CASE NO.: CR 20/2012

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

THE STATE

and

MATHEUS DAWID MERORO **ACCUSED NO. 1**

MATHEUS NAIKETE **ACCUSED NO. 2**

HIGH COURT REVIEW CASE NO.: 1806/2011

CORAM: HOFF, J *et* NDAUENDAPO, J

Delivered on: 15 March 2012

SPECIAL REVIEW JUDGMENT

HOFF, J: [1] This matter has been sent on review in terms of provisions of section 116(3) of Act 51 of 1977 by the divisional magistrate for the Keetmanshoop division, Mr S. Zisengwe.

[2] The two accused persons were charged with theft of stock (51 goats) in contravention of the provisions of section 11(1)(a) of the Stock Theft Act, Act 12 of 1990. Both accused persons pleaded not guilty in a periodical court in the district of Mariental.

After the State had led the evidence of witnesses against them and after both accused persons had testified both of them were convicted of theft of stock (37 goats, each valued at N$750.00). The accused persons were legally represented by Mr S Maritz of the legal firm Dr Weder, Kauta & Hoveka Inc., Windhoek. The trial magistrate transferred the matter to the Regional Court for purpose of sentencing in terms of section 116(1)of the Criminal Procedure Act, 51 of 1977.

The regional court magistrate, Mr Zisengwe, stated in his cover letter that after he had perused the evidence led, he was not satisfied that the State had proved its case against accused no. 2 beyond reasonable doubt.

[3] In a nutshell the evidence led by the State was that accused no. 1 sold 40 goats to a Mr Sitwana Mapenzi. It was subsequently discovered that these goats belonged to the complainant, Mr George Mbundu, and that the goats had been removed from his farm, Anana Sud. Accused no. 1 did not deny that he sold 40 goats to Mr Mapenzi. Accused no. 2 was at the time of the sale of the goats employed by accused no. 1 as a foreman on his farm whose primary duty was to look after goats. It is common cause that the entire negotiations and transaction regarding the sale of the goats were between accused no. 1 and Mr Mapenzi.

It is also common cause that the goats were collected by the employees of Mr Mapenzi from the farm of accused no. 1. Mr Mapenzi was not present at that stage. According to one of the state witnesses Mr Bonkratis Kamena, (one of the employees of Mr Mapenzi), accused no. 1 took them to a kraal and showed them the goats he wanted to sell. Accused no. 2 was present.

Another state witness, Joseph Mukoya, one of the persons who collected the goats from accused no. 1, testified that accused no. 1 told accused no. 2 to point out the goats that would be sold to Mr Mapenzi. He testified that they then collected the "pointed goats" and drove them to Mr Mapenzi's farm. These goats had yellow eartags and there were markings "NGB" on the goats. These tags were removed on instructions from Mr Mapenzi and replaced with grey eartags. The complainant testified that on the eartags of his goats was his mark "GB/N".

It is not clear from the evidence of Joseph Mukoya whether accused no. 2 indeed pointed out goats as instructed by accused no. 1. This issue was never explored by the prosecutor neither by the presiding magistrate to establish whether at the stage when the accused no. 2 had been so instructed he had indeed pointed out goats and that at that stage accused no. 2 had known those goats had in fact been stolen. According to Joseph Mukoya the goats remained on Mr Mapenzi's farm but after about a week returned to the farm of accused no. 1. They decided to collect the goats from the farm of accused no. 1. When they arrived on his farm accused no. 1 gave them 40 goats without eartags. Bonkratis Kamena supports the evidence of Joseph Mukoya that it was accused no. 1 who had initially pointed out the goats to be delivered to Mr Mapenzi. The version of accused no. 1 was that the employees of Mr Mapenzi entered the kraal and selected 40 goats. He never testified that he instructed accused no. 2 to "pinpoint" 40 goats. Accused no. 2 testified that when Mr Mapenzi's workers arrived on the farm of accused no. 1 he was informed by accused no. 1 that he was selling 40 goats to Mr Mapenzi and that 40 goats were then selected without identifying who had selected the 40 goats. His testimony was that some of the goats selected had silver eartags. He testified further that 37 of the goats sold returned to their kraal two weeks later. It is common cause that when the 40 goats arrived on the farm at Mr Mapenzi he instructed his workers to slaughter three of the goats hence only 37 goats returned to the farm of accused no. 1. Accused no. 2 during cross-examination was never confronted with the evidence of

Joseph Mukoya that accused no. 1 instructed him (i.e. accused no. 2) to "pinpoint" the goats to be sold to Mr Mapenzi.

