REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No.: CA 96/2014

SYLVESTER DANIEL BINGA

APPELLANT

versus

THE STATE

Neutral citation: *Binga v State* (CA 96-2014) [2015] NAHCMD 180 (5 August 2015)

Coram: **SHIVUTE, J *et* SIBOLEKA, J**

Heard: **13 May 2015**

Delivered: **5 August 2015**

ORDER

The appeal is dismissed.

APPEAL JUDGMENT

SHIVUTE J (SIBOLEKA J concurring):

[1] The appellant, a former police officer, appeals against his conviction for contravening s 33 of the Anti-Corruption Act 8 of 2003. It was alleged that he directly or indirectly, corruptly solicited or accepted or agreed to accept for the benefit of himself or any other person to wit Mr Josef Lebereki for gratification as an inducement to or not to do anything or a reward for having done or having omitted to do anything, namely demanding and receiving a goat valued at N$300 from Josef Lebereki in order for his donkey cart not to be seized for having been used to commit a stock theft offence.

[2] The appellant was represented by a legal practitioner during his trial and during the appeal he was represented by Mr Grobler instructed by W Maske Legal Practitioners. Mr Eixab appeared on behalf of the respondent.

[3] The grounds of appeal may be summarized as follows:

The learned magistrate erred in law and or in fact that:

a. By accepting the evidence of the State witnesses, except that of Constable Ganeb, as the truth despite the 'lies' they told and by rejecting the evidence of the defence witnesses.

b. By finding that the first State witness' testimony was corroborated by the testimony of the second State witness whilst the first witness was a single witness in relation to the alleged demands by the appellant.

c. By failing to treat the first witness as a single witness and by neglecting to apply the cautionary rule regarding evidence of single witnesses as well as failing to make a credibility finding on his evidence.

d. By not finding that one of the State witnesses, Isak Sibolelo, falsely implicated the appellant and threatened the first witness with a knife to lay a charge against the appellant.

e. By failing to properly evaluate the evidence in its totality and by failing to make a finding that the appellant's version could be reasonably possibly true.

f. By committing 'serious irregularity' in refusing the appellant an opportunity to properly present his defence when the evidence of the State witnesses was placed before appellant to respond thereto and by ruling that the questions put to the witnesses were leading.

[4] Counsel for the respondent initially raised a point in *limine* in his heads of argument that the record is incomplete and therefore the matter should be struck from the roll.

[5] We allowed both counsel to argue the points in *limine* as well as the merits of the case and reserved ruling and judgment on the issues.

[6] On the point in limine counsel for the respondent argued that it is the duty of the appellant to ensure that the record is properly paginated and complete. However, counsel proceeded to contend that despite certain portions of the evidence being missing, the material aspects of the case are on the record and the court can still make a determination whether the magistrate was right or wrong in convicting the appellant. Although not formally abandoning the point in limine, counsel did not persist with it and urged the court to consider the merits.

[7] On the other hand counsel for the appellant persisted with his argument that this court should allow the appeal as the record is incomplete. Counsel argued on this aspect that material parts relating to the evidence of the appellant and his cross-examination of State witnesses have been lost thus making it difficult for the court to

weigh up the evidence of the appellant with that of the State witnesses and that on this ground alone the conviction should be set aside.

[8] As regards the merits, counsel for the appellant argued that if the donkey cart were to be seized, this was supposed to be done by senior police officers who were in the company of appellant and not by him as he was a junior officer. Police officer Clark asked the appellant about the goat that was loaded in the vehicle and the appellant said he bought it at the post where it was loaded. Which means that Clarke accepted the appellant's explanation that he bought it. There was a senior officer, Keya, who should have been charged and not the appellant.

