



CASE NO.: CR 84/2011

“Not Reportable”

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

VS

TURIPURA KUHANGA

(HIGH COURT REVIEW CASE NO.: 1648/2011)

CORAM: PARKER, J et, NDAUENDAPO, J

Delivered on: 2011 September 22

REVIEW JUDGMENT

PARKER J [1] The accused (accused 2 in the trial court) was charged before the Gobabis Magistrate’s Court on two counts of theft of stock: count 1 – four head of cattle (valued at N\$12,000.00); count 2 – two horses (valued at N\$2,500.00). The theft of stock takes into account the Stock Theft Act, 1990 (Act No. 12 of 1990), as amended (‘the Act’). The accused pleaded not guilty; he was tried and convicted. The evidence shows that the value of each cattle accepted by

the trial magistrate is N\$3,000.00; and I have no good reason to fault the learned magistrate's factual finding.

[2] The trial court committed the accused for sentencing by the Regional Court, Gobabis, in terms of s. 116 (1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (CPA). The learned Regional Magistrate was of the opinion that the proceedings in the trial court were not in accordance with justice. He, therefore, declined to sentence the accused and lay the record of the proceedings, together with the reasons for his opinion, before this Court in terms of s. 116 (3) of the CPA for special review of the proceedings. Since the learned magistrate of the trial court had given reasons in his judgment for convicting, I did not see the need to seek any more reasons from him.

[3] In considering the special review, I have taken account of the record of proceedings in the trial court, including the learned magistrate's judgment and the reasons for the Regional Magistrate's opinion.

[4] The factual finding made by the learned trial magistrate was that the accused was found in possession of three head of cattle. From this fact, the learned trial magistrate made the inference that the accused also stole the fourth cattle and the two horses. I find that the inference drawn is not consistent with the proved fact, that is to say, the inference drawn by the learned trial magistrate cannot exclude every reasonable inference. Thus, upon the authority of *R v Blom* 1929 AD 88, I find that from this lone proved fact of the accused being found in possession of three head of cattle, the inference drawn by the learned trial magistrate cannot be said to be reasonable.

[5] Accordingly, I find that the conviction of the accused on count 2 is unsafe and unsatisfactory and so it cannot stand. But the conviction on count 1 cannot be faulted, bar the number of stock involved in the crime. Since 'cattle' is a countable noun, I do not think it is wrong and unreasonable to say that on the facts the accused could be found guilty of three, instead of, four head of cattle as appears in the charge sheet. I am aware that the charge sheet charges in count 1 the theft of four head of cattle. In this regard, it has been said that substitution of one offence for another would be permissible as an amendment, provided that there was no possibility that the accused would be prejudiced thereby (Du Toit, *et al*, *Commentary of the Criminal Procedure Act, 1977* (Act No. 51 of 1977: p. 14-23, and the cases there cited). Thus, subject to the overriding qualification of potential prejudice, a charge should preferably be endorsed rather than be declared invalid. This avoids a new trial with its accompanying waste of time and money without the accused being prejudiced in any way (Du Toit *et al*, *ibid*, pp. 14-9, 14-21 and the cases there cited). Altering four head of cattle (count 1) to three head of cattle (count 1) only is, on the authorities, a permissible amendment because the latter charge (i.e. theft of three head of cattle) would not prejudice the accused as the latter charge is not more serious than the substituted ones (i.e. theft of four head of cattle) (Du Toit, *et al*, *ibid*, p. 14-23, and the cases there cited). Indeed, the latter (i.e. three head of cattle (count 1)) favours the accused in every respect.

[6] For all the foregoing, I do not see any good reason why this Court, *qua* review court, is not competent to amend the charge sheet and endorse the charge in count 1 to read theft of three head of cattle (Du Toit, *et al*, *ibid*, p14-24, and the cases there cited). Accordingly, I make the following order:

- (1) The charge in count 1 is amended to read:
'theft of three head of cattle (valued at N\$9,000.00'.
- (2) The conviction of the accused on count 1, as amended, is confirmed.
- (3) The conviction of the accused on count 2 is set aside.
- (4) The record is sent back to the Regional Magistrate's Court, Gobabis, to enable the learned Regional Court Magistrate to summon the accused and sentence him accordingly as respects count 1, as amended.

PARKER, J

I agree.

NDAUENDAPO, J