The testimony of accused no. 1 in respect of the goats with the yellow eartags was that those goats belonged to a relative of his and that he had informed the person selecting the goats, that the goats with the yellow tags should not be touched. Accused no. 2 supported the evidence of accused no. 1 on this point. There is thus a dispute whether the 40 goats delivered to Mr Mapenzi had yellow eartags when they were so delivered.

[4] The trial magistrate dealt in her judgment (consisting of twenty paragraphs) with the involvement of accused no. 2 only in paragraphs 19 and 20, and as follows:

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> "Accused 2 being the caretaker of accused no1, it would be expected that he knows which goats belonged to accused no. 1 and which goats would be strange. However this accused although 37 goats bearing yellow ear tags marked NGB were in accused 1's kraal as per the evidence, proceeded to partake in the sale of such goats. Interesting to note is that the accused under oath proceeded to lie testifying that the second batch of 37 goats were the exact same goats from the first batch, whilst the evidence proves otherwise. The only inference that the court can draw is that this accused acted in common purpose with accused one.
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> With the evidence adduced the court found the state witnesses to be credible, their testimonies were consistent to the material issues. The evidence adduced also proves that the accused 1 and 2 had the intention to permanently deprive the complainant of his goats, hence the sale thereof ..."

[5] The evidence of accused no. 2 regarding the return of the goats was that after the initial 40 goats had been driven from the kraal by the employees of Mr Mapenzi 37 goats returned after approximately 2 weeks. These goats had Mr Mapenzi's eartags on. He informed accused no. 1 of the return of the goats who in turn informed him to keep the goats

in the kraal. The next day Kamana a worker of Mr Mapenzi came and he (i.e accused no. 2) gave him 37 goats in total. Accused no. 2 continued to testify that on "a certain night after the sale of the goats accused again came with Mapenzi and the following morning Mapenzi sent his son to come and collect accused no. 1 to his farm. Accused no. 1 went to Mapenzi.
I then saw three vehicles, 1 of accused, Mapenzi and the police and they said to take them to the kraal. Among the goats sold to Mapenzi, 27 goats *again* returned, amongst these goats, 3 goats came, from the 3 goats, 2 goats had Mapenzi eartags and 1 had yellow eartag. The 24 goats had grey eartags".

[6] During cross-examination only two questions were posed to accused no. 2.

The first one as follows:

> "Q. From the 27 goats, that returned, only 24 goats are the goats that accused no. 1 sold to Mapenzi ?
> A. Correct, the 3 other goats that also came with, 2 had Mapenzi eartags and it was these 2 goats that were identified by the complainant as his."

[7] It was never the testimony of accused no. 2 that the second batch of 37 goats were the exact same goats as the first batch. Accused no. 2 testified that when Kamana, the worker of Mr Mapenzi came he gave him 37 goats in total. It was never clarified whether the 37 goats he so gave to Kamana were of the same batch of goats initially delivered to Mr Mapenzi.

[8] The evidence of accused no. 2 was not very clear regarding the issue of the returning goats. He testified after the initial sale, 37 goats returned with Mapenzi's earmarks on. Thereafter 37 goats were delivered to Kamana. He then testified that among the goats sold to Mapenzi, 27 goats *again* returned of which 24 goats had grey eartags on. What is not clear to me is whether the 27 goats which returned *again* were part of the 37 goats delivered to Kamana during the second occasion.

