



**CASE NO. CR 61 /2010**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

versus

**JOHANNES IVAN XAMSEB**

**ACCUSED**

HIGH COURT REVIEW CASE NO. 1679/2009

**CORAM:** VAN NIEKERK, J *et* SWANEPOEL, J

Delivered on: 30 September 2010

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**SPECIAL REVIEW JUDGMENT**

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**SWANEPOEL, J.:** [1] This matter came before me as a special review in terms of section 116(3)(a) of Act 51/77 as the then Regional Court's magistrate was not satisfied that the conviction in the district court of the abovementioned accused was in accordance with justice.

[2] The accused was originally arraigned for theft – taking into consideration the provisions of Stock Theft Act, Act no. 12 of 1990 and after conviction the matter was transferred to the regional court for sentence. It should be noted that the prosecutor in the regional court agreed with the learned regional magistrate that the matter should have been sent on special review.

[3] Although the undefended accused originally pleaded guilty to the charge and admitted that he slaughtered the sheep of the complainant, the following also appears from the questioning in terms of section 112(1)(b) of Act 51/77 (unedited):

*“Q: Can you explain to court what transpired leading to your arrest?”*

*A: I did not caught the sheep, I just returned from work and found the sheep already slaughtered and stunned.*

*Q: Who slaughtered the sheep?*

*A: I don't know, we are four on the farm.*

*Q: How many carcasses did you had?*

*A: I had one carcass but I did not steal or slaughtered it.”*

Thereafter a plea of not guilty was entered and the State proceeded with the leading of evidence.

[4] The State called two witnesses to wit the complainant who testified about a call he had received from his brother pertaining to stock. The brother however was not called to confirm the hearsay evidence of the complainant. The second witness was the police officer who had found the accused and the small boy with a bag of meat, but he

could not tell the court what meat it was. During his investigation he took the accused to the alleged scene of the crime where the accused made certain pointing outs and the witness also observed shoe prints at the scene which allegedly matched the shoe prints worn by the accused. He did not give any evidence as to the uniqueness of the prints and his evidence on this score remains merely an opinion on which the court could not rely.

Furthermore, the accused was not warned and appraised by the investigating officer of his constitutional and statutory rights to have remained silent and/or that he was not obliged to give any evidence in self incrimination. Compare in this regard *S v Malumo and Others* (2) 2007(1) NR 198 where Hoff J ruled that any evidence obtained without the necessary warnings was inadmissible.

[5] For the abovementioned reasons I agree with the learned regional court's magistrate that the conviction cannot stand and is hereby set aside.

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**SWANEPOEL, J**

I agree

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VAN NIEKERK, J