CASE NO. CA 09/2005

SUMMARY

KENNEDY MASULE CHANDA v THE STATE

HOFF, J *et* HEATHCOTE, A.J.

23 June 2005

Jurisdiction – Theft – Accused cannot be charged (in a Namibian court) with theft of an item which he allegedly stole in Zambia, unless he is in possession of such item in Namibia.

Jurisdiction – Prosecutors and magistrates particularly those in jurisdictions close to the borders of Namibia should study the Supreme Court case of S v Mwinga 1995 NR 166 (SC)

Evidence – Hearsay – Meaning of - Oral and written statements by persons who are not a party to the proceedings or who are not witnesses in the proceedings, and who are not called, cannot be tendered as evidence for the truth of what those oral or written statements say

Record – Magistrate should indicate on record whether a town is situated in Namibia or Zambia where towns in Namibia and Zambia have the same names

Fair Trial – Constitutional right to cross-examine those called against accused – Refusal to recall witness in terms of section 167 of the Criminal Procedure Act – Such refusal *in casu*, tantamount to refusal of right to cross-examine – Irregularity vitiating the proceedings

CASE NO. CA 09/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

KENNEDY MASULE CHANDA **APPELLANT**

versus

THE STATE **RESPONDENT**

CORAM: HOFF, J *et* HEATHCOTE, A.J.

Heard on: 2005.06.23

Delivered on: 2005.06.23 *(Ex temporae)*

JUDGEMENT

HEATHCOTE. A.J.: In this matter the appellant (to whom I shall refer as the accused in this *ex tempore* judgement) was charged with theft in the District Court of Katima Mulilo. The charge sheet reads that the accused is guilty of crime of theft,

"In that upon or about the 20th day of July 2003 and at or near Katima Mulilo in the District of Katima Mulilo the said Accused did wrongfully and unlawfully and intentionally steal the property or in the lawful possession or control of Joshua Ilungu."

At the appeal the accused was represented *pro amico* by Mr Von Weilligh and the State by Ms Rakow. Both of them filed very helpful heads of argument.

The accused was arrested on 29 July 2003 and convicted and sentenced on 20 August 2004. Today is 23 June 2005, almost two years after the arrest.

One thing that I need to impress upon the learned magistrate in this matter, or for that matter, upon all learned magistrates in regions where towns of Namibia are situated close to the Namibian border, is that this court, more often than not, do not know to which places are being referred to if the record is perused. Indeed from the record of this case, it appears that the towns referred to, have got the same names on the Namibian side as well as the Zambian side of the border. It is

therefore imperative that in these records, when there is reference to names of towns, it should be indicated by the learned magistrate in which particular country the town (being referred to) is situated.

The best that can be said from this record, is that, after I have read it twice, I gathered that at some stage somewhere in the north of Namibia alternatively somewhere in the south of Zambia there was a bicycle. How the Accused could have been found guilty of theft of the bicycle on that evidence remains a mystery.

But apart from that, a number of irregularities have also occurred, the most important or significant one being that at some stage during the trial the Accused indicated that he wanted disclosure of the docket. He was then offered the contents of the docket at the price of approximately N$27.50. At the next hearing the accused wanted to recall the first State witness to cross-examine him on the contents of the docket. The request was obviously made in terms of Section 167 of the Criminal Procedure Act. This was out-rightly refused by the magistrate, claiming that the complainant, who was the first

witness, had already gone back to Zambia. No indication whatsoever has been given on the record as to what steps could have been taken in order to recall the complainant. It also appears from the record that the complainant's so-called bicycle and trousers were still at Court, and clearly, he would have had an interest in those. The State would have remained or could have remained in contact with him. The bottom line is that this request was refused and the accused was not given the opportunity to cross-examine. The rights contained in Article 12 of the Namibian Constitution are to be given effect to by purposefully interpreting that Article. The right to cross-examine those who were called against an accused is a specific right. The magistrate refused the accused this right mentioned in Article 12. To refuse an accused the opportunity to recall someone in order to cross-examine him on the contents of statements made by that person, is tantamount to refusing cross-examination to take place. In *S v Kandovazu* which is a case reported in the Namibia Law Reports 1998 page 1 (Supreme Court of Namibia) written by Gibson, AJA, with whom Mtambanengwe, AJA and Mahomed CJ agreed, the Court set aside a conviction and sentence of the accused on the basis that the accused was refused access, after request

was made by his attorney, to the contents of the State docket. At page 7 of that judgement, next to the letter G, Gibson AJA said the following:

> “In non constitutional matters, therefore the Court asks whether the irregularity is of a general or exceptional category. On reaching this conclusion the learned Chief Justice turned to consider the effect of a breach of the fundamental rights and freedoms entrenched in the constitution.
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> To decide this issue the learned Chief Justice examined authorities in the Commonwealth, (Canada, Jamaica, Australia) and the United States of America, and went on at 484A:
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> 'But even if it is assumed that the breach of every constitutional right has the same effect on a conviction which is attacked on appeal, it does not follow that in all cases that consequence should be to set aside the conviction. I am not persuaded that there is justification for setting aside on appeal all convictions following upon a constitutional irregularity committed by a trial court.'
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> The learned Chief Justice then concludes at 484B-C
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> '. . . that the test proposed by our common law is adequate in relation both to constitutional and non-

constitutional errors'.

