CA 93/97

STATE v K HIHANGUAPO & 1 OTHER

Hannah. J: **Mainga,** J

2000-04028

CRIMINAL PROCEDURE

Discharge of accused at close of prosecution case. Such order is appealable by

CASE NO.: CA 93/97

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE **APPELLANT**

FIRST RESPONDENT

SECOND RESPONDENT

and

KARIPO HIHANGUAPO KLEINMAN DESIE

CORAM: HANNAH, J. et **MAINGA,** J.

Heard on: 2000.04.28

Delivered on: 2000.04.28

JUDGMENT

HANNAH, J.: The two respondents appeared before the Opuwo Magistrate's

Court charged with housebreaking with intent to steal and theft. They pleaded not guilty and at the close of the State's case the magistrate ruled that no prima facie case had been made out and acquitted both. The State now appeal against their acquittal.

The evidence led by the State falls within a fairly narrow compass. Johannes Humu is employed as a driver and mechanic at the Government Garage in Opuwo. He had one key to the garage while another was kept by a person called Danger. On 4th July, 1997 Danger was on leave and Humu testified that Danger's key was in the possession of the second respondent. On that day Humu collected two tyres and inner tubes from Ruacana and in the afternoon handed them over to the second respondent who placed them in the office at the garage. The story is then taken up by Sakeus Kamatuka, a security guard employed by the Minstry of Works and Transport. At about 2 am on Saturday, 5th July, 1997 he was on patrol in Opuwo and came to the Government Garage. He found the two respondent's pulling a hydraulic jack from the garage. When asked to explain the first respondent said that he had forgotten his keys and had come to collect them. On entering the garage Kamatuka saw one tyre and inner tube. The police were then called. A third State witness was Joao Laranja. He said that at about 2 am on 5th July, 1997 he was at a certain bottle store with other people including the second respondent. The second respondent asked him if he could use his car in order to fetch some money from home and he lent his car to the second respondent. However, the second respondent did not return. At about 4 am he went to the police station to report the matter and found both his car and the second respondent who was under arrest. There was a new tyre inside the car which had not been there when he lent the car to the second respondent.

Returning to the evidence of Kamatuka, he said that he met up with Halandja at the police station and he was looking for his car. "Halandja" is obviously a misprint for "Laranja". On returning to the Government Garage he, Kamatuka, found the car behind the garage and inside it was a tyre and an inner tube. Kamatuka said that the tyre and tube belonged to the Government Garage.

In his evidence Humu said that the second respondent had the right to give permission for goods to be removed from the Government Garage. It was this piece of evidence which led the magistrate to acquit the respondents at the close of the State's case. Apparently, the magistrate was of the view that the two respondents may simply have been removing the jack, the tyre and the tube in order to use them and then return them. When it is borne in mind that the removal was taking place at 2 am on a Saturday morning this view cannot possibly have any real foundation unless, perhaps, the two respondents were able to give some explanation for such extraordinary behaviour.

Although the State's case was presented rather poorly I am of the view that a prima facie case was made out and that the magistrate erred when ruling otherwise.

Ms Verhoef, who appeared for the State before us, also submitted that the magistrate erred by not giving the prosecutor an opportunity to address him before making the ruling that no prima facie case had been made out. Clearly there is substance in this submission but in view of the conclusion I have reached on the facts of the case it is unnecessary to consider the effect of this irregularity.

Ms Verhoef was also invited by the Court to deal with the question whether the grant of a discharge to an accused is appealable. This invitation was extended to counsel because of the following statement in Commentary on the Criminal Procedure Act by Du Toit et al at 22 -30:

> "The decision as to whether to refuse or grant a discharge is a matter solely within the discretion of the presiding officer and may not be questioned on appeal."

Reference is then made to R v Lakatula and Others 1919 AD 362 and R v Afrika 1938 AD 556.

As Ms Verhoef correctly submitted these two cases do not deal with the granting of a discharge but with the refusal of a discharge. Counsel submitted that different principles apply in the case

of the former and in support of this submission referred us to Attorney - General Venda v Molepo and Others 1992(2) SACR 534(V). In that case the Court held that a decision to grant an application for the discharge of the accused at the end of the State's case in terms of section 174 of the Criminal Procedure Act, No 51 of 1977, is appealable and for the reasons given by Le Roux CJ in his judgment I respectfully agree. In fact there are at least two reported judgments of this Court where appeals were allowed where orders for discharge were wrongly made at the close of the prosecution case. See S v Van Den Berg 1995 NR 23; S v Kooper 1995 NR 80.

We have been informed by counsel that the magistrate who tried the case against the two respondents is no longer on the bench and it would therefore be a fruitless exercise to

remit the case for a continuation of the trial. The case will have to be commenced de novo.

HANNAH, J.

For the foregoing reasons the appeal is allowed, the order made in the court a quo that the two respondents are found not guilty and discharged is set aside and the case is remitted to the Magistrate's Court for the trial to commence de novo.