CASE NO.: CR 11/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

FLOYD KAHEVITA

(HIGH COURT REVIEW CASE NO.: 481/2011)

CORAM: DAMASEB, JP *et* LIEBENBERG, J.

Delivered on: 14th February 2011

REVIEW JUDGMENT - SECTION 116 (3) ACT 51 OF 1977

LIEBENBERG, J.: [1] The accused appeared in the Magistrate's Court, Gobabis on a charge of stock theft, read with the provisions of the Stock Theft Act, 1990 (Act 12 of 1990), as amended. After evidence was led, he was convicted of theft of two head of cattle, and then committed for sentence in the Regional Court in terms of s 116 (1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), ('the Act'). [2] When the matter was brought before the Regional Court magistrate he was of the opinion that the proceedings were not in accordance with justice; and after recording the reasons for his opinion, referred the matter for review in terms of s 116 (3) of the Act. The reasons advanced by the learned magistrate are two-fold: (i) That the trial magistrate's refusal to grant a postponement to the unrepresented accused to

secure legal representation was irregular; and (ii) the evidence does not sustain a conviction of theft of two head of cattle on the basis of, lack of identity of the animals in question.

[3] On his first appearance in court on 10 September 2007 the magistrate explained to the accused his right to legal representation; whereafter he informed the court that he would instruct a legal representative of his choice. The accused was admitted to bail in the amount of N$2 500, and after it was paid, he was released. The case was thereafter postponed several times; mostly for 'plea' and 'further investigation'. On two occasions the accused failed to attend court, which eventually resulted in him forfeiting his bail monies and he was thereafter ordered in custody. I pause here to observe that the procedure adopted by the magistrate during an enquiry held into the absence of the accused from court, falls far short from the provisions of s 67 of the Act. Suffice it to say that the manner in which the enquiry was conducted represents a most unsatisfactory and disturbing state of affairs; which is not in the interest of the administration of justice.

[4] When the case was postponed on 16 September to 16 December 2009 for plea and trial, the accused was remanded in custody and admitted to bail in the amount of N$3 500. He was not in the position to raise the bail money. The court did not at this stage enquire from the accused whether his legal representation was in place and ready, as it was clear that the case would then go on trial.

[5] With the commencement of proceedings on 16 December 2009 the accused was still in custody and without legal representation. Despite him having informed the court on his first appearance in 2007 that he "needs a legal representative of his own choice", the accused was asked to plead without the court first establishing what the position was regarding legal representation. When the accused then pointed out to the magistrate that he had instructed a lawyer to represent him, the court persisted in its stance that the accused should *first* indicate whether he was willing to disclose the basis of his defence in terms of s 115, *before* the issue of legal representation would be entertained. As the magistrate had put it: *"Then I can hear*

him at a later stage". The accused thereafter disclosed his defence and added that, up until then, he was unaware of the progress the police had made with their investigation concerning the number of cattle stolen, and retrieved.

[6] This clearly suggests that the content of the police docket was not disclosed to the accused before the trial had started. It is not only legal practitioners, representing accused persons in criminal cases, who have the right to disclosure of witness statements and other documents the State intends relying on during the trial, but also the unrepresented accused. They are equally entitled to disclosure of all witness statements and other documents relied on by the State at the trial; and where the accused is unsophisticated and unaware of such right, the court should explain it to the unrepresented accused, and when necessary, make an appropriate order, compelling the State to comply. In the present case it is clear that the accused, at the commencement of the trial, was not put in the position where he knew what case he had to face, so that he could properly prepare his defence or give proper and full instructions to his legal representative **(S** *v Nassar* 1994 NR 233 (HC)). He therefore could not be said to be ready for trial - least, to conduct his own defence.

[7] Regarding legal representation, the accused informed the court that he had contacted Mr. Maske, a legal practitioner from Gobabis, and that the lawyer was put in funds earlier that day. Also, that his attorney told him that he would contact the State prosecutor to inform him accordingly. The accused then wanted to know from the prosecutor whether he was contacted by his lawyer, or not. I find it strange that the prosecutor, by then, had not already informed the court *mero motu* that he was indeed contacted by Mr. Maske earlier that day; and that he failed to narrate to the court the nature of these discussions, as it was obviously about the accused's trial that were to commence later that day. It was only when opposing the accused's application for an adjournment in order to bring his lawyer to court, that the prosecutor - quite reluctantly it seems - informed the court, that during his discussions with the accused's

attorney that morning, he had told the attorney that the case was already registered in 2007; that the State witnesses were present and that "we are proceeding"; to which Mr. Maske then indicated that he 'understood'. Also, that he had only been 'engaged' the previous day.