[9] Counsel argued that although the court made a finding that the testimonies of witnesses for the defence namely Keya, Clark and Van Wyk appeared to be evidence of witnesses with interest to serve and rejected or attached little weight on such evidence this finding is not borne out by evidence tendered. The court *a quo* has misinterpreted the evidence of Warrant Officer van Wyk when it held that he had testified that there was no similar instance in the past when an article was supposed to be seized when Van Wyk confirmed that a lot of donkey carts are involved in stock thefts and they never confiscate a donkey cart as they always have a problem with safe keeping as they do not have the facilities thereby confirming that the police always used their discretion not to confiscate the article if it is a donkey cart. Counsel further argued that the learned magistrate misdirected herself by finding that this case was different from other cases where police officers can exercise their own discretion as this finding was based on the above mentioned, incorrect interpretation of Van Wyk's evidence.

[10] It was further counsel's criticism of the court *a quo* that it failed to consider the evidence of Abraham Bendt that witness Sibolelo drew a knife and threatened Josef Libereki to stab him should he fail to lay a charge against the appellant for taking his goat in exchange for his donkey cart not to be impounded. The magistrate failed to caution herself on accepting the uncorroborated evidence of a single witness and

failed to make a credibility finding on his evidence as being clear and satisfactory in every material respect. Furthermore the learned magistrate failed to make a finding that the threats by Sibolelo to Libereki could have resulted in a reasonable likelihood for Libereki to make false allegations against the appellant in order for Libereki to serve his own interests.

[11] It was again counsel's argument that the court *a quo* erred in law by accepting Sibolelo's testimony about a goat that was given in exchange for the impounding of a donkey cart as the truth, whilst it was hearsay as according to Sibolelo, he was not present and did not see it as he was only informed. Therefore, the evidence of Sibolelo in this regard is inadmissible.

[12] Counsel further argued that the learned magistrate erred in law by making a finding that: "Most of the time, I mean articles are seized and they are kept at the police station, at the end of the case the articles are released." Such finding according to counsel is not supported by the evidence adduced, neither was she entitled to take judicial notice in that respect.

[13] Counsel went on to submit that the learned magistrate misdirected herself by finding that the State had proved its case beyond reasonable doubt, whilst she did not properly evaluate the evidence before her as she failed to consider whether the appellant's evidence could reasonably possibly be true when weighed it up against the evidence of State witnesses, the inherent strengths and weaknesses, probabilities and improbabilities on both sides as to exclude any reasonable doubt about the appellant's guilt and because she was satisfied with the evidence of the State witnesses the appellant's evidence as well as his witnesses' evidence were rejected. Counsel therefore urged the court to set aside the conviction.

[14] On the other hand, counsel for the respondent argued that the discretion to seize or not to seize is a red herring and has no material bearing on the outcome of the appeal. It was not disputed that the complainant offered his goat to the

appellant. At the same time it is common cause that although playing an accessory role in the stock theft, complainant has never been arrested nor was his donkey cart seized even though it was used in the furtherance of a criminal activity. Furthermore, the appellant never paid anything for the goat he took from the complainant; yet he claimed the goat was sold to him. Counsel submits that the fact that appellant never paid anything to Mr Libereki from 5 May 2005 to 20 September 2005 when the case was opened gives credence to the version of the complainant.

[15] Counsel for the respondent argued that the appellant approached the complainant at one stage and told him that if police officers went to him he should tell them that the appellant took the goat on credit from him. Libereki transported stolen stock on his donkey cart yet he was not charged and his donkey cart was not attached because he negotiated with the appellant and the appellant received a goat. There was no material misdirection on the part of the court *a quo*. Again Libereki was not a single witness because Bendt heard what the appellant was saying to Libereki and again Libereki told him what the appellant said.

