REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CR 4/2013

In the matter between:

THE STATE

and

MELUMO SILAS

(HIGH COURT MAIN DIVISION REVIEW REF NO 1421/2012)

Neutral citation: *S v Silas* (CR4-2013) [2013] NAHCMD 24 (30 January 2013)

Coram: VAN NIEKERK, J and UEITELE, J

Delivered: 30 January 2013

Flynote: Criminal law – Possession of stock suspected to be stolen in contravention of s 2 of the Stock Theft Act 12 of 1990 – Elements of offence comprising (i) found in possession (ii) stock or produce (iii) reasonable suspicion (iv) unsatisfactory account (v) *mens rea* –

Reasonable suspicion must exist contemporaneously with being found in possession – Accused may still attempt to satisfy court at trial that he has satisfactory account for possession - Provisions of s 112(1)(b) of Criminal Procedure Act 51 of 1977 applicable to charge of c/s 2 of Stock Theft Act – S 112(1)(b) therefore also applicable to element of reasonable suspicion in mind of someone else - Court must be satisfied on plea of guilty that accused admits all elements of offence.

Criminal procedure – Charge – Charge of c/s 2 of Stock Theft Act 12 of 1990 – Charge must be formulated using the correct tense – Correct formulation is to allege that accused was found in possession of stock in regard to which there was a reasonable suspicion that it has been stolen – If wrong tense is used the charge does not disclose an offence and magistrate should have invited prosecutor to amend it, alternatively ordered amendment in terms of s 86 of Criminal Procedure Act – Not necessary that accused's inability to give satisfactory account must have existed at time of being found in possession – Accused can still attempt to satisfy court of satisfactoriness of his account at the trial - Preferable to formulate this element in the present tense.

Plea – Plea of guilty – Questioning in terms of s 112(1)(b) of Criminal Procedure Act 51 of 1977 – Provisions of s 112(1)(b) applicable to charge of c/s 2 of Stock Theft Act 12 of 1990 – Accused can make admission about element of offence of which he does not have personal knowledge such as reasonable suspicion in mind of person

who find him in possession – court has duty to satisfy itself of reliability of such admission where accused is not legally represented.

ORDER

The conviction and sentence are set aside.

REVIEW JUDGMENT

VAN NIEKERK, J (UEITELE, J concurring):

[1] The accused pleaded guilty in the magistrate's court to a charge of c/section 2 of the Stock Theft Act, 1990 (Act 12 of 1990) (Possession of suspected stolen stock). The particulars in the charge read as follows:

> 'In that upon or about the 19 day of December 2009 at or near Omalondo Village in the district of Ondangwa the accused was found in wrongful and unlawful possession of stock and produce, to wit 2x cattle to which there is reasonable suspicion that it has been stolen and was unable to give a satisfactory account for such possession.'

[2] During the course of dealing with automatic review cases on a charge of contravention of section 2 of the Stock Theft Act and other similarly worded offences, e.g. the offence of possession of suspected stolen goods other than stock or produce in contravention of section 6 of the General Law Amendment Ordinance, 1956 (Ord. 12 of 1956), I have noticed that there are aspects regarding the formulation of the charge and the questioning in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the CPA'), that create some difficulty for prosecutors and magistrates. This is also the case in the present instance. I therefore propose to deal with these aspects in this judgment.

[3] Firstly, where as in this case, the offence is one of a contravention of section 2 under the Stock Theft Act and the subject matter is cattle, the expression 'stock and produce', as used in the charge in this case, is incorrect. 'Stock' and 'produce' each have their own meaning as defined in the Act. 'Stock' is defined as 'any horse, mule, ass, bull, cow, ox, heifer, calf, sheep, goat, pig, poultry, domesticated ostrich, domesticated game or the carcase or portion of the

carcase of any such stock'. Clearly, in the case of cattle, the applicable expression is 'stock'.

[4] The second and more important aspect that requires comment is the fact that the charge alleges that 'there is reasonable suspicion that' the cattle have been stolen (the underlining is mine). In this sense it literally follows the wording of section 2, which reads as follows:

> 'Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence.'