> What has to be looked at, as the learned Chief Justice observes is 'the nature of the irregularity and its effect'. If the irregularity is of such a fundamental nature that the accused has not been afforded a fair trial then a failure of justice per se has occurred and the accused person is entitled to an acquittal for there has not been a trial, therefore there is no need to go into the merits of the case at all."

In the *Kandovazu* case, the Supreme Court did not look at the merits of the matter any further, but declared that the accused had an unfair trial and set aside the conviction of the accused. In my view, the irregularity that occurred in this case is a similar kind of irregularity. It is fundamental. It deprived the accused of a fair trial. For that reason the conviction and sentence cannot stand and should be set aside.

But I do need to raise, for purposes of this judgement, two other aspects. The one is jurisdiction. I would have assumed that in all towns close to the borders of Namibia, especially in the north, magistrates and prosecutors are aware of and have studied the Supreme Court judgement of *S v Mwinga and Others*. It is reported in the Namibian Law Reports 1995 NR at

166. In that judgement the Court discussed various issues, as far as jurisdiction is concerned. The Supreme Court drew distinctions between continuing crimes and crimes that are not. This judgement should be known and studied by all those who are involved in criminal law in towns close to the borders of the Namibia.

The State must prove beyond reasonable doubt that the Court has jurisdiction to hear the matter. It is so that theft is a continuing crime, but that does not mean that a thief can be prosecuted in any country where he finds himself, even in circumstances where he is not in possession of the alleged stolen thing anymore. At least, that is the Namibian law. I refer to South African Criminal Law and Procedure vol (2) by Milton on page 628 where the learned authors says the following:

> "Whatever might have been the position in the Roman and Roman Dutch Law it has been accepted by our courts that theft is a continuing crime. By that is meant 'the theft continues as long as the stolen property is in possession of the thief or of some person who was a party to the theft or of some person acting on behalf or even possibly in the interest of the original thief or party

to the theft."

Now in this case, the State has never proven beyond reasonable doubt that the Court of Katima Mulilo had jurisdiction to adjudicate upon this theft. The one difficulty that faces the State today, is the one that I have already mentioned. That is that this Court simply does not know to which particular towns are being referred to in the record. It is so and I don't need to refer to authority, that a court can take judicial notice of places in countries, where a reliable map is handed in to Court. It has the same effect as handing in a calendar. It might be useful if such a map is included in all records where it becomes necessary. But this would not be necessary if the magistrate clearly indicates on the record, in exactly which country a town is situated.

In my view the State has not proven beyond a reasonable doubt that the Court had jurisdiction. The fact that theft is a contining crime does not assist the State. The fact of the matter is that the complainant lived, as it appears from the record, in Zambia and apparently his bicycle was removed from this house in Zambia. There is no indication that the

accused ever brought that bicycle, or for that matter, the trousers in to Namibia. There is a possibility upon speculation, but that is not good enough. For that reason the appeal should also succeed.

The only further issue which I wish to deal with is the issue of hearsay evidence. It appears that neither the magistrate nor the prosecutor were *au fait* with the meaning and concept of hearsay evidence. It is not necessary to refer to any authority. It would suffice to state the definition of hearsay to the following effect: And that is that, "oral and written statements by persons who are not a party to the proceedings or who are not witnesses in the proceedings, and who are not called, cannot be tendered as evidence for the truth of what those oral or written statements say". That is, I gather, why magistrates and prosecutors should by now know that if an accused is unrepresented and a name is mentioned by a witness, there should at least be an indication given to the magistrate that that person will be called to come and state the truth of the matter, so in order for the statement to become admissible.

What is more alarming is that an unrepresented accused might in certain circumstances, and that is what happened in this case, be tempted to cross-examine on statements which were patently hearsay. In those circumstances the risk is that hearsay evidence, solicited through cross-examination, will become admissible. I am not so sure, and it is not necessary to decide, whether the same rule should apply, or rather that the same rule should be applicable to undefended accused persons. In this matter, the witnesses referred to letters which could have been posted either in Zambia or Namibia. The allegations in those letters were admitted against the accused without any indication being given that the author will be called. And the irregularities just went on and on and on. The irregularities continued, and the accused remained in custody for a period of two years in respect of the crime not proven, and in respect of a crime over which the Court did not even have jurisdiction.

In all those circumstances I am of the view that the appeal should succeed, and it is ordered that the appellant's appeal against conviction succeeds. The accused's conviction and sentence are set aside.

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HEATHCOTE, A.J.

I agree

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HOFF, J.

ON BEHALF OF THE APPELLANT **Mr Von Weilligh**

Instructed by: **P D Theron & Associates**

ON BEHALF OF THE RESPONDENT **Ms Rakow**

Instructed by: **Office of the Prosecutor-General**