

CASE NO. CA 13/2009

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**ABRAHAM KOOPER**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**CORAM:** Muller, J and Smuts, J

**Heard on:** 2011.02.28

**Delivered on:** 2011.02.28

**JUDGMENT**

**MULLER, J et SMUTS J:** [1] The appellant was convicted on 24 February 2005 in the Magistrate's Court, Leonardville, on a charge of stock theft. The presiding magistrate convicted him after he had pleaded guilty and was questioned under s 112 of the Criminal Procedure Act, no 31 of 1977 (CPA). The district magistrate was correctly satisfied that the appellant had admitted all the elements of the charge. When the matter came up for sentencing on 30 March 2005, four previous convictions were proved and the case was transferred to the Regional Court for sentencing in terms of s 114 of the CPA because of the provision of the Stock Theft Amendment Act which

provides for a mandatory 30 year sentence where an accused has prior convictions and the value of the stock stolen exceeds N\$500. In this case the appellant was with theft theft of 3 goats valued at N\$900.

[2] The proceedings in the Regional Court, Gobabis, commenced on 9 June 2005 with the state prosecutor putting the prior proceedings in the Magistrate's Court, Leonardville on record. The state prosecutor informed the Regional Court that the appellant had pleaded guilty to the charge of the theft of 3 goats, valued at N\$900.00, was convicted on the charge and that previous convictions were proved and admitted. Because the sentence to be imposed was beyond the jurisdiction of the Magistrate Court, the matter was transferred to the Regional Court for sentencing.

[3] After that introduction, the Regional Magistrate enquired from the interpreter if the appellant followed what was said. The appellant then denied his guilt and proceeded to deny that he had pleaded guilty in the Magistrate Court. The Regional Court Magistrate without further ado recoded a plea of not guilty and postponed the matter for trial. When the matter resumed in the Regional Court, a trial commenced and evidence was led. At the end of the trial, the accused was convicted as charged and sentenced to 30 years imprisonment.

[4] The record of the Regional Court proceedings indicates that a procedural irregularity had been committed by the Regional Magistrate. Although she had the record of the magistrate's court proceedings, she obviously did not base her decision on those proceedings in order to satisfy herself as required by the provisions of s 114(2) of the CPA. This she was required to do. All that occurred according to the record, is that, after the introduction of the state prosecutor on 9 June 2005, the Regional Magistrate merely accepted what the appellant said, namely that he did not plead guilty in the

Magistrate's Court to the charges against him. On his mere say so, she entered a plea of not guilty and proceeded with a trial after the postponement.

[5] Had she properly had regard to the record in the Magistrate Court at the outset when she ought to have done so, she would have seen that the accused had in fact pleaded guilty and admitted all the essential elements of the charge and was then correctly convicted. It was only at the end of the trial (after the accused had been erroneously tried again) that she then referred in her judgment to the record of the proceedings in the Magistrates Court.

[6] In the event of such a referral, s 114 (3) makes it clear that a regional court must make a formal finding of guilty and sentence an accused unless one or two circumstances exist. These are firstly that the regional court is satisfied that a plea of guilty or an admission by an accused material to his or her guilt was incorrectly recorded. That clearly did not occur. The second instance is where the Regional Court is not satisfied that the accused is guilty of the offence for which he or she has been convicted and in respect of which the accused has been committed for sentence.

[7] It is evident that the Regional Magistrate did not consider or even have regard to the record in the District Court to satisfy herself as to whether the accused's guilt accorded with his plea of guilty. The belated reference to that record in her judgment would seem to amount an attempt to justify her erroneous decision to proceed with a full scale trial.

[8] The mere statement by the appellant that he was not guilty and had not pleaded guilty would by no means meet requirement of not being satisfied that the appellant was guilty of the offence for which he had been convicted. Indeed a quick perusal of the record would have demonstrated that the appellant's claim to have pleaded not

guilty was false. There could also be no question that his plea of guilty was incorrectly recorded. He had after all admitted all of the elements of the offence and had done so unequivocally and extensively. There was thus no proper basis for the Regional Magistrate to have not been satisfied that the appellant had committed the offence in the circumstances. He had thus been correctly convicted by the district Court. As neither of the requisites of s 114 (3) had been met, it follows that the entire further proceedings before the Regional Court were irregular and have to be set aside.

[9] In view of the conclusion we reach, namely that the further proceedings were vitiated by the irregularity, it would not be necessary to consider the issues of the ineptly prepared notice of appeal or condonation raised by Ms Husselmann on behalf of the State.

[10] The result is that the accused's conviction in the Magistrate Court, Leonardville still stands. The referral (committal) to the Regional Court would also stand. All that must now occur is for the matter to be referred back to the Regional Court to comply with the provisions of s 114 (2) of the CPA. The Regional Court Magistrate must accordingly proceed to attend to the sentencing of the accused. Until that process is finalised, the accused remains in custody.

[11] With regard to sentencing and without usurping the function of the Regional Court in that regard, the Regional Court Magistrate may wish to consider whether the return of 2 of the 3 goats to the owner and lengthy of time spent in custody already may possibly constitute the presence of substantial and compelling circumstances for the purpose of the Stock Theft Amendment Act.

ON BEHALF OF THE APPELLANT IN PERSON

ON BEHALF OF THE RESPONDENT

MS. HUSSELMANN

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL