

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
REVIEW JUDGMENT



NAMIBIA MAIN DIVISION,

Case Title: <i>The State</i> v <i>Andries Gaoe</i>	e No: 96/2022
Heard before: Hon. Judge Liebenberg <i>et</i> Hon. Judge Shivute	Division of Court: Main Division
Neutral citation: <i>S v Gaoe</i> (CR96/2022) [2022] NAHCMD 470 (9 September 2022)	Delivered on: 9 September 2022
The order: The conviction and sentence are confirmed.	
Reasons for order: SHIVUTE J (LIEBENBERG J concurring): [1] The accused was charged in the Magistrate's Court in the district of Bethanie with the following crimes: Count 1: Theft of stock in terms of section 1(1) (a), 1,14 and 17 of the Stock Theft Act 12 of 1990 as amended. In the alternative to Count 1: possession of suspected stolen stock contravening section 2 read with section 1, 11(1) (a), 15 and 17 of Act 12 of 1990 as amended. Count 2: Theft-general deficiency. [2] On 11 August 2020, the accused person appeared before magistrate Van der Colff, whereupon he pleaded not guilty to Count 1 and Count 2 and pleaded guilty to the alternative to Count 1 being in possession of suspected stolen stock. The court proceeded in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA)	

in respect of the first alternative count. Subsequently, the accused was acquitted in respect of Count 1 and found guilty in respect of the first alternative count of possession of suspected stolen stock. The court then applied section 115 of the CPA, which is a not guilty plea in respect of Count 2. The matter was postponed to 11 November 2020 to proceed to trial in respect of Count 2.

[3] On 11 November 2020, the matter could not proceed and was postponed to 16 June 2021. On 16 June 2021, the matter was again postponed as the magistrate was not available. After that, the matter was postponed twice. On 11 May 2022, the case appeared before magistrate Masuku and he decided to proceed with the trial. He then acquitted the accused in respect of count 2 and sentenced the accused in respect of the first alternative count to a fine of N\$2000 or in default of payment, eight months' imprisonment of which N\$500 or two months are suspended for a period of three years on condition that accused is not convicted for the offence of possession of suspected stolen stock committed during the period of suspension.

Query

[4] I directed a query to magistrate Masuku to enquire what happened to magistrate Van der Colff and why he took over a partly heard matter.

[5] The magistrate responded that he failed to indicate on record what happened to magistrate Van der Colff. He then stated that she was transferred to Windhoek. He further responded that, the matter was not a partly heard as no evidence was led before magistrate Van der Colff and that he relied on section 118 of Act 51 of 1977, which deals with the non-availability of a judicial officer after a plea of not guilty.

Applicable law

Alternative to count 1-the conviction of possession of suspected stolen stock contravening section 2 Act 12 of 1990 as amended

[6] Since a conviction was entered in respect of the alternative to count 1 by magistrate Van der Colff, section 275 of the CPA became applicable when magistrate Masuku took over the matter. The section provides for a sentence by a judicial officer other than the judicial officer who convicted. The section reads as follows;

'If sentence is not passed upon an accused forthwith upon conviction in a lower court, or if, by reason of any decision or order of a superior court on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a lower court or to pass sentence afresh in such court, any judicial officer of that court may, in the absence of the judicial officer who convicted the accused or passed the sentence, as the case may be, and after consideration of the evidence recorded and in the presence of the accused, pass sentence on the accused or take such other steps as the judicial officer who is absent, could lawfully have taken in the proceedings in question if he had not been absent.'

[7] Therefore, a magistrate other than the magistrate who convicted the accused may pass sentence after consideration of the evidence recorded and in the presence of the accused. Had the magistrate who took down the plea not entered a conviction on record, section 275 of the CPA would not have been applicable.¹

[8] After a proper analysis of the record and the relevant law applicable, I have been convinced that magistrate Masuku has applied the correct procedure in sentencing the accused.

Section 118 of the CPA in respect of Count 2

[9] In *S v Immanuel*, it was stated that 'it is not irregular for one magistrate to commence with the trial where the accused had pleaded before another magistrate as long as the record reflects that the magistrate before whom the accused had pleaded, is not available and no evidence has been adduced yet'.²

[10] Section 118 of the CPA provides for the above and reads:

'If the judge, regional magistrate or magistrate before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court.'

[11] *S v Immanuel* referred to *S v Wellington* where it was stated as follows;

'Section 118 of the Criminal Procedure Act only sanctions this procedure where the original presiding officer is 'not available' and does not entitle the prosecution to proceed before another

¹ *S v Mutota* (CR 82/2020) [2020] NAHCMD 482 (22 October 2020).

² *The State v Judas Simon Immanuel* Case No.: CR 23/2010 (unreported) delivered on 29 September 2010.

presiding officer for any other reason. I agree with M T Steyn J, (as he then was) that to continue with a trial in front of another magistrate where the original magistrate is still available constitutes an irregularity. If the original magistrate is not available it is the duty of the State to place this fact on record. See: **S v Mkhuzangewe**, 1987 (3) SA 248 (O) at 266F-267A.³

[12] In *S v Mwalyombu*, the court had to decide whether the irregularity was so fatal that it would vitiate the proceedings before the second magistrate who proceeded with the trial in the matter. This court did not find the irregularity to have vitiated the proceedings as the trial proceedings were in accordance with justice and the accused suffered no prejudice. The sentence and conviction was then confirmed on review.⁴

[13] In the present case, there is no indication on the record of proceedings of the 11th May 2022, that magistrate Van der Colff was not available to continue with the trial which results in an irregularity, however, considering the trial proceedings and whether the accused was prejudiced, I am of the opinion that the irregularity is not fatal to make the proceedings defective, thus the conviction and sentence is confirmed on review.

[14] I must, however, pause to state that magistrates must still act within the ambit of section 118 of the CPA. Thus magistrates must familiarize themselves with the proper application of the section as well as read these review judgments in order to avoid the cause of such irregularities.

[15] In the result, it is ordered:

The conviction and sentence are confirmed.

N N SHIVUTE	J C LIEBENBERG
Judge	Judge

³ *S v Wellington* 1991 (1) SACR 144 (Nm).

⁴ *S v Mwalyombu* (CR 58/2017) [2017] NAHCMD 271 (25 September 2017). See also *The State v Lucas* (CR 02/2013) [2013] NAHCNLD 10 (04 March 2013).