirmed. The second count is what this court had an issue with and in that regard the following query was forwarded to the magistrate:

'Regarding count 2, Contravening section 4 (a)(i) of the Prevention of Organised Crime Act 29 of 2004 :Disguising unlawful origin of property, on a question by the Magistrate if it was the intention of the accused to conceal the origin of the goat, the accused answered that he just wanted to turn it into money. Was the Magistrate satisfied that the accused admitted to all the elements of money laundering in the light of the above answer given?'

[3] Chapter 3 of POCA deals in sections 4 to 11 with offences relating to money laundering. The accused *in casu* was charged under section 4: Disguising unlawful origin of property, which provides that:

' Any person who knows or ought reasonably to have known that property is or forms part of proceeds of unlawful activities and-

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with that property, whether it is performed independently or in concert with any other person,

and that agreement, arrangement, transaction or act has or is likely to have the effect-

(i) of concealing or disguising the nature, origin, source, location, disposition or movement of the property or its ownership, or any interest which anyone may have in respect of that property; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in Namibia or elsewhere-

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly,

as a result of the commission of an offence, commits the offence of money laundering’

[4] Any form of theft, or as in this case theft of stock, will qualify for a charge on the said section as ‘unlawful activity’ is defined in POCA as:

‘any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia.’

[5] The facts before the court *a quo* was that the accused, after stealing the goat as per count 1, sold it. The State alleged that he did this to conceal or disguise the origin of the stolen property by turning it into currency. The magistrate asked the correct question in that regard however, the answer given by the accused could not have satisfied him that the accused had the necessary intention to launder or conceal his deed. The magistrate in reply conceded that the particular element was not admitted. The magistrate also correctly submitted that he should have entered a plea of not guilty in terms of section 113 CPA at that stage of the proceedings for the State to prove the said allegation.

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

1. Both the conviction and sentence on count 1 are confirmed.
2. Both the conviction and sentence on count 2 are set aside.
3. In terms of section 312 of the Criminal Procedure Act 51 of 1977 the matter is remitted to the Magistrate’s Court of Oshakati for the magistrate to enter a plea of not guilty in terms of section 113 of the CPA and bring this matter to its natural conclusion.

| Judge(s) signature | Comments: |
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| KESSLAU J:         | None      |
| SALIONGA J:        | None      |