Nevertheless there is no evidence at all (not from the state witnesses and not from any one of the accused persons), that accused no. 2 partook in the sale of goats to Mr Mapenzi. This finding by the trial magistrate is not supported by the evidence on record. It is common cause that only accused no. 1 received payment from Mr Mapenzi in respect of the goats sold to Mr Mapenzi

[9] I agree with the trial magistrate one would have expected that accused no. 2, being the goatherd of accused no. 1, would have known which goats belonged to accused no. 1 and which did not. However to rely on such an expectation and then to convict the accused, having regard to the paucity of the evidence adduced, falls far short of the legal standard of proof in criminal matters. The State has the onus in criminal proceedings to prove all the allegations in the charge sheet, including the element of *mens rea* and that accused no. 2 had knowledge of the unlawfulness of the sale of the goats to Mr Mapenzi and that he knowing participated in such unlawful conduct, beyond reasonable doubt.

[10] The cross-examination by the prosecutor (of accused no. 2) in respect of these two aspects is non-existent. Not one question was asked in respect of his knowledge regarding the ownership of those goats initially sold to Mr Mapenzi. I have indicated that only two questions were put to accused no. 2 during cross-examination. One question related to the number of goats which had returned to the farm of accused no. 1 and the second question was about the fact that according to accused no. 1, the complainant identified two goats without eartags as his goats.

Similarly, accused no. 1 was never cross-examined by the prosecutor whether accused no. 2 had any knowledge of the ownership of the 40 goats delivered to Mr Mapenzi. The issue of whether accused no. 2 had knowledge of the ownership of the 40 goats was also never explored by the presiding trial magistrate. It was never put to accused no. 2 by the

prosecutor that the 40 goats sold to Mr Mapenzi had yellow eartags with markings “NGB”. This one would have expected the prosecutor to do since accused no. 1, who testified before accused no. 2, placed ownership of the goats in dispute. The cross-examination of accused no. 2 by the prosecutor, was in my view, shockingly brief.

[11] I am aware that it is undesirable and is regarded as an irregularity for a magistrate “to descend into the arena” and to fulfill the function of the prosecutor in respect of the cross-examination of an accused person. This however does not mean that a magistrate must, as was done in this case, be content with the totally inadequate cross-examination of the prosecutor.

[12] The function of a judge was described by Curlewis JA in *R v Hepworth* 1928 AD 265 at 277 as follows:

> “A criminal trial is not a game where one side is entitled to claim the benefit of an omission or mistake made by the other side, and a judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.”

[13] Section 167 of the Criminal Procedure Act, 51 of 1977 provides as follows:

> “The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, *and may recall and re-examine any person including an accused, already examined at the proceedings*, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.”
> (Emphasis provided).

[14] In terms of the provisions of section 186 of Act 51 of 1977 a Court may at any stage of criminal proceedings subpoena witnesses.

[15] It should be apparent from the provisions of section 167 that an accused person may be recalled and/or may be re-examined by the Court. It is further apparent that the Court has a *duty* to so recall or re-examine an accused in those instances where it appears to the court essential to the just decision of the case.

[16] In *S v Van den Berg* 1996 (1) SACR 19 (Nm) O'Linn J at 64 considered the role of Namibian courts in relation to ss 167 and 186 and remarked as follows at 64 e – f:

> "The role of the court in Namibia has often been described as that of 'administrator of justice'. The role of administrator of justice entails that the court will attempt to ensure, with all the means at its disposal, including the powers and duties under ss 167 and 186, that substantial justice is done. Substantial justice, in turn, is ensured when an innocent person is not punished and a guilty person does not escaped punishment. The role of administrator of justice furthermore envisages a balancing of the interests of the prosecution with that of the defence."

And continues at 64 g – h as follows:

> "The role of the Court as set out herein is particularly relevant in a developing country such as Namibia, where at this point in time many policemen, prosecutors and, to some extent even magistrates are not adequately qualified or trained and/or are inexperienced, often leading to the subversion of the law and the legal system and in many cases to a travesty of justice, of which the present case is an illustration. This in turn is one of the causes of the progressive loss of confidence of law-abiding citizens in the legal system."

