



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 43/2011

In the matter between:

ANNA NEHOYA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nehoya v The State* (CA 43/2011) [2013] NAHCNLD 38 (28 June 2013)

Coram: LIEBENBERG J and TOMMASI J

Heard: 21 June 2013

Delivered: 28 June 2013

Flynote: Criminal Procedure – Section 114 of the Criminal Procedure Act, 51 of 1977, as amended – when accused is committed for sentence by the regional court the magistrate is required to afford the accused the opportunity to, on a balance of probability, satisfy the court that the plea and admissions were incorrectly recorded – the magistrate is further required to make a formal finding of guilty if satisfied that plea and admissions were correctly recorded or that the accused is guilty – failure to do so a fatal irregularity.

Summary: The appellant pleaded guilty to seven counts of stock theft in the district court and was hereafter committed for sentence by the regional court in terms of s114 of Criminal Procedure Act, 51 of 197, as amended.

The regional court magistrate however failed to give the appellant the opportunity to satisfy the court that the plea and admissions were incorrectly recorded and furthermore to make a formal finding of guilty. The court held that this was a fatal irregularity and that the sentence thus imposed should be set aside. Matter is remitted to the regional court in order for the magistrate to comply with the provisions of section 114(2) and (3) of the Act.

ORDER

1. The application for condonation for the late noting of the appeal is granted.
2. The sentence is set aside.
3. The matter is remitted to the regional court for the district of Ondangwa for the regional court magistrate to comply with the provisions of section 114 (2) & (3) of the Criminal Procedure Act, 51 of 1977.
4. The magistrate is furthermore directed, in the event a formal finding of guilty is made, to take into consideration when sentencing afresh, the term of imprisonment already served; and to note that the mandatory minimum sentences provided for in section 14(1)(a)(ii) and (b) of the Stock Theft Act, 1990 has been struck down as unconstitutional.

JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1] This is an appeal against the sentence imposed by the regional court for the district of Ondangwa. The appellant pleaded guilty to seven counts of stock theft read with the provisions of the Stock Theft Act in the district court. She was committed for sentence by the regional court in terms of the provisions of s114 of the Criminal Procedure Act, 51 of 1977. The regional court imposed a sentence of 20 years' imprisonment of which 10 years were suspended on the usual conditions.

[2] The appellant filed an application for condonation for the late noting of the appeal and same was not opposed by the respondent. Upon perusal of the record it came to the attention of the court that a fatal irregularity occurred during the procedure adopted by the regional court when sentencing the appellant. The court requested counsel to address the court on the failure by the magistrate to comply with the provisions of s114 of the Act. Both counsel agreed that it was evident from the record that the magistrate had failed to comply with the provisions of s114(2) and (3). In view of the concession made, the grounds of appeal will not be dealt with in this judgment.

[3] The relevant provisions of s114 reads as follow:

“(2) Where and accused is committed under subsection (1) for sentence by a regional court, the record of the proceedings in the magistrate's court shall upon proof thereof in the regional court be received by the regional court and form part of the record of that court, and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the court that such plea or such admission was incorrectly recorded.

(3)(a) Unless the regional court concerned-

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his guilt was incorrectly recorded; or

- (ii) is not satisfied that the accused is guilty of the offence of which he has been convicted and in respect of which he has been committed for sentence,

the court shall make a formal finding of guilty and sentence the accused.

[4] The magistrate was, in terms of the above-mentioned provisions, required to afford the accused an opportunity to, on a balance of probability, satisfy the court that the plea and the admissions were incorrectly recorded; and thereafter make a formal finding of guilty if the magistrate is not convinced that it was incorrectly recorded or is satisfied that the accused is guilty. It is a mandatory requirement of section 114(3) that a formal finding of guilty should be made. The magistrate *in casu* however did not enquire from the accused whether the plea and admissions were correctly recorded and failed to make a formal finding of guilty. The conviction of the district court was thus not confirmed. This irregularity vitiates the entire sentencing procedure in the regional court. The appellant could not have been sentenced without the regional court magistrate first complying with the provisions of s114(2) and (3). The sentence imposed by the regional court magistrate cannot, under these circumstances, be permitted to stand. ¹

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

1. The application for condonation for the late noting of the appeal is granted.
2. The sentence is set aside.
3. The matter is remitted to the regional court for the district of Ondangwa for the regional court magistrate to comply with the provisions of section 114 (2) & (3) of the Criminal Procedure Act, 51 of 1977
4. The regional court magistrate is furthermore directed, in the event a formal finding of guilty is made, to take into consideration when sentencing afresh, the term of imprisonment already served; and .to note that the mandatory minimum sentences provided for in section

¹ (See Elizabeth lileka v The State an unreported judgment, Case no CA 96/2009, delivered on 30 July 2010)

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14(1)(a)(ii) and (b) of the Stock Theft Act, 1990 has been struck down as unconstitutional²

M A Tommasi
Judge

JC Liebenberg
Judge

² DANIEL v ATTORNEY-GENERAL AND OTHERS; PETER v ATTORNEY-GENERAL AND OTHERS 2011 (1) NR 330 (HC)

APPEARANCES

APPELLANT:

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RESPONDENT

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