[16] Concerning the evidence of Sibolelo, counsel for the respondent contended that even if it is eliminated, the evidence for the State would still be intact. Regarding the issue of the finding by the magistrate that police officers Clark van Wyk and Keya had an interest to serve this could be a wrong finding. However, it did not affect the other findings of the magistrate on conviction. The magistrate by making this finding could have been prompted by the fact that the police officers shared the meat of the goat in issue with the appellant

[17] Furthermore, counsel argued that the second State witness' testimony corroborated the version of the complainant in material respects in as far as he testified that he overheard the appellant requesting a goat in exchange for the seizure of Libereki's donkey cart. Therefore, so urged counsel, the first State witness was not a single witness in this regard. Counsel further submitted that Libereki and Bendt's versions remain intact despite minor contradictions seized upon

by the appellant. It cannot be ignored that the appellant was a police officer on duty when he stumbled upon Libereki and for all intents and purposes he should have treated Libereki as a suspect. Counsel contends that no reasonable police officer in the execution of his duties tasked with the investigation of a suspect in a stock theft case would venture into a contract to buy livestock from a suspected criminal when he is investigating unless he is corrupt.

[18] Counsel for the appellant in reply argued that the State bears the *onus* of proof beyond reasonable doubt that appellant bribed Mr Libereki and that he is guilty of corruption. Counsel argued that there are two mutually destructive statements of Mr Libereki and the appellant. If the court decides that the magistrate was not entitled to make a decision that the police officers acted for their own benefit then the court should consider the evidence of police officer Clark that supports the evidence of the appellant that the appellant told him that he bought a goat and that police officer Keya was the investigating officer.

[19] The court having heard arguments advanced by both counsel is now called upon to determine first whether the evidence on record is sufficient for the court to consider the appeal on the merits. Secondly, should it proceed with the consideration of the merits, whether the magistrate erred in law or in fact by convicting the appellant I will obviously take into consideration the authorities referred to us by both counsel concerning the contentions made by them.

[20] In *S v Whitney and Another* 1975 (3) SA 453 (N) at 453 Van Heerden J stated that:

> ‘The decided cases are in agreement that where a record has been lost an accused is not *ipso facto* entitled to an acquittal but that the best available evidence of the record must be obtained to form the basis of any review or appeal. The general principle or approach applies equally where part of a record is lost as where the whole record is lost; it also applies equally where evidence is lost where the machine fails to record the evidence or any portion thereof.’

See also *S v Peza* 1962 (1) SA 664 (O)

In *S v Collier* 1976 (2) SA 378 (C) at 379 Burger J maintained that he was in agreement with the practice that:

> 'Where the whole record or a very material part thereof has been lost prior to review or the appeal being concluded, the proceedings and sentence should be set aside. In such cases the Court of appeal or review is clearly unable to consider the case. But it seems to me wrong that the same result should follow where only some answers of a witness on matters which are apparently not of vital importance are not recorded; It will lead to an absurd result.'

[21] The responsibility of ensuring that the record is complete and properly paginated lies with an appellant. If a part of the record is missing, it is the responsibility of an appellant to obtain the best available evidence to enable a court to consider the appeal. Having perused the record, I am of the view that although some parts thereof are missing the material evidence is still available and the Court is thus in a position to consider the merits of the appeal. For example, the appellant's version can be found at pages 50 – 60 of the record. We are able to consider the merits of the appeal and the Court would not be justified on the basis of missing portions of the record alone to set aside the conviction.

[22] I will now proceed to deal with the merits of the appeal. The appellant was part of a team of police officers investigating a case of stock theft. He was not a senior officer nor was he in charge of the investigations. Josef Libereki (the complainant) whose donkey cart was used to transport stolen stock was approached by the appellant, police officers Clark and Keya regarding the stolen stock in his donkey cart. The appellant called him aside and told him if he did not give him a goat he would seize his donkey cart. Upon the appellant soliciting a goat from him, the complainant and the appellant drove to complainant's kraal and gave a goat valued at N$300 to the appellant.

[23] The appellant on the other hand testified that there was an agreement made on a previous occasion between him and Libereki for Libereki to give the appellant a goat in exchange for N$300 which was never paid.

[24] The appellant raised several grounds that the magistrate misdirected herself in convicting the appellant.