[8] In what purports to be a ruling of the court on the application, the magistrate made some incoherent remarks as regards 'a speedy trial' as envisaged in the Constitution. I assume reference was made to Article 12 (1)(b), which requires that a trial should take place within a reasonable time. The court then reminded the accused that when the case was postponed for trial three months earlier, *"(h)e was quiet when he was told that the State is going to lead evidence on the 16th of December. He never informed the State that he is struggling to get a lawyer before Court. So, the lawyer communicated with, he understood, according to the State he understood and he said he was only instructed yesterday and he did not negotiate for anything else and the witnesses are here, so the matter will proceed."* (Emphasis provided) It must be said that the accused was not told in so many words that the State would be leading evidence on that date - neither was it said on previous occasions when the case was also set down for trial.

[9] It seems clear that by the time Mr. Maske had spoken to the prosecutor over the phone about the accused's case that morning, he was already put in funds and had *accepted* the instruction. That is also evident from the fact that he had told the accused earlier that he would contact the prosecutor, which he in fact did. It was not conveyed to him by his lawyer that the latter would not be able to attend court that day, for whatever reason; and as he had instructed his lawyer as such, he was *entitled* to have his legal representative present. If Mr. Maske decided otherwise afterwards, for reasons only known to him, then the accused should have been informed immediately in order to afford him the opportunity to make alternative arrangements. This clearly was not the case, as the accused had to hear in court, about the non-appearance of his counsel. Not surprising, he sought the court's indulgence to contact Mr. Maske personally, in order to enquire from him as to his failure to attend the proceedings. It

should be borne in mind that the accused did not apply to the court to have the matter postponed to another date, but only to have the matter stood down to enable him to contact his lawyer, who was in the same town.

[10] In terms of s 168 of the Act the court may adjourn proceedings to any date. The section reads:

> *"A court before which criminal proceedings are pending, may from time to time during such proceedings, if the court deems it necessary or expedient, adjourn the proceedings to any date on the terms which the court may seem proper and which are not inconsistent with any provision of this Act."*

The decision to adjourn proceedings or not, is in the discretion of the court and if the discretion has been exercised in a judicial manner, then a court of appeal will be reluctant to interfere, even if it may have come to a different conclusion *(R v Zackey* 1945 AD 505).

[11] The right of an accused person to be legally represented at his/her trial has long been recognised in our law and that right was given statutory force by s 73 (2) of the Act, which provides that:

> *"An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question."*

Therefore, it has almost become common practice in the courts that an adjournment will normally be allowed to enable an accused to secure legal representation, and I associate myself with the remarks made by Samela, J (Motala, J concurring), in *S v Owies,* 2009 (2)

SACR 107 (C) where the following was said regarding legal representation, at 108 para [8]:

> *"[8] It can be stated that the exercise of a right to legal representation is of critical importance in any trial as it is the only source through which the other rights can be effectively exercised. ..... Judicial officers are encouraged to go an 'extra mile' where accused are facing serious charges, to encourage them to opt for legal representation rather than defend themselves. (See S v Nkondo 2000 (1) SACR 358 (W) at 360b - e; and S v Manale 2000 (2) SACR 666 (NC) at 669g - 670a.)"* (Emphasis provided) It serves no purpose encouraging accused persons to opt for legal representation, simply to afterwards deny them that right without good reason.
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> The courts have always displayed a higher degree of tolerance when it comes to accused persons' right to legal representation; more so after the enactment of the Constitution, as Article 12 (1)(e) provides:
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> > *"All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice."* (Emphasis provided)

Although the right to choose a legal representative is a fundamental right, enshrined in the Constitution and one to be zealously protected by the courts, it is not an absolute right, and is subject to reasonable limitations. The accused's right to choose a specific legal representative presupposes that the accused is in the position to make the necessary financial or other arrangements for engaging the services of the chosen lawyer; and that such person is available to perform the mandate, having due regard to the court's organisation. By choosing any particular legal representative, the accused cannot simply ignore all other considerations. Hence, the availability and convenience of counsel is not an overriding factor *(Centirugo AG v Firestone (SA) Ltd* 1969 (3) SA 318 (T); *S v Halgryn* 2002 (2) SACR 211 (SCA) at 215h - 216c para

[11]).