[5] It has been held time and again in matters dealing with similarly worded statutory provisions in other laws dealing with goods or stock (I shall just use the term "stock") that the reasonable suspicion that the stock has been stolen must exist at the time, or virtually at the time, that the accused was found in possession thereof (*S v Mokoena* 1957 (1) SA 398 (T); *S v Hunt* 1957 (2) SA 465 (N) 468; *S v Ismail* 1958 (1) SA 206 (A) 209G-H read with 211F-G; *S v Ndou* 1959 (1) SA 504 (T); *S v Reddy* 1962 (2) SA 343 (N); *S v Khumalo* 1964 (1) SA 498 (N) 499; *S v Zuma* 1992 (2) SACR 488 (N) 491*e*). It is therefore incorrect to allege that the reasonable suspicion 'is' in existence in the present tense, i.e. at the trial. As charge sheets usually refer to past conduct, the allegation under discussion, read in context, should have stated that the accused was found in possession of stock in regard to which there was a reasonable suspicion that it has been stolen. (See *Ismail (supra)* 213A). The use of the correct tense is not just a question of grammar. It conveys what the actual allegation is which

constitutes an element of the offence. In fact, before the courts were granted statutory power under section 86 of the CPA to order amendment of a charge, the use of the wrong tense has led in some cases to a quashing of convictions on appeal as the charge was held not to disclose any offence (see e.g. *Ismail (supra)* 213A-B). In the instant case the magistrate should have noticed that the charge does not disclose an offence and invited, alternatively ordered, the prosecutor to amend the charge to read that there was a reasonable suspicion.

[6] The third aspect relating to the charge which requires comment is this: the charge alleges that the accused 'was unable to give a satisfactory account' [my underlining]. Although the reasonable suspicion that the goods have been stolen must exist contemporaneously with the accused being found in possession, it is not necessary that the accused's inability to give a satisfactory explanation must also exist at that time. Snyman, *Criminal Law*, (5th ed), p 527, with reference to the under mentioned authority, states the following in this regard:

> 'As far as this requirement is concerned the courts follow a generous interpretation of the section by allowing X to give an account of his possession at any time up to and including his trial. It follows that the crime is completed only at the moment the trial court finds that he was unable to give a satisfactory account of his possession.'
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> (See *Ismail (supra)* 212D-E; *R v Armugan* 1956 (4) SA 43 (NPD); *Osman v Attorney-General of Transvaal* 1998 1 SACR 28 (T) 30*e-f*.)

[7] It was held in *Ismail* (at 212E-H), while approving *R v Hunt* 1957 (2) SA 465 (N) 469, that in relation to the phrase 'is unable to give a satisfactory account of

such possession', that the use of either the past or the present tense would be good. Nevertheless, it does seem to me, with respect, to be preferable to use the present tense in order to more clearly convey the notion that it is not an offence merely if an accused does not give any explanation at all to the person who finds him in possession, nor is it an offence if the accused is unable to give a satisfactory explanation when he is found in possession. In other words, the use of the phrase 'is unable to give a satisfactory account of such possession' in the present tense more clearly, to my mind, conveys that it is still open to the accused at the time of the trial to satisfy the magistrate that his explanation for possessing the stock is good. By saying this I must not be misunderstood. I do not intend to convey that the fact that an accused did not give any explanation at the time he was found in possession, or that the fact that he gave an unsatisfactory explanation at the time is irrelevant. Such facts could be relevant when the accused's credibility or the satisfactoriness or otherwise of his explanation to the court is considered.

[8] Some have expressed reservations about whether this kind of offence is suitable to form the subject matter of questioning in terms of section 112(1)(b). In *S v Shabalala* 1982 (2) SA 123 (TPD) the Court was concerned with the equivalent statutory offence in South Africa to the Namibian offence of c/section 6 of Ord 12 of 1956. McEwan J went so far to hold that an accused cannot admit that there was a reasonable suspicion in the mind of the finder. He stated (at 125A-C):

> 'In fact I experience some difficulty in understanding how the provisions of s 112 (1) (b) can be applied in the case of a charge under s 36 of Act 62 of

> 1955. How can an accused person admit that some unknown person had a reasonable suspicion that goods found in his possession were stolen? The normal and proper thing in cases of this kind is that the State calls some person, frequently a policeman, who says that he found goods in the possession of the suspect. He then states his reason for suspecting that the goods were stolen and then states whether or not the suspect afforded an explanation of his possession.'

(Also see the remarks made in *S v Mbebe* 2004 (2) SACR 537 CkHC 541*b-c*; *S v Mahlasela* 2005 (1) SACR 269 NPD 270*e*).

