



CASE NO.: CR 40/2012

IN THE HIGH COURT OF NAMIBIA

HELD IN WINDHOEK

In the matter between:

THE STATE

and

KAMBOLE ROBERT MULALEHI

(HIGH COURT REVIEW CASE NO.: 1979/2011)

(RUNDU R/C NO.: 02/2011)

CORAM: PARKER, J et SHIVUTE, J

Delivered on: 2012 June 04

REVIEW JUDGMENT

SHIVUTE, J: [1] This matter was referred to me for special review in terms of section 116 of the Criminal Procedure Act.

[2] The accused was charged in the Magistrate's Court with the offence of theft read with the provisions of the stock theft Act, Act 12 of 1990 as amended and convicted of theft of stock valued at N\$1500.00. The matter was transferred to the Divisional Court for sentencing.

[3] After the Regional Magistrate perused the record he was not satisfied that the state had proved its case beyond reasonable doubt against the accused because the verdict of guilty was not supported by the evidence and he requested the conviction to be set aside.

[4] The learned Divisional magistrate gave the following reasons for his conclusion.

4.1 The accused was charged with the theft of two (2) cattle valued at N\$4500.00. At the end of the trial the accused was "found guilty of theft of stock valued at N\$1500.00..."

4.2 It is not clear to me how the guilty verdict was arrived at. In my view the conviction is not supported by the evidence and should be set aside.

4.3 According to the evidence of Bossman Sikute Wakunyi the complainant, five of his cattle went missing. He subsequently recovered three (3) cattle. The accused had allegedly offered one live animal for sale and slaughtered the other according to the information the complainant had

gathered. The meat from the slaughtered animal has been sold to various people in the village including Sheki.

4.4 When convicting the accused I am uncertain as to which “stock” the magistrate had in mind in terms of the definition in the Stock Theft Act. There is no proper identification of the stock either numerically or descriptively before a value is placed on the stock. Assuming that the value of N\$1500.00 placed on the stock by the magistrate pertains solely to the animal that was allegedly sold in the village, then obviously the second animal remains unaccounted for. It cannot be said with such a paucity of evidence that the state had managed to prove its case beyond a reasonable doubt.

4.5 Neither the alleged potential buyer of one of the live animals Raphael Kachana nor the alleged purchaser of some of the meat from the allegedly slaughtered beast Sheki Nagara were called as witnesses to verify and corroborate the assertion made by the complainant. It would appear as if the conviction was based principally on the “confession” or “admission” allegedly made by the accused as well as inadmissible hearsay evidence from amongst others the late Kapungi and the late Chief.

- 4.6 There is no proof on the record that the provisions of either section 217 (confession) or section 219 A (admissions) of the Criminal Procedure Act were complied with before the relevant evidence was admitted. In particular it was critical to establish whether or not the confession or admission has been voluntarily made. In my view it was not.
- 4.7 The evidence on this score from the complainant himself was that he had left a word with the accused's wife instructing her to advise the accused to come to his school failing which something was going to happen. It is not in dispute that in compliance with this request the accused visited the complainant's school. From the testimony of the second state witness Christiaan Mbolwa it becomes apparent that the complainant first reminded the accused about veiled threat before he started interrogating the accused in the office. It is clear that the complainant suggested to the accused that he was responsible for the theft of the two cattle and the sale of the meat after he had slaughtered them.
- 4.8 The accused himself also made certain allegations that he was threatened by the complainant with a firearm to admit that he had stolen his cattle. Sight should not be lost of

the power relations that existed between the complainant and the accused. It must be recalled that the complainant is a school teacher whilst the accused is a mere unsophisticated rural dweller residing in the same village locality with the complainant. It is quite possible that when the accused “confessed” he was under threat from the complainant.

[5] The learned magistrate who convicted the accused could not give her reasons why she arrived at the verdict of guilty because she had left for her country of origin.

[6] The learned Divisional magistrate summarized the evidence and what transpired in court in his reasons. After I have considered the evidence produced as a whole and the reasons given by the Divisional magistrate I fully agree with him.

[7] There was no proper identification of the stock alleged to have been stolen. It would appear the learned magistrate relied on hearsay evidence because none of the witnesses who alleged to have bought the live stock or the meat were called to testify.

[8] The learned magistrate appeared to have relied further on what the accused told the complainant that it was he who slaughtered the complainant’s cattle, however the accused stated that he “confessed”

because he was allegedly threatened with a firearm. What the accused said is not sufficient to constitute a confession.

[9] A confession can be defined as “an unequivocal acknowledgment of guilt which is equivalent to the plea of guilty before a court of law” (see *Rv Becker* 1929 AD 167 at 171).

[10] Furthermore as the learned Divisional magistrate correctly pointed out, there is no proof that the requirements for a confession in terms of Section 217 or an admission in terms of Section 219A were met, and so what the accused said could not be said to be a confession neither an admission.

[11] For the foregoing reason I am in full agreement that the learned magistrate convicted on the strength of inadmissible hearsay evidence and “admission” or “confession”. It follows that the verdict of guilty cannot be allowed to stand.

[12] In the result the conviction is set aside.

SHIVUTE, J

I agree

PARKER, J