CASE NO.: CA 39/04

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GERT KISTING **Appellant**

and

THE STATE **Respondent**

CORAM: **PARKER, AJ**

Heard on: 31 March 2006

Delivered on: 12April 2006

JUDGMENT

PARKER, AJ.:

[1] This is an appeal from a decision of the Oshakati Regional Magistrates' Court (regional court), which convicted the appellant on five counts, namely, theft of motor vehicle, or alternatively using a motor vehicle without a *bone fide* claim of right and/or consent of the owner (Count 1); theft of goods, namely, a pistol (Count 2); theft of seven rounds of ammunition (Count 3); theft of money (N$288,210.72) (Count 4); and theft of money (N$3,851.45) (Count 5).

[2] The facts of the case found by the regional court – and most of them were common cause between the appellant and the public prosecutor at the trial – were as

follows. The appellant was an employee of Coin Security Company (Coin Security). He was entitled, subject to certain limitations, to use the company car; and his employer issued to him a company firearm and ammunition. According to Mr. Immanuel Nampala, who at the material time was a vice-Supervisor at Coin Security, the procedure was that after the appellant had closed from work for the day, he must park the company car and hand in the firearm and ammunition. On 15 May 2001, the appellant had in his possession and control money that he had collected as part of his official duties from the Coca-Cola Company and Bearers Co (or from Mwadhina Dawids). On the same day, the appellant, the company car, the pistol, the ammunition and the money disappeared. The appellant gave the following explanation (and it was the basis of part of his defence throughout the trial: according to him, he was kidnapped at gunpoint, robbed, put in the boot of a car and driven from Oshakati to Windhoek. In Windhoek, his kidnappers held him as a hostage until the Police found him.

[3] The learned regional magistrate (magistrate) did not accept the appellant's explanation for his disappearance and the disappearance of the above-named items. He rather believed what he called "The sequence of evidence of all witnesses who testified on behalf of the State, cogently linked each other."

[4] The appellant's grounds of appeal are basically that the magistrate erred: (a) when he rejected the appellant's explanation of events connected with the alleged kidnapping; (b) in accepting the evidence of the witnesses called by the State; (c) in not finding that he was not properly identified by the witnesses called by the State; and (d) for not granting him the opportunity, and facility with which, to call his witnesses.

[5] When the appeal came up for a hearing on 12 November 2004, this Court directed that counsel should first address the Court on the failure of the magistrate to give the appellant the opportunity to call witnesses. I presume the presiding Judge at the time felt that the point *in limine* he had raised *suo motu* would assist the Court in deciding the appeal without going into the merits. Mr Dos Santos, who appeared as *amicus curiae* counsel for the appellant, and Mr. Truter, a Deputy Prosecutor-General and counsel for the State, are also new to the case, but they appear to have the same thoughts respecting the purpose of the appoint *in limine*. Consequently, I will now treat the point *in limine*. Mr Dos Santos filed heads of argument. Another Deputy Prosecutor-General who passed away before the hearing of the appeal by me filed the

heads of argument on behalf of the State. Therefore, Mr Truter had to inherit, as it were, the heads of argument that his late colleague had filed.

[6] After the State had closed its case, the magistrate explained to the appellant his rights, *inter alia*, his right to testify and call witnesses. The appellant, then, informed the court that he would testify on oath and call witnesses. Upon enquiry by the magistrate, the appellant informed the regional court that he would call witnesses, some of who were State witnesses but whom, according to him, “the investigating officer left out.” I take this to mean that there were some witnesses who were on the list of witnesses to be called by the State, but whom the State did not call. I hasten to note that there was nothing amiss for the appellant expressing the desire to call State witnesses because in judicial proceedings, no one party has property in a witness. Besides, the appellant further informed the court that he was unable to pay the necessary costs and fees involved in securing the attendance of the witnesses. The appellant, therefore, requested the regional court’s assistance in this regard. The appellant particularly wanted to call a Ribbenaar, one Johnny Kaiser, a Mr Boelie Burger, someone from the Continental Hotel whose name he did know, a Pieta, the boss of Veronika, Constable Kalunga and the appellant’s wife.

[7] A provision concerning the process of securing attendance to this appeal and the circumstances of the appellant is in s. 179 (3) of the CPA. The subsection provides:

> (3) (a) Where an accused desires to have any witness subpoenaed and he satisfies the prescribed officer of the court –
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> (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.[1]

In my view, the provision in the CPA has found powerful expression in art. 12 (1) (d) and (e) of the Namibian Constitution. Paragraph (d) provides: "All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them." And paragraph (e) provides "All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice."

[8] In terms of s. 179 (3) of the CPA, the State must assist an accused, who is unable for financial reasons to secure the attendance of any witness, in securing the attendance of such witness, so long as the witness is necessary and material to the accused's defence. The constitutional provisions referred to above are also cast in peremptory terms, and the provisions are a part of those constitutional stipulations that are non-derogable.