[9] In *S v Martins* 1986 (4) SA 934 (TPA) the Court discussed the issue of whether an accused can make an admission about an element of an offence of which he does not have personal knowledge. In that case the particular element was the subjective element of the existence of a reasonable suspicion in the mind of the person who found the accused in possession, that the property was stolen. The Court held (at 945B) that the view expressed in *Shabalala (supra)* was an *obiter dictum* and criticised it as not being in accordance with the legal position. The Court in *Martins* further held as follows (at 935G-936B):

> 'The provisions of s 112 (1) (b) of the Criminal Procedure Act 51 of 1977 are applicable to a charge under s 36 of the General Law Amendment Act 62 of 1955 (possession of suspected stolen property) in respect of any admission which an accused may wish to make and, therefore, also to the subjective element of the existence of a reasonable suspicion at the time that the accused is found in possession of the goods. The accused is consequently able to admit such element, of which he bears no personal

> knowledge..... The legal position as regards admissions made by an accused in terms of s 112 (1) (b), a matter about which a degree of uncertainty and conflicting approaches have been evident, ought to be crystallised as follows: (a) that all admissions made by an accused in terms of s 112 (1) (b), including admissions of facts not within the personal knowledge of such accused, should be admissible in evidence against him; (b) that this principle should apply in both civil and criminal proceedings; (c) that there is no support to be found in the provisions of s 112 (1) (b) for distinguishing between the types of offences in respect whereof such admissions can be made; (d) that there is no legal basis for the distinction between admissions made by an accused personally and admissions made by his legal representative (in terms of s 112 (2)) and that this distinction is merely to be found in the endeavour of the courts at all times to guard against the possibility of an unrepresented accused incriminating himself falsely; (e) that the probative value of an admission of a fact not within the accused's personal knowledge would depend upon the circumstances of the case. It would be of particular importance to examine whether the other information placed before the court affords a sufficient indication that a basis for such admission exists; (f) that should the court be satisfied that such an admission of a fact outside the personal knowledge of the accused was voluntarily made in the full knowledge of the implications and consequences of such admission, it should be recorded without hesitation and without necessitating further proof.'

[10] In *S v Adams en Tien Ander Soortgelyke Sake* 1986 (3) SA 733 (C) the Court also considered the issue of an accused making admissions about a matter of which he does not have personal knowledge, but in the context of section 2(a) of

the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 1971 (Act 41 of 1971). The gist of the court's judgment on this issue is summarised as follows in the headnote at 735B-E:

> 'Where an accused is charged with contravening s 2 (a) of Act 41 of 1971 in respect of a prohibited dependence-producing substance such as mandrax, and he pleads guilty and makes the admission that the substance is indeed mandrax, the court will normally be entitled to convict him where he is represented by a legal representative. Where, however, the accused is an inexperienced person who is unrepresented, the position is different. In such an event, the court may not simply accept his admission of an unknown fact. There would have to be additional grounds on which the court could rely that the admitted fact is true before the court can be satisfied that the accused is guilty. The assurance concerning the acceptance of a fact which is admitted but which is beyond the personal knowledge of such an accused can be obtained in different ways, for example, by closer questioning of the accused in order to determine the strength of the knowledge on which he has made the admission, or what his knowledge of the matter and the surrounding circumstances are, or by examining the relevant certificate of analysis of the substance. Whether there is then sufficient evidence for the magistrate to convince him that the accused is guilty will depend on the facts of the particular matter. What however must still be borne in mind, is that it is the court's duty to convince itself of the accused's guilt and that the court is not relieved of this duty in this regard merely by such an unrepresented and inexperienced accused admitting a fact which is beyond his knowledge.'

[11] The High Court in *S v Maniping; S v Thwala* 1994 NR 69 HC considered the approaches in both *Martins (supra)* and *Adams (supra)* in the context of sections 2(a)

and (b) of Act 41 of 1971. In this regard Hannah, J (Muller, AJ, as he then was, concurring) stated (at 73I-74E)[the insertion and omissions are mine]:

> '[The Court in *Adams'* case ..... drew a distinction between an accused who is legally represented and one who is not. In the case of an inexperienced accused who is unrepresented the Court held that his admission of an unknown fact such as that a particular substance is Mandrax should not simply be accepted. There would have to be additional grounds on which the court could rely for finding that the admitted fact is true before the court could be satisfied of the accused's guilt.
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> In *S v Martins* 1986 (4) SA 934 (T) the Court held that there was no legal basis for the distinction between admissions made by an accused personally and admissions made by his legal representative in terms of s 112(2) but, apart from this difference, it would appear that the Court was in agreement with the approach adopted in *Adams'* case. It held, *inter alia*, that an admission of fact not within the personal knowledge of an accused should be admissible in evidence against him but that the probative value of such an admission would depend upon the circumstances of the case.
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> It would be of particular importance to examine whether the other information placed before the court afforded a sufficient indication that a basis for such admission exists. In my respectful opinion, the approach adopted in *Adams'* case *supra* and *Martins'* case *supra* is the correct one. The court is enjoined by s 112(1)(b) to satisfy itself of the guilt of the accused before convicting and I fail to see how any court can properly be so satisfied on the basis of a bare admission of a fact which the court knows must be outside the personal

knowledge of the accused. It must, in my view, have material before it from which it can properly determine the dependability of the admission.'

