



CASE NO. CR 43/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

**ISAACK SEBULELO
JOSEPH COETZEE
JOSEPH GARISEB**

**1ST ACCUSED
2ND ACCUSED
3RD ACCUSED**

HIGH COURT SPECIAL REVIEW CASE NO. 1581/2009

CORAM: MULLER, J *et* SWANEPOEL, J

Delivered on: 28 September 2010

SPECIAL REVIEW JUDGMENT

SWANEPOEL, J.: [1] The record of proceedings in the abovementioned matter was forwarded in terms of section 116(3)(a) of Act 51/1977 to be placed before a judge in chambers as the regional court's magistrate was not satisfied that the proceedings were in accordance with justice in terms whereof the three accused were found guilty in

the district court of the offence of theft taking into account the provisions of the Stock Theft Act (Act no. 12 of 1990).

[2] I am in full agreement with the learned regional court magistrate that the convictions of accused no. 2 and 3 cannot stand. The high water mark of the State's case against the aforementioned two accused was that they were both found on the vehicle of accused no. 1 upon which a head of a goat and a head of a sheep and meat were found. The police testified that four other carcasses of small stock were found at the house of the father of accused no. 3, but in view of the fact that the father or any other possible eye witness was not called to confirm the aforesaid evidence, I agree with the learned regional court magistrate that such evidence was inadmissible hearsay and as such their convictions are to be set aside. This view is supported by the evidence of one Johannes Goagoseb who had testified that when accused no. 1 had slaughtered animals on a certain plot Bokpos of his employer at 4 o'clock in the morning where the heads of stock were *inter alia* buried, he was accompanied by two other persons who were not accused no. 2 and 3 before court.

[3] The reasons set out by the learned regional court magistrate for not being satisfied with the conviction of accused no. 1 is set out in his memorandum as follows:

"The only evidence on record against accused one is the evidence of constable Gaiseb to the effect that the marks of tyres found on the scene where animals were probably slaughtered were similar to the tyres found on the motor vehicle of accused one of which photos were taken and handed in at court..."

That accused one was found with one head of a goat and one head of a sheep with the alleged earmarks of the complainant and meat on his motor

vehicle and that two further heads of goats and sheep with the alleged earmarks of the complainant which were brought by Constable Mbaepi were discovered at the house of accused three's father.

Accused one did not dispute the evidence that a head of a goat and head of a sheep were found in his possession. His evidence was that the heads of a goat and sheep found in his possession were his animals. The magistrate's remarks during judgment 'that accused one did testify although he never said anything about the evidence given or the charge at hand, only testified about few issues ' was not correct.

Photos of marks made by tyres on the ground at the scene were handed in as well as photos taken of the tyres on the vehicle of accused one. The opinion of constable Gaiseb was that the marks made on the ground at the scene were similar to those of the tyres on the motor vehicle of accused one. The mere opinion of the Police Officer is not sufficient, he should have explained as to what facts he relies on to come to his conclusion.

-Unlike palm- and fingerprints which are unique, it is possible that more than one motor vehicle will have the same type of tyre or the same size and shape of tyre. The same as shoe and foot prints, it was necessary for the State to provide evidence that the tyres (sic) marks on the ground had enough unusual features and that it bears a unique resemblance to that of the tyres on the vehicle of accused one. Nothing unique was pointed out to show that the marks made on the ground were indeed made by the tyres on the motor vehicle of accused. The court could therefore not have come to the conclusion beyond reasonable doubt from the mere photos that the marks made on the ground at the scene were indeed made by the motor vehicle of accused one.

Complainant testified that his granddaughter's identification mark on her goats was a white plastic ear tag. The identification mark on the sheep of his mother was a metallic ear tag with the letters 9, S, V on it. During cross-examination of the witness by accused one whether he [complainant] is the only one having those ear tags complainant's answer was that everybody

can have those ear tags but a farmer knows your animals with your eyes. The fact is that he did not himself saw (sic) the head of the goat and the

head of the sheep discovered on the motor vehicle of accused one. His son-in-law phoned him explaining to him the ear mark, a white ear tag on the goat and the black head of a dorper sheep which he then identified as his. The photos handed in at court were not even shown to him in order for him to identify the head of the goat as his goat or the head of the sheep as the sheep of his mother.

In these circumstances the court is of the opinion that accused one's version that the head of the goat and sheep found on his motor vehicle were those of his animals is a reasonable possibility which might be substantially true."

[4] In the reasoning of the regional court's magistrate he correctly pointed out that constable George Geiseb did not explain 'as to what facts he relies on to come to his conclusions' that the marks made on the ground at the scene were similar to those of the tyres on the motor vehicle of accused 1. He was furthermore of the view that no uniqueness was pointed out to show that the marks made on the ground were indeed made by the tyres on the vehicle of accused no. 1 and that the police officer's opinion is not sufficient and that he had to explain as to what facts he relied on to come to his conclusion.

[5] In analyzing the constable's evidence it is in my view clear that a comparison was duly made between the photographs of the four separate tyres of accused no. 1's vehicle and the tracks found at the scene of the crime where the animals were slaughtered. Photos 12, 13, 14 and 15 in photo plan 2 compare with the tracks photographed and depicted in photos 15, 16, 17 and 18 of photo plan 1. Taking further into account that the evidence of constable Geiseb as well as witness De Bruyn who

testified that he had almost three years experience in “working with tyres” the uniqueness of the tyres with the tyre marks found at the scene speaks for itself. Four

different brands of tyres were found on the vehicle of accused no. 1 and four different tracks left by four tyres with different brands at the scene where the animals were slaughtered were photographed. The real evidence before court of the 8 photographs leave in my mind no doubt that it was accused no.1's vehicle which was at the scene of the crime where the animals were slaughtered.

[6] This must now be weighed up and considered against the evidence and/or statements put by accused no. 1 to the State witness that:

- (i) His vehicle was never at the scene of the crime;
- (ii) He was never at the scene of the crime.

[7] His defence is thus one of an alibi which should not be considered in isolation, but regard must be had to all the other evidence placed before court. Having further regard to accused no. 1's statements put to State witnesses and/or his evidence in defence that he had the consent of the owner of the plot where he admitted having slaughtered animals, and furthermore that he also had consent to collect firewood at times. This is in contrast with the uncontested evidence of the foreman of the plot owner Johannes Goagoseb who admitted that accused no. 1 collected wood from time to time but that it was the first time that he had slaughtered and skinned animals on the plot and that at 4 o'clock in the morning whereafter the skins of the animals were buried – something he found very strange. Accused no. 1's alibi defence is in my respectful view false and correctly rejected by the district magistrate.

Compare the remarks by the court in S v S 2007(1) 305 H.C.

[8] In view of the fact that the State only led evidence of six slaughtered small stock animals but did not call the father of accused no. 3 to testify that accused no. 1 and 3 brought four animals to his home with a 1400 bakie, I am of the view that accused no. 1 could only have been found guilty of stock theft of two small stock.

[9] In the result the following orders are made.

1. The convictions of accused no. 2 and 3 are hereby set aside.
2. The conviction of accused no. 1 stealing twenty-four small stock is hereby substituted with a conviction of stock theft of two small stock.
3. The matter is referred back to the regional court for sentence of accused no. 1 of having stolen two small stock.

SWANEPOEL, J

I agree

MULLER, J