CASE NO.: CR 02/2011

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

JOHANNES AMUKWAYA
STEPHANUS SAKARIA

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 31.01.2011

REVIEW JUDGMENT - SECTION 116 (3) ACT 51 OF 1977

LIEBENBERG, J.: [1] The accused persons appeared in the Magistrate's Court, Tsumeb on a charge of theft, read with the provisions of the Stock Theft Act 12 of 1990 (as amended). Despite both accused pleading not guilty on a charge of theft of two head of cattle, they, at the end of the trial, were convicted as charged and committed for sentence by the

Regional Court.

[2] The Regional Court magistrate, acting in terms of s 116 (3) of the Criminal Procedure Act, 1977 (Act 51 of 1977), was not satisfied that the convictions of both the accused were in accordance with justice and sent the matter for review, pursuant to the provisions of the Act. I pause here to observe that the record of the proceedings is incomplete, as it would appear that page 54 of the record is missing. This part of the record is crucial as it partly covers the testimony and cross-examination of the first accused and without it this Court would be unable to consider the evidence presented in the trial court.

[3] However, as pointed out by the learned Regional Court magistrate, the trial court committed a procedural irregularity, vitiating the proceedings subsequent thereto. Although the Regional Court was also not satisfied that the trial court's assessment of the evidence is correct and justifies the convictions, it would be improper for this Court, at this stage, to evaluate the evidence where the accused are likely to call witnesses to give evidence on the merits. Hence, I decline to consider the matter before me on the merits.

[4] At the close of the State Case the court acquitted accused no. 3 and put the two other accused (accused no's 1 and 2) on their defence. The court then explained to them the right they had to give evidence and call witnesses whereafter both accused informed the court that they wanted to give evidence. After an altercation between the magistrate and accused no.1 about the calling of witnesses - which, in my view, was quite unnecessary - the said accused intimated to the court that he had witnesses to call, but that it would be difficult for him to secure their presence at court as he was in custody. The second accused elected not to call any witnesses. Accused no.1 then gave the names and residential addresses of three witnesses he intended calling.

[5] Before the matter was postponed for three months the court conveyed the following to the accused:

"Accused no.l, the State will summon your Witnesses on your behalf as you are in custody."

[6] On resumption of proceedings on 29 April 2010 the magistrate enquired from the accused persons who had a witness by the name of "Johannes Kayoko"; and from the record it would appear that it was accused no. 1's witness as the court wanted to know from him whether he wanted to testify first or call his witness first. Despite the proceedings being mechanically recorded, there is nothing on record showing from where the court got the name of the witness referred to; or that application was made to lead the evidence of accused no.1 's witness first. It would therefore appear that the magistrate was of the view that an accused person (the defence) has a *discretion* as to the sequence in which evidence will be presented ie whether the accused will be testifying first and then the witnesses, or the other way round. That however, is wrong, as the Criminal Procedure Act is clear on what procedure should be followed when an accused wants to adduce evidence in his/her defence.

[7] It therefore seems necessary to quote the relevant section of s 151 of Act 51 of 1977 which reads:

"(1)(a) If an accused is not under section 174 discharged at the close of the case for the prosecution, the court shall ask him whether he intends adducing any evidence on behalf of the defence, and if he answers in the affirmative, he may address the court for the purpose of indicating to the court, without comment, what evidence he intends adducing on behalf of the defence.

(b) The court shall also ask the accused whether he himself intends giving evidence on behalf of the defence, and-

*(i) if the accused answers in the affirmative, he shall, <u>except where the court on good cause shown allows otherwise, be called as a witness **before** any other</u>*

witness for the defence; or

(ii) *if the accused answers in the negative but decides, after other evidence has been given on behalf of the defence, to give evidence himself, the court may draw such inference from the accused's conduct as may be reasonable in the circumstances.*

(2)(a) ....."

(Emphasis provided)

[8] Therefore, an accused - on application and during which the State is entitled to oppose the application - must show *good cause* as to why his/her witness(es) need to testify first before the accused takes the stand. The reasons for this procedure seems obvious, as the accused would have an unfair advantage when, before testifying himself, has the opportunity of first hearing the evidence of his witnesses. That would enable him to adapt his evidence according to their version. Courts should therefore not readily accede to a request from the defence to lead the evidence of other witnesses before calling the accused without good cause shown justifying such ruling.

[9] The defence case commenced with accused no.1 testifying and was immediately followed by accused no.2 giving evidence. At the end of the latter's testimony the record reflects the following:

"COURT: Go back where you were standing before. (sic) yes Ms State prosecutor, submissions. Two Accused closed their case. CASE FOR THE DEFENCE

MS MATSI ADDRESSES COURT IN SUBMISSION: Thank you Your Worship. (Indistinct) Your Worship (inaudible).

JUDGMENT"

From the excerpt it is clear that the court did not enquire from accused no.1 whether he still intended calling any witnesses to testify on his behalf - in fact, there is nothing on record showing that the three witnesses the accused intended calling; and for whom subpoenas were

to be issued as directed by the court, were present and thus available to give evidence.