[25] As mentioned before, the magistrate's findings are being attacked, amongst others, on the ground that she convicted on evidence of a single witness, without warning herself as to the cautionary rule regarding the evidence of single witnesses. According to the evidence on record the version of the complainant that the appellant called him aside and demanded for a goat in exchange of the seizure of his donkey cart was corroborated by the evidence of Mr Bendt who said that although the appellant spoke with a low voice he was able to hear the conversation between the appellant and the complainant. In addition to Mr Bendt hearing the conversation between the two, the complainant also told him what he and the appellant discussed. Therefore, in my view the magistrate did not misdirect herself on this score as the complainant was not a single witness. The contradictions between the complainant and Bendt concern the distances where witnesses were standing when he overheard the conversation. These contradictions are not material.

[26] The complainant testified that he was indeed, threatened by Sibolelo because he bribed a police officer by giving him a goat. It is not in dispute that the appellant received a goat from the complainant the only dispute is whether the goat was solicited from the complainant in order for the appellant to omit to seize the complainant's donkey cart that was used in the commission of the offence. Even if the complainant was forced by Sibolelo to lay a charge, the fact remains that there is evidence from the complainant and Bendt that the appellant solicited the goat in exchange for the seizure of the complainant's donkey cart. It appears that Sibolelo was trying to be a good citizen by insisting on the combating of corruption and did

not instruct the complainant to lay a false charge. As to the ground that the evidence by Sibolelo that a goat was given to the appellant is hearsay, even if this evidence is ignored the outcome will still be the same because there is corroborating evidence from Bendt that the goat was given in exchange for the seizure of the donkey cart. These grounds therefore cannot succeed.

[27] As regards the evidence of police officer Van Wyk, he was not present at the scene. He gave his opinion on why donkey carts allegedly used in the commission of crime were not sometimes seized. But it was not the appellant's evidence that he used his discretion not to seize the donkey cart because of storage problems. Moreover, as already mentioned he was overheard to demand a goat in exchange for the seizure of the donkey cart. It is common cause that he was given the goat which he never paid for.

[28] Furthermore, I agree with counsel for the State that the discretion to seize or not to seize is peripheral in nature and has no material bearing on the outcome of the appeal.

[29] At the pain of being repetitive, although appellant testified that he received a goat from the complainant because they had made arrangements prior to this incident for the appellant to buy a goat on credit from the complainant, there was no money paid to the complainant in respect of the goat four months before he was arrested and subsequent to his arrest. Concerning the evidence of Clark that he was told by appellant that he bought the goat, this does not further the appellant's case. Clark

did not hear what the appellant and complainant discussed. According to the appellant when he and Libereki went to fetch the goat Clark and Keya went to the shop. Whether Clark had accepted what the appellant told him or not is irrelevant. Again if the appellant had bought the goat on credit why would he go to the complainant and tell him that if the police went to him asking about the goat he should say he bought it.

[30] Looking at the evidence in its totality it is highly unlikely that a police officer who is part of the investigating team and who was tasked to take statements from suspects, including complainant as per appellant's version would indulge himself in dealings with the suspect in a case of stock theft to buy a goat from the person suspected of stealing the stock he was investigating. The magistrate was correct in accepting the version of the complainant and Bendt as appellant's version is highly improbable. The court a quo cannot be criticised for not accepting the evidence of Keya and Clark; after all these shared the meat of the goat in issue with the appellant and may therefore have had interests of their own to serve.

[31] In view of this I find that there was no misdirection on the part of the magistrate in accepting the version of the State and rejecting the version of the defence and her further finding that the State had proved its case beyond reasonable doubt.

[32] In the result the following order is made:

The appeal is dismissed.

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N N Shivute

Judge

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A M Siboleka

Judge

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APPEARANCES

APPELLANT:	Mr Grobler – Instructed by W Maske Legal Practitioners
STATE :	Mr Eixab Office of the Prosecutor-General