CASE NO.: CR 70/2010

"Not Reportable"

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

vs

STEFANUS GAWESEB
WALTER GONTEB
ROBERT GAEB

(HIGH COURT REVIEW CASE NO.: 579/2010)

***CORAM*:** **PARKER, J** *et* **SIBOLEKA, J**

Delivered on: 2010 October 06

REVIEW JUDGMENT

PARKER, J [1] The three accused persons were convicted in the Omaruru District Magistrates' Court on a charge of theft which takes into account the relevant provisions of the Stock Theft Act, 1990 (Act No. 12 of 1990)(as amended). The learned magistrate of the district magistrates' court committed the accused persons to the regional court,

Swakopmund, for sentencing in terms of the s. 116(1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977) (the 'CPA'). It is the opinion of the learned magistrate of the regional court that the proceedings were not in accordance with justice. In the submission to this Court the learned magistrate of the regional court has attached her reasons for her opinion. I gave instructions that in the interest of fairness the opinion of the learned magistrate of the regional court should be submitted to the learned trial magistrate for his comments in virtue of the former's opinion. In response, the learned magistrate sent to this Court his reasons for so convicting the three accused persons.

[2] One major plank in the opinion of the learned magistrate of the regional court is that on the State's evidence the trial magistrate should have afforded the unrepresented accused persons the opportunity to apply for an acquittal in terms of s. 174 of the CPA. I do not think the learned district court magistrate's failure to do so is such a gross irregularity that it can, without more, constitute failure of justice. Whether that should be such a result depends upon the circumstances of each case. In the instant case, there is a multiplicity of accused persons. In *State v Naftalie Kondja and Others* Case No. CC 04/2006 (Unreported) at p. 8, after reviewing the authorities, I stated about s. 174 applications thus:

> ... there must, at the close of the State case sufficient evidence upon which the accused might be convicted, without the State hoping to rely on some self-incriminating evidence that might fall in the way of the prosecution at some latter stage of the proceedings. But, and I respectfully agree with Nugent, AJA,

> '[T]he same considerations do not necessarily arise, however, where the prosecution's case against one accused might be supplemented by the evidence of a co-accused. The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial (Skeen (supra at 293)) that need not always be the case.
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> Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice.'

[3] Accordingly, I do not think the learned district magistrate's failure, as aforesaid, constitutes failure of justice. But that is not the end of the matter. Did the State prove the guilt of each accused person beyond reasonable doubt? The regional court magistrate is of the view that the State did not; the trial district magistrate takes the opposite view.

[4] In this regard, I do not accept the view of the regional court magistrate that the State did not prove beyond reasonable doubt that the piece of skin of the head of a donkey found in accused 2's house was that of the donkey that was stolen from the complainant. There is sufficient evidence tending to prove that the complainant identified that piece of skin to be from the carcass meat of her donkey that had been stolen; and she did so immediately she was shown the carcass meat by

the Police in the presence of police officer Gilbert Sanyendo (S.W.5). Sanyendo corroborated the complainant's evidence in that regard. The learned regional magistrate takes issue with the fact that the complainant did not point to any 'other distinguishing marks'. Granted; the complainant did not: she explained that the ears of the carcass had been cut off. There is no doubt in my mind that that was done to conceal the identity of the donkey. In any case, this cannot throw any doubt on the fact, as I have found, that the complainant sufficiently identified the carcass meat as that of her stolen donkey. Accused 3's testimony that the donkey he had slaughtered belonged to him as he had been given the donkey by his late uncle. That may be so, but the evidence is uncontradicted that that donkey's colour was greyish. From all this it follows that accused 3's testimony cannot be possibly true; it is rejected as false.

[5] The only remaining question that remains to be decided is this. Does the totality of the evidence account for the finding of guilt of all three accused persons? In my view it does. Shivute J (as he then was) cited with approval in *Mashale Paulus Malapane v State* Case No. CA 58/2001 (Unreported) at pp 9 – 10 the principle of law enunciated in *S v Van der Meyden* 1999 (1) SACR 447 at 449J–450A-B (and approved by the Supreme Court of Appeal in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101D-E) that the conclusion which is reached as to whether it be to convict or acquit must account for all the evidence: 'Some of it might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored'.

[6] *In casu*, having applied my mind to the totality of the evidence, and ignoring none of the evidence, I come to the inexorable conclusion that the guilt of all three accused persons has been accounted for. What is more, in *S v Simon* 2007 (2) NR 500 at 512B-D this Court cited with approval Denning J's (as he then was) explanation of the well-tested principle that 'proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt (*Miller v Minister of Pensions* [1947] 2 All ER 372 (KB) at 373)'. Thus, on the totality of the evidence, I find, as the learned trial district magistrate also found, that the State succeeded in proving the guilt of all three accused persons beyond reasonable doubt.

[7] In the result, I make the following order:

(1) The conviction of accused 1, accused 2 and accused 3 is confirmed; and the record is sent back to the regional court to enable that court to summon all three accused persons in order to sentence them accordingly.

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PARKER, J

I agree

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SIBOLEKA, J