[10] Had they not been present, the court should have determined whether they were subpoenaed as directed; and once satisfied that the legal requirements pertaining to the serving thereof were met, the court was entitled to issue warrants for their arrest. Not only did the court fail to enquire about the witnesses earlier mentioned by accused no.1, whom he intended calling; it also failed to enquire as to whether the person by the name Johannes Kayoko - who was *present* - was indeed his witness and whether he wanted to call him to testify.

[11] This omission on the part of the magistrate is a serious irregularity prejudicial to the accused and inevitably would lead to the setting aside of the conviction and sentences imposed. Although only accused no. 1 intended calling witnesses, it does not mean that only he would have suffered prejudice. Because of the close relation between the respective acts allegedly committed by the accused in the commission of the crime; and not knowing what any of the witnesses would come and say when testifying, the possibility, in my view, cannot be excluded that their testimony might strengthen the case of accused no.2 as well. To that end he would also have suffered prejudice.

[12] In *S v Kazonganga* 1994 NR 275 (HC) the Court said that a presiding officer at a trial always has the power to prevent an abuse of the procedure of the Court, but that it must be very clear to the Court that it was indeed the position before refusing the calling of a defence witness. Although the magistrate in the present case did not *refuse* to allow the accused to call his witnesses but *omitted* affording him that opportunity, the consequences are exactly the same. Dealing with the right of an accused to call witnesses this Court endorsed what was *inter alia* said in *R v Billy* 1963 (1) SA 42 (SR); *S v Tembani* 1970 (4) SA 395 (E); and *S v Gwala* 1989 (4) SA 937 (N) where Didcott J at 938F-G, whilst referring to the function of the magistrate, said:

> *"He had no function in those circumstances but to hear what the witness might say, which was apparently most material. The accused had an absolute right to call the witness. And he lacked the power to deny her that right. His denial of it amounted to a gross and indefensible irregularity. And the irregularity was the sort so prejudicial to the defence that it vitiated the whole trial."* (Emphasis provided)

Hence, on that basis the conviction of both accused stand to be set aside.

[13] Matters became worse when, after having closed the defence's case, the court did not afford the accused persons the opportunity to address the court on the merits. In this regard, endorsing what was said in *S v Mabote* 1983 (1) SA 745 (O), O'Linn J in *S v Khoeinmab* 1991 NR 99 at 101C-F said the following:

> *"It is quite clear that a failure or refusal to permit the right to address is an irregularity which will generally lead to the setting aside of a conviction.....*
> *The accused has the right to address the Court, regardless of his prospects of success. Such an irregularity destroys the fairness of the trial and must be regarded as a gross irregularity."*

See also: *S v Kamati* 1991 NR 116 (HC)

[14] From the above it is clear that the trial court's failure to afford the unrepresented accused the opportunity of addressing the court on the merits amounts to an irregularity. Although the Court in the *Khoeinmab* case had set aside the entire proceedings, that was because of the specific circumstances of the case and the fact that the accused had almost completed serving his sentence. That is not the position in this case and there is no need to make a similar order as the procedural irregularities committed can be cured by a proper order. The proceedings up to the end of the testimony of the accused no.2 are procedurally in accordance with justice; and there is no reason why the evidence adduced up to that stage, cannot remain standing.

The trial should therefore continue from where the accused persons are afforded the opportunity of calling witnesses and after the close of the defence's case, the accused must be invited to make submissions on the merits.

[15] Whereas the accused persons have already been committed to the Regional Court for sentence and the Criminal Procedure Act not providing for a remittal of the case to the Magistrate's Court by the Regional Court, it would require an order from this Court to have the accused persons again be brought before the trial court to continue with the trial in compliance with guidelines set out herein.

[16] Prior to their conviction accused no.2 was admitted to bail, whilst accused no.1 remained in custody throughout the trial. The bail of accused no.2 was cancelled upon conviction and whereas the conviction now stands to be overturned, I see no reason why he should remain in custody pending the finalisation of the trial. Under s 116 (3)(a) of the Criminal Procedure Act 51 of 1977, read with ss 303 - 304 of the Act dealing with review procedure, this Court has the power to make any order *"in regard to any matter or thing connected with such person (the convicted person) or the proceedings in regard to such person as the court seems likely to promote the ends of justice"* (s 304 (2)(vi)). If the bail money paid by accused no.1, in the mean time (after accused no.l's bail was cancelled), had been refunded, he should again be admitted to bail in the same amount; and should the bail monies have not been refunded to the depositor, then accused no.2's bail should simply be extended until the court, on good cause shown, orders otherwise.

[17] In the result, the Court makes the following order:

1. The conviction and sentence in respect of both accused are set aside.
2. The matter is remitted to the Magistrate's Court Tsumeb with the direction that

the trial magistrate must proceed with the trial in accordance with the guidelines set out in this judgment.

3. The accused, upon their next appearance in the Regional Court, should be informed accordingly.

LIEBENBERG, J

I concur.

TOMMASI, J