



**CASE NO.: CR 22/2010**

**IN THE HIGH COURT OF NAMIBIA  
HELD AT OSHAKATI**

In the matter between:

**THE STATE**

**and**

**IMMANUEL NGHITOTELWA AND ANOTHER**

*(HIGH COURT REVIEW CASE NO.: 52/2010)*

**CORAM:** LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: October 06, 2010.

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**REVIEW JUDGMENT – SECTION 116 (3) ACT 51 OF 1977**

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**LIEBENBERG, J.:** [1] The three accused were arraigned in the Magistrate's Court, Eenhana on a charge of stock theft, read with the provisions of the Stock Theft Act, 1990 (Act No. 12 of 1990), as amended. The accused pleaded not guilty and conducted their own defence. At the end of the State case accused no. 2 was discharged in terms of s 174 of the Criminal Procedure Act, 1977 (Act 51 of 1977)

("the Act"). Accused no's 1 and 3 were convicted whereafter they were committed for sentence by the Regional Court in terms of s 116 of the Act.

[2] When the case came before the Regional Court it was discovered that the record of the proceedings in the Magistrate's Court could not be transcribed, as the envelope containing the tape recordings went missing when sent to Windhoek for transcription. Fortunately, the notes kept by the presiding magistrate were still available; from which a fairly complete record could be reconstructed. The reconstructed record is the notes kept by the magistrate in summary form. This record was then handed to the accused persons, who reduced their submissions to writing and which form part of the record of the proceedings. No objections were raised by either of the accused against the correctness of the reconstructed record, and each merely amplified his defence.

[3] I pause here to observe that in this case it would have sufficed to merely substitute the missing record with the magistrate's notes, without summarising the evidence as the magistrate did. In some respects the summary does not correspond with what had been recorded in the notes; to which I shall return later herein. For purposes of reviewing the trial proceedings, I consider the magistrate's notes to be sufficient to substitute the missing record of proceedings; as these appear to be complete and *prima facie* (correctly) reflect the evidence presented at the trial. Thus, where there is a difference between the notes and the magistrate's summary (the latter constituting a "reconstructed record"), preference will be given to the notes.

[4] The Regional Court magistrate, after perusing the reconstructed record and for the reasons set out in his accompanying letter, was not satisfied that the trial proceedings were in accordance with justice, and had therefore sent the matter on review in terms of s 116 (3) of the Act. He is of the view that on the evidence, the State did not prove that one heifer, which the accused allegedly stole, did *not* belong to accused no.3 as he claims; that accused no.3 is not linked to the alleged theft of one ox; that from the record it is not clear whether the accused were convicted of stealing the heifer *and* the ox or only the heifer; and, that the right to cross-examine was not explained to the unrepresented accused, resulting in an irregularity.

[5] The observations made by the learned magistrate are factually correct.

[6] It is common cause that the complainant, Martin Kalondo, who is also a headman, had stray cattle among his own herd for some years. Prior to that, some cattle belonging to accused no.3 went missing, amongst them, a heifer. Whilst in search of his cattle accused no.3 came to the complainant and after giving a description of his missing heifer, the complainant handed him a heifer in calf, matching the description. Accused no.3 then requested accused no.1 to drive the heifer to the cattle post of one Mudjanima whilst he continued searching for the rest of his missing cattle. Accused no.1 instead sold the heifer to Salmon Nghiishililwa without the knowledge or permission of accused no.3, who only heard about it at the time of his arrest.

[7] According to Thomas Weyulu accused no.1 brought one ox and a cow with a calf into his kraal during July 2007 and which led to his arrest. I pause here to remark that in the reconstructed record the magistrate confused the facts by stating that it was accused no.3 who had brought the cattle into Weyulu's kraal and committed a misdirection by finding that accused no.3 did not challenge that evidence. According to the witness accused no.1 admitted to the police that he had taken (stolen) an ox and a heifer after accused no.2 had told him that these were stray cattle; that he had sold the heifer and that the ox was in the field of one Ndafelani. These animals turned out to be stray animals kept by headman Kalondo; and the heifer, being the same one collected by accused no.3 earlier. There is no evidence explaining how the ox ended up with accused no.1 and therefore no evidence linking accused no.3 to the alleged theft of an ox. Accused no.1 denied his involvement in stealing the ox.

[8] Regarding the charge on which both accused stand convicted, the record is ambiguous and contradicting. I have earlier alluded to the fact that the reconstructed record, in some respects, differs from the handwritten notes of the magistrate, particularly where it refers to the charge on which the accused were convicted. For example, the following appears at p 27 of the handwritten notes reflecting the court's *ex tempore* judgment:

“Ct: The state prove the allegations against both accused – theft of one heifer. Judgment accused 1 and 3 guilty as charged.” (My emphasis)

On the charge sheet it was indicated that accused no’s 1 and 3 were “*guilty as charged*”; whilst the following appears in the summary (the reconstructed record) at p 6:

“The court is satisfied that the state prove that accused 1-3 did steal the cattle in issued from Mr. Kalondo. Accused 1-3 are guilty of the theft of one heifer, one ox valid N\$6500-00.” (sic)

[9] The accused were charged with theft of “2 cattles i.e. 1 cow and 1 ox valued at N\$6500-00.” (sic) The ox in question was also a stray animal which was among the cattle of Kalondo, but which on its own, had earlier joined the cattle of one Kombanda Jason. The witness Kalondo did not explain when and how this came to his attention and if he was responsible (as headman) to take care of stray cattle found in the area; and why he failed to bring the said ox back to his place when he realised that it had wandered off to another herd? Be that as it may, there is no evidence that links accused no.3 with the alleged stolen ox; whilst there is some doubt as to the identification of an ox later found at Weyulu’s place as being the same one allegedly stolen from Kalondo. That would be consistent with the court’s finding in its *ex tempore* judgment that the accused are guilty of theft of *one heifer* (only). The judgment in the summarised (reconstructed) version does not reflect this fact and tends to show that both accused were convicted of theft of one heifer and an ox. As stated, precedence must be given to the original handwritten notes; according to which both the accused were *only* convicted of theft of the heifer, despite the record reading “as charged”.

[10] On the evidence adduced in the court *a quo* the State did not prove that the heifer, sold by accused no.1, was stolen. On the contrary, it was shown to have been the property of accused no.3, which he retrieved from headman Kalondo’s kraal. Thus, no crime was committed and the accused could not have been convicted of theft of the heifer. The trial court clearly misdirected itself in its evaluation of the evidence and the conviction of both accused cannot be permitted to stand.

[11] In the result, the Court makes the following order:

1. The convictions of accused no's 1 and 3 are hereby set aside.
2. The matter is remitted to the Regional Court with the direction to discharge the accused persons.

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**LIEBENBERG, J**

I concur.

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**TOMMASI, J**