[17] These remarks to some extent still hold true more than a fifteen years later.

[18] Regarding the issue or perception of the court descending into the arena, O'Linn J stated the following in *Van den Berg (supra)* at 67 a – b:

> "Of course, the Court should never descend into the arena so to speak. But when the Court is placed in the position where it has to inform itself it must of necessity exercise its powers and fulfill its duties in terms of aforesaid provisions of the Criminal Procedure Act and to do so cannot be regarded as "descending into the arena". *Alternatively*, even if it can be described as "descending into the arena", such "descending into the arena" is prescribed by statute and is mandatory in some cases and desirable in others. The basic role as administrator of justice again needs emphasis because it seems that many legal practitioners and even some judicial officers are either not aware of these provisions and precedents or fail for some unknown reason to give effect to it."
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> (See also *S v von Mollendorf and Another* 1987 (1) SA 135 TPD).

[19] The quotation at 64 g – h in *Van den Berg (supra)* was quoted with approval in *S v Ngcobo* 1999 (3) BCLR 298 (N) by the Full Bench of the Natal Provincial Division in South-Africa.

[20] In *S v Mseleku and Others* 2006 (2) SACR 237 NPD a Full Bench decision the Court held at paragraphs 10, 11 and 12 that if the Court examines any person in terms of s. 167 the prosecutor and the accused may put questions arising from such further questioning by the Court; that various principles have arisen which are to the effect that the Court may intervene at any time to elucidate a point, but should not take over the cross-examination or put leading questions to support the State case before the parties have finished their examination of the witness; that the court however may do so at the end of the examination by the parties; and that the purpose of the Court's examination should be to elucidate any points that may still be obscure after examination by the parties. In my experience this is in line with the practice in

Namibia. It was emphasized in *Mseleku* that the impartiality of a Court in criminal proceedings should be evident from the nature and scope of its questions.

[21] The presiding trial magistrate in paragraph 19 stated that the inference drawn by the court was that accused no. 2 “acted in common purpose with accused one”, without stating the factual basis for such an inference. In my view it would be a misdirection to regard the employer – employee relationship *per se* as the basis of such an inference.

[22] The evidence adduced, in my view, also does not support the finding by the magistrate, in paragraph 20,that accused no. 2 intended to deprive the complainant of his goats, permanently.

Magistrates should have the confidence and courage to comply with their functions as prescribed in ss. 167 and 186 of Act 51 of 1977, and to comply with their duty as administrators of justice, despite the fact that the legal representative of an accused is present in the courtroom. The trial magistrate in my view, would have been perfectly entitled and justified to question accused no. 2, directly, regarding his knowledge of the ownership of the 40 goats delivered to Mr Mapenzi.

[23] I agree, for the aforesaid reasons, with the regional court magistrate, that the evidence adduced by the State did not prove the commission of the crime of theft of stock by accused no. 2 beyond reasonable doubt and that accused no. 2 was wrongly convicted. The conviction in respect of accused no. 2 accordingly stands to be set aside.

[24] The legal position in Namibia regarding review proceedings before sentence is that as a general rule those proceedings are not reviewable and a Court on review will only exercise

its inherent common law powers of review in rare instances of material irregularities where grave injustice might otherwise result, or where justice might not be attained by other means. (See *S v Immanuel* 2007 (1) NR 327 (HC); *S v Cornelius Swartbooi* CR 09/2012 unreported judgment of this Court delivered on 15 February 2012).

[25] However proceedings transmitted by a magistrate in terms of the provisions of section 116(3) of Act 51 of 1977 is not subject to this limitation and may be transmitted after conviction but before sentence.
(See *S v Mogoregi* 1978 (3) SA 12 OPD at 14B).

[26] In the result the following orders are made:

1. The conviction in respect of accused no. 2 is set aside.

2. The matter is remitted to the Regional Court for the purpose of sentencing accused no. 1.

HOFF, J

I agree

NDAUENDAPO, J