[12] The court, as the common law has always required, has a clear duty to ensure that an accused person is afforded a fair trial; irrespective whether the accused is legally represented or not. When faced with an application to have proceedings adjourned, the court must consider the conflicting interests of the State and the accused in the particular case, against the background of affording the accused a fair trial. The nature of these interests will obviously differ from one case to the next, but the principle stays the same ie that the court has to consider *all* the facts and circumstances pertaining to the matter; and by exercising its judicial discretion, dispense fair justice. In its assessment, the court should not underestimate the importance of legal representation - which includes a representative of the accused's choice. Among the factors that need to be taken into consideration is the gravity of the charge; the severity of the sentence, should the accused be convicted; and the complexity of the case. On the other hand, the remissness or otherwise of the accused in failing to arrange for legal representation in good time, is also a factor to be taken into account.

[13] Stock theft, in this jurisdiction, has always been considered to be a serious crime and one which would normally attract severe punishment - more so, since the enactment of the Stock Theft Amendment Act, 2004 (Act 19 of 2004), which, depending on the value of the stolen stock, prescribes minimum sentences of not less than two and twenty years imprisonment, respectively. In this case, the accused was charged with theft of stock valued at N$35 000, and upon conviction, would undoubtedly have fallen in the latter category. Dealing with cases of stock theft, the identity of the stock alleged to have been stolen is usually in dispute, as it determines ownership. In this case the accused, from the outset, claimed ownership of the alleged stolen cattle; and it was obvious that the identification of the cattle would be a crucial issue during the trial. In the field of evidence, experience has shown that proof of identity is more often than not, found to be a complex issue; and one which the courts normally

approach with the necessary caution, when relying on such evidence in order to convict. The present case turned out to be an excellent example where the court convicted on contradicting and unreliable evidence, as regards the identification of the cattle alleged to have been stolen. Thus, when the court considered the application, it ought to have realised that an unrepresented accused would most probable find it difficult during the trial to meet the challenges he was facing.

[14] From the excerpt of the proceedings quoted above, it is obvious that the accused's failure to secure legal representation in good time, was given considerable weight by the magistrate when considering the application. In fact, it appears to have been the *only* consideration as there is nothing on record showing that the interests of the accused were also considered. What should have counted in favour of the accused, namely, that he had already instructed a legal representative to appear on his behalf, but who failed to turn up at court, was now used against him ie that his attorney *understood* (that the trial would proceed without the accused being represented). What was there to understand other than being under a *duty* to at least appear in court on behalf of the accused *as instructed?* I assume the magistrate interpreted the attorney's answer (as conveyed through the prosecutor) to mean that he would not oppose the State's request that the trial should proceed that same day. Clearly, that was contrary to what the accused intended and outside the ambit of the instruction. When his legal representative failed to turn up at court, the accused had no other option than to ask that the matter be stood down, so that he could get clarity from his attorney. The conclusion reached by the court was without first hearing the attorney regarding his instructions from the accused; and without him explaining his absence from court. If the facts presented to the court were to be correct, the accused's attorney, after having been informed that the State would oppose an application for postponement, was under a duty to at least bring an application for an adjournment in order to prepare for the trial; irrespective of the prosecution's view. After all, the final decision did not lie with the prosecutor, who was merely a party to the proceedings, but with the court. The fact that an adjournment, if granted, would interfere with the smooth administration of

justice, is a factor carrying less weight. Although the State witnesses were in attendance, they were all residing within the jurisdictional boundaries of the court and most probably would not have experienced too much difficulty in returning to court at a later stage.

