

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 53/2013

In the matter between:

THE STATE

APPELLANT

and

JOHANNES IMMANUEL

RESPONDENT

Neutral citation: *S v Immanuel* (CA 53/2013) [2016] NAHCNLD 92 (14 November 2016)

Coram: JANUARY J, TOMMASI J (CONCURRING)

Heard: 25 July 2016

Delivered: 18 November 2016

Flynote: Appeal – Acquittal – Theft – Irregularity – not vitiating proceedings – Inadmissible evidence not considered – Remainder of admissible evidence considered – State proved a *prima facie* case – Acquittal set aside – Substituted for conviction

Summary: The accused in this matter was acquitted on a charge of theft of a gearbox of a motor vehicle. A part of the State's evidence was inadmissible but the other evidence was admissible. On the proven admissible facts the State proved a *prima facie* case. The magistrate committed an irregularity. The acquittal is set aside and substituted with a conviction of theft. The matter is remitted to the magistrate for sentence.

ORDER

1. The appeal succeeds
2. The acquittal is set aside and substituted with a conviction for theft.
3. The matter is remitted to the magistrate for sentence.

JUDGMENT

JANUARY J, TOMMASI J (CONCURRING)

[1] This is an appeal by the State after the acquittal of the respondent who was tried in the magistrate's court Oshakati on a charge of theft of a gearbox valued at N\$5000. Leave to appeal was granted by this court after application by the applicant in terms of section 310 (1) read with sections 310(2)(a) and 310(3) of the Criminal Procedure Act, Act 51 of 1977.

[2] The respondent pleaded not guilty to the charge of theft and gave a plea explanation. Respondent stated the following in his plea explanation; 'I will disclose my

defence your worship. My co-accused is the one who took the car to his friend and removed the gear box.'

[3] Ruusa Kuutondokwa testified that the respondent is a taxi driver. She gave her car to the respondent on 11 September 2012 to drive as a taxi. The following morning the witness requested the respondent to come to her place but he did not do so. At around 08h00 the respondent informed the witness that he was in Okahao. The respondent informed the witness that customers were few in Oshakati and that is why he went to Okahao. The day thereafter the respondent indicated that he was still in Okahao. The witness requested the respondent to go to her house upon arrival in Oshakati to record the money made from the taxi as per their agreement.

[4] The witness had to go to the High Court in Oshakati. She called the respondent from the high court where he informed her that he was on his way from Okahao. The witness had in the meantime observed her motor vehicle at a place in Oshakati called Mike Motor Spares with the respondent busy on a cell phone. The witness did not inform the respondent that she observed him at Mike Motor Spares. The respondent told the witness that he was on his way from Okahao. The witness then went to a super market where she said the respondent should have come to. He was however not there and informed her that he was passing certain robot lights. She requested the respondent to bring the car and N\$250 but he did not turn up.

[5] The witness called a certain Michael Nankabe who eventually brought the car. Michael informed the witness that the gear box was not functioning properly. The witness tested the vehicle and realized that the gearbox was not the same as it was. The gearbox which was in the vehicle when the respondent received the vehicle was replaced shortly before with one to the value of N\$7000. The witness called the respondent upon which he said the gearbox was just like that. The police recovered the gearbox in question.

[6] Mr Amathila Kuutondokwa testified that he is working for the Namibian Police, Oshakati and is the husband of the previous witness. He is the complainant in the matter. He told his wife to look for a driver for their car a Toyota 1995 model. On 11

September 2012 she called him and informed him that she found a driver. On 13 September 2012 his wife informed him that she took the car from the respondent and that the gearbox was not in a good condition. This witness went to a certain garage where he was told that some things were missing. The gearbox was removed and he noticed that something was missing. On 26 September 2012 he went to Mike's garage and was referred to a certain Mr Namagongo who dealt with the vehicle.

[7] Mr Namogongo told the witness that a gearbox was removed and replaced with another one. Mr Namagongo referred Mr Kuutondokwa to a certain Mr Paulus Phillipus the owner of a white Corolla. The witness found him about to install a gearbox. Mr Kuutondokwa identified his gearbox. Mr Paulus Phillipus told the witness that it was the respondent who sold the gearbox to him. Mr Paulus Phillipus eventually returned the gearbox to the complainant. After some days Mr Kuutondokwa went with a police vehicle to trace the respondent. When the respondent was pointed out by Mr Paulus Phillipus, he started running away. They followed the respondent into a house that he ran into and arrested him. The respondent admitted that he removed the gearbox.

[8] Mr Paulus Phillipus testified that he met the respondent at a bar in September 2012. This witness mentioned to the respondent that he was looking for a gearbox for a Corolla motor vehicle. The respondent told the witness that he had a spare gearbox and offered it to the witness. The witness took his car to the person who had to repair the vehicle and told him that the gearbox will be brought there. The next day Mr Namongongo arrived with police officers asking for the gearbox. This witness looked for the respondent and saw him on the way to Ongwediva. He called the police who came and collected the respondent. The respondent admitted that he gave the gearbox to the witness.

