CASE NO.: CR 96/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

LENA AIXAS	**1st Accused**
GABRIEL WIMMERT	**2nd Accused**

HIGH COURT REVIEW CASE NO.: 3/2006

CORAM: GIBSON, J *et* PARKER, AJ

Delivered on: 2006 October 23

REVIEW JUDGMENT

PARKER, AJ.:

[1] This matter comes to this Court on automatic review. The accused persons were charged with theft of goods valued at N$8,000.00: “In that upon or about 18/10/2004 and at or near Swakopmund, Sphinx Street, H/No. 4 in the district of Swakopmund

the said accused did unlawfully and intentionally steal goods, …the property or in the lawful possession of Isabella Roger." The record of proceedings indicates that the accused persons were tried for theft of a Nokia cell phone only.

[2] The record shows that the 1st Accused tendered a plea of guilty to the charge, while the 2nd Accused pleaded not guilty. But the learned magistrate has explained in his response to my remarks to him that his recording of plea of guilty by the 1st Accused was an error because both accused persons pleaded not guilty to theft.

[3] After evidence was led, the learned magistrate convicted both accused persons not of theft but for being "found in possession of suspected stolen property, … which is an alternative charge of theft." The learned magistrate was asked by me to comment as to what legal basis upon which the two accused persons were found guilty of "an alternative charge of theft" when the record did not show that they were charged with any alternative charge. In his response, the learned magistrate admitted that the accused persons were not charged with any alternative charge. However, he contended that he convicted the accused persons for possession of suspected stolen property, which according to him, is a competent verdict. But "competent verdict" does not appear any where in the learned magistrate's judgment.

[4] In any case, with the greatest respect, possession of suspected stolen property is not an offence contemplated in s. 264 (1) (a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA). The competent verdict to theft provided in s. 264 (1) (a) of the CPA involves "the offence of receiving stolen property *knowing it to have*

been stolen. (My emphasis) The culpability requirement of the offence consists, therefore, of knowledge by the accused person that (1) he or she is receiving the goods into his or her possession, and (2) an appreciation of the fact that the goods are stolen. These are the essential elements of the crime provided in s. 264 (1) (a) of the CPA.[1]

[5] In this connection, it would seem the learned magistrate, with the greatest deference, does not appreciate that there is a difference between alternative charge and competent verdict. Sections 256 to 270 of the CPA govern verdicts of guilty to offences other than offences specifically charged.[2] Therefore, competent verdicts should be distinguished from alternative charges, which are permitted by s. 83 of the CPA. Thus, a competent verdict may be returned in respect of an offence even if the accused person has not been charged with that offence, so long as the accused person is informed that a competent verdict may be returned and what it would be.

However, as I have stated above, possession of suspected stolen property is not a competent verdict for theft in terms of s. 264 (1) (a) of the CPA.

[6] That being the case, the learned magistrate's conviction of the accused persons on the basis of "competent verdict for an alternative charge" is wrong in law and, therefore, unsatisfactory.

[7] But that is not the end of the matter. I will deal with the 1st

[1] *Rex v Patz* 1946 AD 845 at 856.
[2] See Due Toit, *et al*., *Commentary on the Criminal Procedure Act*, 1997: p 26-1.

Accused first. In her evidence, the 1st Accused testified that she knew that Mr. Matheus Haraseb, the second prosecution witness and self-confessed thief of the cell phone, who gave her the cell phone, was not employed. She also knew that Mr. Haraseb did not possess a cell phone, that is the reason, according to her, she asked him where he got the cell phone from. Mr. Haraseb did not tell her where he got the cell phone. Thus, 1st Accused had no reasonable cause to believe that the cell phone was the property of Mr. Haraseb, and despite her doubts and suspicion, she agreed to sell the cell phone for Mr. Haraseb, and was prepared to part with the cell phone after a payment of only N$150.00 when she was selling it for N$1,000.00.

[8] On the evidence, I find that the 1st Accused would not have conducted her defence differently even if she had been charged with an alternative charge under s. 7 (1) of the General Law Amendment Ordinance, 1956 (Ordinance No. 12 of 1956).

[9] I now proceed to deal with the 2nd Accused. The 2nd Accused testified that he met one Harry, who is not a friend of his, at a shebeen called Amagus, and Harry told him that someone was selling a cell phone. When the 2nd Accused met the 1st Accused, the later told the former that she did not want Harry to hear their conversation, even

though, according to him, it was Harry who introduced him to the 1st Accused. It is significant to note that the 2nd Accused did not know the 1st Accused prior to that meeting. The 2nd Accused, who is a schoolteacher, testified further that he was sceptical about buying a cell phone in the street, and so he asked the 1st Accused if the cell phone was her property. According to him, the 1st Accused told him that a "white person" gave the cell phone to her. In cross-examination, the 1st Accused put it to the 2nd Accused that she did not tell him the cell phone belonged to a "white person". She also put it to him that no documentation about the ownership of the cell phone was discussed: the only thing they discussed was the down payment of N$150.00 and payment of the balance of N$850.00 when the 2nd Accused returned to Swakopmund from his journey to Windhoek.

[10] In any case, despite being sceptical about buying the cell phone in the street, as he testified, and without having reasonable cause to believe that the cell phone was the property of the 1st Accused or that she was authorized by the owner to sell it, the 2nd Accused concluded the sale with someone who was a total stranger to him, took possession

of the cell phone and travelled to Windhoek. The 2nd Accused testified that he told his friend Bulolani that he had not bought the cell phone and that he was still expecting proof from the seller that the cell phone was not stolen property, and yet he did not call Bulolani to testify in his defence. The 1st Accused testified further that Harry told him that the 1st Accused got the cell phone from "a white person"; but he did not also call Harry to testify in his defence.

[11] On the evidence I also find that the 2nd Accused would not have conducted his defence differently even if he had been charged with an alternative charge under s. 7 (1) of Ordinance No. 12 of 1956.

[12] For the aforegoing reasons, I find that the 1st Accused could be convicted for contravening s. 7 (1) of Ordinance No. 12 of 1956 of the offence of receiving stolen property, to wit, a cell phone without having reasonable cause for believing at the time of receiving the cell phone that it was the property of Mr. Haraseb or that the owner thereof had authorized Mr. Haraseb to deal with, or dispose of, it. By a parity of reasoning, on the evidence, the 2nd Accused, too, could be convicted for contravening s. 7 (1) of Ordinance No. 12 of 1956 of the offence of acquiring stolen property, to wit, a cell phone, without

having reasonable cause for believing at the time of such acquisition that the cell phone was the property of the 1st Accused or that the 1st Accused was duly authorized by the owner of the cell phone to deal with, or to dispose of, it.

[13] From what I have said above, I am satisfied that this is a proper case where this Court can substitute an erroneous judgment of the court below with an appropriate one;[3] and in the circumstances, no prejudice would be occasioned to the accused persons. The sentence imposed by the learned magistrate was a reasonable one, which seems to me still appropriate, and so I do not intend to interfere with it.

[14] In the result the following orders are made:

(1) The conviction is set aside and the following is substituted therefor:

"Guilty for contravening s. 7 (1) of Ordinance 12 of 1956".

(2) The sentence is confirmed.

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Parker, AJ

[3] See, e.g. *S v David* 1994 NR 39.

I agree.

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Gibson, J