[15] In *S v Seheri en Andere,* 1964 (1) SA 29 (AD) a similar situation as what the accused was facing in the present case, arose when the appellants' lawyer and advocate, instructed to represent them, failed to turn up at court on the day of the trial. The prosecutor in that case informed the presiding judge that he had earlier contacted the appellants' counsel at their request, and that the lawyer had said that, because he did not receive a copy of the Preliminary Examination proceedings on time, he was unable to brief the advocate, hence his non-appearance. What was not conveyed to the presiding judge was that the appellants had already put the lawyer in funds and that promises were made to the appellants that counsel would pitch at court. Appellants' application for a postponement was dismissed and the trial commenced. On appeal the conviction was set aside and the Court held:

> *"The general rule that an accused is bound by what is done by his legal representative, only applies with reference to the case where the legal representative appears at, or perhaps in connection with, a trial on behalf of the accused in the execution of his mandate, and not with reference to a case where the legal representative remains in default in executing his mandate, and thus does not appear at all on behalf of the accused. The accused cannot, merely on the ground of his attorney's negligent failure to carry out his mandate, be denied the opportunity of having legal representation at the trial."* (Head note - judgment is written in the Afrikaans language).

I fully endorse the sentiments expressed by the learned judge and find it equally applicable to the present facts.

[16] The inference drawn by the trial court, that the accused was solely to blame for being before court unrepresented, was clearly not justified in the absence of further clarification; and the court, in exercising its discretion to proceed with the trial, had clearly misdirected itself in this respect. And, were it not for this, the court would no doubt have felt that the accused's right to legal representation and the requirements of a fair trial, outweigh the obvious inconvenience and delay caused by a postponement of the case. In the light of the seriousness of the charge and the consequences of a possible conviction and the prescribed minimum sentences, this undoubtedly would be disastrous for the accused. The accused's request, asking time in order to enable him to contact his legal representative, in the circumstances, was reasonable and should never have been refused. The magistrate clearly misdirected herself, which materially influenced her in exercising her discretion, resulting in an irregularity.

[17] If the trial court fails to exercise its discretion judicially - that is to say capriciously or in accordance with wrong principles or not on material grounds - then a Court of Appeal will interfere with its decision. In this regard prejudice to an unrepresented accused, flowing from the refusal of a postponement, is sometimes virtually presumed where the effect of the refusal is to deprive the accused of legal representation. However, if a misdirection on the part of a presiding officer is found to be an irregularity, it does not *per se* result in an unfair trial, necessitating the setting aside of the conviction. In addition, it must be shown that the conviction has been tainted by the irregularity ie that the accused suffered prejudice. See *Hlantlalala and Others v Dyantyi NO and Another* 1999 (2) SACR 541 (SCA) at 545f-h.

[18] Whether or not prejudice has resulted from the lack of legal representation, is really a question that can be determined only by having regard to the whole trial - the way in which it was conducted; the ability (as shown during the course of the trial) of the accused to represent himself adequately; and whether the evidence adduced has led justifiably to the conviction

and sentence.

[19] In the present case the magistrate, during the course of the trial, explained to the accused his rights (as she was required to do) and assisted him to some extent to clarify certain questions that were unclear to him. Other than that, he was very much on his own. This notwithstanding, the accused effectively cross-examined the State's witnesses and has clearly shown that these witnesses gave contradicting evidence regarding the identity of the stock in question. However, whether it can be said that the accused represented himself adequately, is doubtful. Had the accused been legally represented disclosure, in all probability, would have been made and the legal representative would have had the benefit of comparing the evidence given by the witnesses in court, to their statements made to the police. Where there had been any deviation, then the cross-examination, most probability, would have been more comprehensive and intensive. In fact, had disclosure been made to the accused, as the State was supposed to do, then the cross-examination of the accused may equally have been more effective, than what it actually was. Furthermore, on the poor quality of the evidence pertaining to the identification of the stolen cattle, the court, at the close of the State case, *mero motu*, ought to have invited the accused to make application for his acquittal in terms of s 174 of the Act. There can be little doubt that such application would have been made to the court, had the accused been legally represented; and if refused, then the accused certainly would have been advised to give evidence and call witnesses to corroborate his claim of ownership. In view thereof, the question that must be answered, is whether the accused received a fair trial. In my opinion the answer is plainly in the negative and the conviction accordingly must be set aside.

[20] For the conclusion reached herein, I do not deem it necessary to deal with the second complaint raised by the Regional Court magistrate ie that the facts do not sustain a conviction. Suffice it to say, that the evidence adduced pertaining to the identification of the cattle on their brand- and earmarks, is unreliable to the extent that it should cast doubt in the mind of the trier of fact.

[21] In the result, the conviction is set aside.

LIEBENBERG, J

I concur

DAMASEB, JP