[12] Later in the judgment the learned judge continued (at 75F-76C):

'In *Martins'* case supra the Court held that there was no legal basis for a distinction to be made between admissions emanating from an accused personally and those made by his legal representative. I do not dissent from that proposition but it is clear that, generally speaking, much more weight will attach to an admission made by a legal representative on behalf of his client than one made by an unrepresented accused. Normally the court would be justified in accepting that the legal representative has made all necessary enquiries of his client or the prosecutor or elsewhere so as to satisfy himself that the admission can properly be made.'

[13] The High Court then summarised the applicable legal position where an accused who pleads guilty makes an admission when questioned pursuant to s 112(1)(b) of a fact which is palpably outside his personal knowledge. The relevant parts of the summary for purposes of the offences under discussion in the instant case are contained in the following paragraphs:

'(a) the court has a duty to satisfy itself of the reliability of that admission where the accused is not legally represented;

(b) – (e).....

(f) where the admission is made by the accused's legal representative more weight can usually be attached to such an admission and normally the court would be justified in accepting

> that the legal representative has satisfied himself that the admission can properly be made.'

[14] Having considered the *Manipeng* case it is therefore clear that the provisions of section 112(1)(b) of the CPA can be applied in a case where the charge is one of c/section of the Stock Theft Act and to an admission by the accused that there existed at the time he was found in possession a reasonable suspicion the mind of someone else, provided that the court satisfies itself of the reliability of such an admission (see also *S v Mahlasela (supra)*).

[15] With this exposition of the legal position in mind I now turn to consider the questioning of the accused in terms of section 112(1)(b) in this case. As a prelude thereto it is useful to consider the approach taken by Hannah, J (Levy, J concurring) in *S v Haimo* 1993 NR 301 HC when he considered the adequacy of the section 112(1)(b) questioning on a charge of c/section 28(1) of the Explosives Act, 1956 (Act 26 of 1956). The particular section provides:

> "Any person who is found to have in his possession or under his control any explosives under such circumstances as to give rise to a reasonable suspicion that he intended to use such explosive for the purpose of injuring any person or damaging any property, shall unless he satisfies the Court that he had no such intention as aforesaid, be guilty of an offence. . . .'

[16] Hannah, J discussed the matter as follows (at 301J-302E):

> 'The elements of the offence are therefore: (1) found in possession or control; (2) of an explosive; (3) in the circumstances specified.

When questioned, the accused admitted that he was found in possession of an explosive, so the first two elements were covered. But the questioning then failed to deal adequately with the third element. In answer to the question why he was in possession of the hand-grenade, the accused replied:

> 'We were using these hand-grenades in the former army of South West Africa.'

Then later, in answer to the question whether he was aware that a hand-grenade could cause injury or damage to property, he replied in the affirmative. And that was the extent of the questioning. He was asked nothing about the circumstances in which he was found in possession. The magistrate could not, therefore, have been satisfied that the circumstances were such as to give rise to a reasonable suspicion that the accused intended to use the grenade to injure someone or to damage property. And, even if he had been asked about the circumstances and the magistrate had been satisfied as a result of his answer that the circumstances were such as to give rise to a reasonable suspicion that the accused intended to use the grenade to cause injury or damage, the accused should then have been advised that he had the right to attempt to satisfy the court, on a balance of probabilities, that he had no such intention. For the foregoing reason the conviction and sentence must be set aside and the matter remitted to the magistrate for further questioning."

[17] In the instant case the section 112(1)(b) questioning went as follows:

> 'CRT: Were you threatened or intimidated by any person to plead guilty?
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> A: No.

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CRT: Do you plead guilty freely and voluntarily without been *(sic)* influenced by any person thereto?

A: Yes.

Q: Explain to court what make *(sic)* you plead guilty, what have you done wrong?

A: I plead guilty because I was found with stocks *(sic).*

Q: When did the incident took *(sic)* place?

A: It took place on 19 December 2009.

Q: Did the incident took *(sic)* place at Omulondo village?

A: Yes.

Q: Is this in Ondangwa district?

A: Yes.