[9] The respondent did not testify in his defence and also did not call any witnesses. His right to cross-examination was explained to him. The respondent did not have any questions for the first witness and stated; 'I have no questions what witness testified is the truth.' The respondent disputed the testimony of the complainant that he said he removed the gearbox. The complainant was adamant that the respondent said that and he wanted to pay back so that the case does not proceed. Respondent did not have any

questions in cross-examination for the last witness and stated; 'No questions, I agree with his testimony.'

[10] The magistrate in his/her reasons for the acquittal found that the testimony of Mr Kuutondokwa about what Mr Namugongo informed him in relation to the removal of the gearbox from Mr Kuutondokwa's vehicle and the placing of it into Mr Paulus's vehicle as hearsay and inadmissible. I agree with the learned magistrate on this evidence. The magistrate admitted the evidence of Mr Paulus provisionally on the understanding that the respondent was going to testify.

[11] It does not appear from the record who gave the assurance that the respondent was going to testify and it appears that, in view of the respondent's later decision to remain silent, that the magistrate ruled the evidence of Mr Paulus Phillipus as inadmissible. The admission of the evidence of Mr Paulus Phillipus was not dependant on the respondent testifying. This was a misdirection.

[12] The magistrate ruled the admission by the respondent to both Mr Kuutondokwa and Mr Paulus Phillipus inadmissible because the respondent was not warned of his legal rights. On a close perusal of the record it is clear that Mr Kuutondokwa was a police officer in the Namibian Police. On the day of the arrest of the respondent, Mr Kuutondokwa was informed by Mr Paulus Phillipus that he had found the respondent in Okandjengedi. Mr Kuutondokwa made use of a police vehicle and was with Mr Paulus Phillipus when he pointed the respondent. It seems that Mr Kuutondokwa and Mr Paulus Phillipus were together when the alleged admission was made. Mr Kuutondokwa is a police officer who arrested the respondent and it was incumbent on him to warn the respondent on his rights. The record does not reflect any warning. I therefore find that this failure constituted a pre-trial irregularity. Consequently I agree with the magistrate that the alleged admissions are inadmissible.

[13] It is by now trite law that not every irregularity vitiates proceedings. It depends on the nature of the irregularity. This court needs to consider and assess the remaining evidence to establish if the State had made out a *prima facie* case at the close of its case. The magistrate found that the identity of the gearbox was never proved. The

identity in my view was however never an issue. The respondent stated in his plea explanation that the gearbox was removed by his co-accused. I need to pause here to state that from the record of the proceedings, no one else was charged with the respondent. The respondent never challenged ownership of the gearbox in question.

[14] I find that the following facts had been proved beyond a reasonable doubt at the close of the State's case. On 11 September 2012 the respondent was entrusted with the complainant's motor vehicle, a Toyota Corolla, to operate as a taxi. The respondent did not return to the complainant's wife the following day to book money earned from operating the taxi as per the agreement with the complainant's wife. The respondent pretended that he was operating in another town as he could not find customers in the town he had to operate in with the taxi. The respondent was at Mike Spares Centre with the vehicle of the complainant contrary to what he (the respondent) stated, that he was in another town. The respondent did not return with the vehicle at all but it was eventually returned to the complainant's wife by one Michael Nankabe.

[15] Upon the return of the vehicle the gearbox was malfunctioning. On investigation it was discovered that the gearbox was replaced with one that had some parts missing. The gearbox in issue was eventually traced to Mr Paulus Phillipus who was about to install it into his wife's motor vehicle. The respondent offered the gearbox for sale to Mr Paulus Phillipus. The gearbox was sold to Mr Paulus by the respondent. Mr Paulus traced the respondent with the complainant in a police motor vehicle. Upon pointing out of the respondent by Mr Paulus, the respondent ran away but was arrested in a house he ran into.

[16] I find that on these proven facts the State proved a *prima facie* case for the following reasons. The respondent was the custodian of the vehicle with the gearbox in question. He sold the gearbox or at least offered it for sale. When requested where he was at a certain point in time, the respondent pretended that he was in another town not knowing that he was observed by the complainant's wife locally. He did not return the vehicle to the complainant's wife. When the complainant and Mr Paulus Phillipus traced him, he ran away.

[17] In these circumstances the magistrate misdirected himself by acquitting the respondent and the acquittal stands to be set aside. The record reflects that the respondent's rights were explained at the close of the State's case.

[18] In the result:

1. The appeal succeeds
2. The acquittal is set aside and substituted with a conviction for theft.
3. The matter is remitted to the magistrate for sentence.

HC JANUARY, J

MA TOMMASI, J

APPEARANCES:

For the Appellant:

Adv. Gaweseb

Office of the Prosecutor-General

For the Respondent:

Mr Nsundano

Legal Aid – Oshakati High Court.