[9] What this means is that under the CPA, so long as the requirements of necessity and materiality are satisfied, the clerk of court, in the case of a magistrate's court, has no discretion in the matter. But, in practical terms the judicial officer may investigate the situation and surrounding circumstances to determine whether the witness is

[1] Act No. 51 of 1977.

necessary and material for the accused's defence. Be that as it may, in my view, the little leeway that a court may have under the CPA has been whittled away by the peremptory and non-derogable provisions of the aforementioned paragraphs (d) and (e) of art. 12 (1) of the Namibian Constitution. The upshot of this is that an accused's right to call witnesses has been constitutionalized by the said art. 12 (1) (d) and (e). Consequently, the CPA provisions must pay obeisance to the constitutional provisions that are part of the rubric of constitutional fair trial stipulations under the Namibian Constitution.[2]

[10] From the foregoing, it is my view that a court will be stifling the accused's right that the Constitution guarantees to him or her under art. 12 (1) (d) and (e), if the court purported to decide for the accused what witnesses he or she must call. I am fortified in my view by the apt statement by Hannah, J in *Johannes Shitaleni v The State*,[3] namely, that "[I]t is not for a judicial officer to decide whether an accused should or should not call a witness."[4] If a judicial officer has the power to decide for the accused, then the provisions of art. 12 (1) (d) and (e) would be rendered futile and otiose. Of course, there may be circumstances in which an accused may forfeit his or her right to call witnesses.[5] Therefore, in order not to forfeit his or her right to call witnesses, the accused, for example, "must make some plausible showing of how their (i.e. the witnesses') testimony would have been both material and favourable to his defence."[6]

[2] See *S v Ganeb* 2001 NR 204.
[3] Case No.: CA 63/02 at p 7. (Unreported)
[4] At p 6.
[5] *S v Beahan* 1970 (3) SA 18 at 24E.
[6] *Loc. cit.*

[11] In this connection, *S v Selemana*[7] is pertinent and apposite to this appeal and the issue being examined. Franklin, J stated succinctly:

> A magistrate must be exceptionally careful when refusing to allow an accused to call a witness. In particular, when the accused is unrepresented, the magistrate, before refusing such a request, should make certain that such a witness cannot possibly give relevant evidence. If the court is not careful to observe this obligation, a miscarriage of justice may result: *S v Tembani*, 1970 (4) S.A. 395 (E).[8]

[12] I will now apply the principles discussed above to the present case. As I have stated previously, the appellant, who was unrepresented, informed the learned magistrate that he wished to call several witnesses; he identified the witness and stated the nature of their testimony. But the magistrate shot his request down with the inept reason that having heard the appellant's evidence in-chief and the evidence of the State witnesses, he was of the opinion that to call the appellant's witnesses would "be a sheer waste of the money fro (*sic*) the State, to make an order that this Ribbenaar and Kaiser and others should come to stand before this Court and give evidence when there is already evidence which this Court can consider." But, the Constitution gives the appellant the right to call witnesses in his defence, and the magistrate did not consider whether or not the evidence of the witnesses would be necessary, material and favourable to the appellant's defence. As Mr Dos Santos correctly submitted, the

[7] 1975 (4) SA 908.
[8] At 909A.

magistrate had prejudged the issue in denying the appellant his right to call witnesses.

[13] The appellant had indicated to the court that Ribbenaar and Johnny Kaiser would testify as to ”whether I went to them or they are the ones who took me.” And in a response to a question posed by the magistrate, the appellant replied that Ribbenaar was the owner of the house where he was found. Surely, the evidence of these two witnesses was supremely crucial to determining an important part of the appellant’s defence which he maintained throughout the trial, namely, that he was taken at gunpoint from Oshakati and driven to Windhoek and kept in a house against his will until he was found by the Police.

[14] Besides, the appellant informed the court, upon enquiry from the magistrate, that Mr Boelie Burger was going to give evidence about the appellant’s authority and discretion respecting his official duties at Coin Security and the use of the official company motor vehicle. The witness from the Continental Hotel, too, was to be called to testify that the appellant was not at his hotel, and he did not give anybody “false money.”

[15] It is quite clear to me that the evidence of all those witnesses whom the appellant wished to call was both material and favourable to the appellant’s defence.

[16] In my view, the above-quoted constitutional provisions in art. 12 (1) (d) and (e) are undoubtedly anchored in the “principle of elementary justice.”[9] By denying the appellant the opportunity, and the facility with which, to call the witnesses, the magistrate acted in breach of the principle of elementary justice; a *fortiori*, he acted in violation of the Namibian Constitution, especially when the appellant did make some plausible showing of how the evidence of the witnesses he wanted to call was material and favourable to his defence.

[17] Mr. Dos Santos has submitted that in the circumstances, a gross irregularity occurred in the proceedings justifying the setting aside of the conviction and sentence. Indeed, Mr. Truter made common cause with Mr. Dos Santos in respect of the submission. Mr. Truter agreed that the refusal of the magistrate to allow the appellant to call witnesses was an irregularity and it was prejudicial to the appellant’s defence. I

[9] See *District Commandant, South African Police and Another v Murray* 1924 AD 13 at 17.

agree with both counsel. In the result, I conclude that the magistrate's refusal was unfair and offensive of art. 12 (1) (d) and (e) of the Namibian Constitution, which guarantees fair trial.

[18] For the reasons given above, the proceedings in the court *a quo*, in my opinion, were tainted with gross irregularity, resulting in an unfair trial of the appellant and, therefore, unmistakably pointing to a failure of justice.

[19] Having so concluded, I do not think there is any need to examine the other grounds of appeal.

[20] That being the case, the appeal succeeds. Both the conviction and sentence are set aside.

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Parker, AJ

ON BEHALF OF THE APPELLANT: Mr A I Dos Santos

as *Amicus Curiae*

ON BEHALF OF THE STATE: **Mr J A Truter**

Instructed by: The Office of the Prosecutor-General