

1997/10/27

Strydom, J.P. et Hannah, J.

**Housebreaking and theft - Court should not allow
prosecutor to lead inadmissible evidence.**

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHNNY LOUW

versus

THE STATE

CORAM: STRYDOM, J.P. et HANNAH, J. Heard

on: 1997.10.27 Delivered on: 1997.10.27

JUDGMENT:

STRYDOM, J.P.: The Appellant appeared as Accused No. 2, together with four others, before the Magistrate Windhoek, on a charge of housebreaking and theft of photographic equipment worth N\$45 000-00. The Appellant pleaded not guilty, but after evidence was led he was convicted and sentenced to three years imprisonment. He applied for, and was granted a judge's certificate to appeal against his conviction.

Mr Mouton appeared *amicus curiae* on behalf of the Appellant and the Court wants to thank him for his assistance in this case. The State was represented by Ms Prollius. Ms Prollius conceded in my view correctly, that there was not sufficient evidence to support the conviction of the Appellant.

Mr Gerhard Botha testified that his shop was broken into during the night of the 21 February 1997, during which photographic equipment and video cameras were stolen. Various witnesses testified. The only one who incriminated the Appellant to a certain extent was Ms Wang Rong Hoa. She testified that on an unknown date Appellant and Accused No. 3 entered her shop. Accused No. 3 was carrying a bag in which there were two cameras which he wanted to sell to her. After negotiations she bought the cameras for NS500-00 and two pairs of shoes. From this evidence it is clear that it was Accused No. 3 who conducted the negotiations. Ms Hoa said that Accused No. 2 was sitting there, eating. She said, that at stages Appellant talked a little, but what and when he spoke is not clear. A reading of Ms Hoa's evidence in Court, where it seems she testified through an interpreter, shows in my opinion that communication must in any event have been difficult. She also testified that when the Appellant talked to Accused No. 3, she did not understand. She said however that when Appellant and Accused No. 3 left, Appellant also took one pair of shoes.

Appellant testified that he met Accused No. 3 at a taxi rank. Accused No. 3 was drunk. This evidence is also supported by Ms Hoa who said that Accused No. 3 had drunk wine and that was why he talked so much. Accused No. 3 asked Appellant to accompany him to a Chinese shop. In the shop the Accused talked to a Chinese lady and handed her a bag. Appellant said that accused No. 3 was paid an amount unknown by this lady. Accused No. 3 also asked him to carry a bag in which there were two pairs of sneakers. The Appellant further testified that he did not know anything about the negotiations between Accused No. 3 and Ms Hoa nor did he know that cameras were involved. The Appellant was not shaken under cross-examination.

The only other evidence implicating Appellant, was that of Constable Florry who, without any interference by the Court, informed the Court that Accused No. 1 told him that Appellant was one of the group who broke into the shop and removed the articles. The evidence of this witness, starting on page 10 of the record, is in my opinion evidence of an inadmissible confession which should never have been allowed by the Court. Also evidence of admissions by some of the other Accused, if they did not amount the confessions, had no evidential value *vis a vis* the Appellant and could not have been used to determine the guilt of the Appellant. It seems that the Court and the prosecutor were satisfied that as long as the confession was freely and voluntarily made, the other requirements laid down by Section 217 of Act 51 of 1977 for the admissibility of such evidence, were of no concern.

In the end there is only the evidence of Ms Hoa. In my opinion this evidence as was also conceded by Ms Prollius, was too vague and imprecise to have justified an inference, as the only reasonable one, that Appellant was present at the sale, because he was one of the people who broke into the shop and stole the articles. The inference, based on the evidence that Appellant only accompanied Accused No. 3 because he was requested to do so, is in my opinion just as reasonable. In fact nothing which Ms Hoa testified really contradicted the evidence of the Appellant, and in many respects this evidence supported his version.

In the result the appeal succeeds and the Appellant's conviction and sentence are set aside.

I agree.

A handwritten signature in black ink, appearing to be "M. J. Am", is written over a horizontal line. The signature is cursive and stylized.