Q: The charge allege *(sic)* that you were found to be in possession of stock or produce which is reasonable *(sic)* suspected that it was stolen?

A: Yes.

Q: What stock were you found to be in possession (*sic)*?

A: It was 2 x cattle

Q: Is it correct that you were unable to give a satisfactory account of such possession?

A: Yes.

Q: Where did you get the stock, 2 x cattle?

A: I get *(sic)* the 2 x cattle from Mekati.

Q: What happen *(sic)* to the two 2 x cattle's *(sic)* you were found to be in possession *(sic)*?

A: It was taken by the police and I got arrested by the police the same day.

Q: Did you knew *(sic)* at the time that what you were doing was wrongful and unlawful to possess suspected stolen stock?

A: Yes.

Q: Did you knew *(sic)* that you could be punished for that?

A: Yes.

Q: Why did you do it?

A: I trusted the person who gave it to me.

Q: Does the State accept the plea tendered by the accused?

A: Yes.

CRT: Satisfied that accused admitted all the allegations of the offence.'

[18] The essential elements of a contravention of section 2 of the Stock Theft Act are (i) found in possession; (ii) stock or produce; (iii) reasonable suspicion; (iv) unsatisfactory account; (v) *mens rea*.

[19] From the questioning it is clear that the accused admitted elements (i) and (ii). As far as element (iii) is concerned, the magistrate asked, 'The charge allege *(sic)* that you were found to be in possession of stock or produce which is reasonable *(sic)* suspected that it was stolen?', to which the accused responded in the affirmative. Taken literally, the question only seeks to confirm what the allegation in the charge is. It does not ask whether the accused admits the allegation. Be that as it may, because the charge is wrongly worded by referring to the fact that there 'is' a reasonable suspicion that the stock was stolen, the magistrate repeated that part of the allegation in the present tense. It was therefore not conveyed to the accused that there was a reasonable suspicion at the time in the mind of someone else, presumably the finder, that the stock was

stolen. No questions were asked about the circumstances in which he was found in possession and what, if anything, was said by the finder. In this regard it should be noted that this 'subjective suspicion must be based upon grounds actually existing at the time of its formation' (*S v Khumalo (supra)* 499). 'If there are not grounds which then made the suspicion reasonable, it was not a reasonable suspicion. Whether grounds actually existed at that time is judged objectively.' (Milton and Cowling, *South African Criminal Law and Procedure*, Vol III, (2nd ed), [para J6-5-6]). There is simply no information from which it can be judged whether grounds for the suspicion existed.

[20] As far as element (iv) goes, the magistrate wrongly thought that the satisfactory account had to be given at the time the accused was found in possession. He therefore directed her question on this issue only with reference to the past. He also ignored the ample authority that an accused should not be asked leading questions during the section 112(1)(b) questioning process. Instead of, e.g. asking whether the accused gave any explanation at the time and if so, what the explanation was, he merely asked, 'Is it correct that you were unable to give a satisfactory account of such possession?' The magistrate also did not inform the accused that he could still attempt to satisfy the court that he indeed has a satisfactory account at the time that he was being questioned by the court.

[21] The answers given by the accused that he got the cattle from Mekati and that he trusted Mekati do not convey anything which could have formed the basis of

the magistrate's satisfaction that the accused admitted all the allegations in the charge.

[22] As far as the element of *mens rea* is concerned, the accused was merely asked, 'Did you knew *(sic)* at the time that what you were doing was wrongful and unlawful to possess suspected stolen stock?' and, 'Did you knew *(sic)* that you could be punished for that?'. These questions only seek to determine knowledge of unlawfulness. Moreover, his answers in the affirmative are inconclusive, as it is not wrongful and unlawful to possess suspected stolen stock. It is only unlawful if the other elements, particularly (iii) and (iv) are also in place. Whilst the question, 'Why did you do it?', may go some way in establishing *mens rea*, provided it does not lead to a confusion with motive, it is not sufficient in the circumstances of this case. Besides, his answer, 'I trusted the person who gave it to me', does not convey the presence of any guilty mind on the part of the accused. On the contrary, there is a hint of an innocent mind.

[23] This case, it seems to me, was ideally suited to the magistrate posing more open questions by continuing to invite the accused to tell the story of what happened as the magistrate initially did when he asked him, 'Explain to court what make *(sic)* you plead guilty, what have you done wrong?'

[24] It is clear that the magistrate could not have been satisfied of the accused's guilt in this case. As such the conviction and sentence are set aside.

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K van Niekerk

Judge

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S F I Ueitele

Judge