CASE NO.: CR 02/2012

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

ANDREAS !OROSEB

(HIGH COURT REVIEW CASE NO.: 278/2011)

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

Delivered on: 20 January 2012

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused appeared in the Magistrate's Court Tsumeb on a charge of housebreaking with intent to steal and theft, and at the end of a trial he was convicted as charged and sentenced to fourteen (14) months imprisonment.

[2] When the matter came on review I directed a query enquiring into the admissibility of evidence given by two police officers about admissions and the pointing out of the crime scene made by the accused in the absence of evidence that the accused was apprised of his rights. In his response the magistrate in two simple sentences explained that (1) the court convicted on the evidence on record; and (2) that it did not accept the evidence about the pointing out. Unfortunately this is not true. As born out by the record (p 29 of the transcript) the magistrate in his sentencing reasons remarked as follows:

> *"You took them yourselves to the house of the Complainant where you showed them where you gained entrance, broke the window and you took the items."*

[3] The record speaks for itself and to now contend that the trial court did *not* rely on the evidence adduced at the trial regarding admissions and pointing out made by the accused, is misleading. I accordingly accept that the trial court, when convicting the accused, *did* rely on the evidence of the two police officers who arrested him; and after questioning him, had taken him to the crime scene where certain admissions and pointing out were made to them by the accused.

[4] Both Sergeants Mukuwe and Ngashipau narrated to the court how they, whilst on patrol duty, came across the accused early one Sunday morning between 6 – 7 am whilst carrying some duvets. Sergeant Mukuwe, to whom the accused was known, became suspicious and decided to approach the

accused. When the accused realised this, he dropped the things he was carrying onto the table or make-shift counter of vendors selling vegetables at a stall. When asked about the linen he was carrying that time of the day the accused explained that it was his and that he was on his way to Grootfontein. Sergeant Mukuwe was not at all satisfied by the accused's reply and then told the accused to accompany them to the police station for further questioning as the accused was known to him and he did not believe the accused.

At the police station he said to the accused that he must tell them where he got the items from and in order to persuade him in doing so, added:

> *"I will just approach Elna [owner] and I will give the things back and talk to the owner so that they do not open a case against you."*

The record further reflects that the questioning of the accused continued up to a point where the accused gave in and led the officers to the complainant's room, where it was discovered that there was a breaking and entry. It is common cause that the complainant was on leave in the north at the time and after a report was made to him he returned to Tsumeb. Only part of the goods stolen from his room (the linen), was handed back to him by the police. It was alleged that these were the same linen found in the accused's possession on the day of his arrest. I shall return to this aspect later.

[5] What is clear from the evidence is that the accused became a suspect from the time the two police officers started questioning him about the property in his possession and notwithstanding the accused's explanations in

that regard, they persisted in questioning him and insisted that he should tell them the truth. On this score Sergeant Ngashipau's evidence reads that the accused *"was refusing to tell us the truth"* whereafter Sergeant Mukuwe employed the tactic of convincing the accused that he would arrange with the owner of the suspect items not to press charges once it has been returned to him, if the accused were to tell them where he got the items from. It was only thereafter that the accused agreed and subsequently made a pointing out of the crime scene as well as accompanying admissions, which led to his arrest and prosecution. There is nothing on the record showing that during these stages of the investigation, the accused was apprised of his constitutional right not to incriminate himself or his right to legal representation; neither were the Judges' rules explained to him upon his arrest.

[6] In the absence of evidence as to the time when the accused was actually arrested, it would appear from the record that this only happened after the accused admitted to having committed the offence and pointed out the scene to the police officers. Prior to his arrest he was a suspect and treated by the police as such. In *S v Malumo and Others (2)*[1] it was stated as per Hoff, J that:

> *"There is persuasive authority (**S v Sebejan and Others**, 1997 (1) SACR 626 (W) (1997 (8) BCLR 1086) that a suspect is entitled to fair pre-trial procedures similar to those procedures an accused person is entitled to. Those procedures in my view include the right to legal representation, the right to be*

[1] 2007 (1) NR 198 at 211J – 213A

presumed innocent, the right to remain silent, and the right against self-incrimination."

[7] In *S v Mafuya and Others (1)*[2] the Court held that an investigating officer, who had disregarded the Judges' Rules and failed to caution the accused before questioning him, had unduly influenced the accused to make a confession.

The first Judges' Rule provides as follows:

"Questions may be put by police men to persons whom they do ***not*** *suspect of being concerned in the commission of the crime under investigation,* ***without any caution first being administered****."*

The second Judges' Rule reads:

"Questions may be put to a person … ***who is under suspicion*** *where it is possible that the person by his answers may afford information which may tend to establish* ***his innocence*** *… In such a case* ***a caution should first be administered*** *…"*

[8] Whereas the accused was a suspect from the outset, the two police officers who questioned him about the items in his possession and their insistence that he must show them where he got it from and during which process the housebreaking was discovered, did not comply with the provisions set out above. In *Malumo* (*supra*)[3] Hoff J stated:

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[2] 1992 (2) SACR 370 (W)
[3] At 210I-J (para [69])

> *"The Namibian Constitution, indeed, does not expressly provide for the right of an accused person or suspect to be informed of a constitutional right, but a court of law in giving effect to constitutional rights of such a person would interpret those constitutional provisions meaningfully."*

And further[4]:

> *"Article 12 of the Namibian Constitution means that the entire process of bringing an accused person to trial itself needs to be tested against the standard of a fair trial."*

[9] When applying the aforementioned principles to the facts *in casu*, I am satisfied that the admissions and pointing out of the scene by the accused should have been ruled inadmissible evidence by the trial court and failing to do so, constituted an irregularity, vitiating the entire proceedings.

[10] I now return to the items found in possession of the accused. It is common cause that the accused was found in possession of linen only, and not with the car radio/MP4 music player; Nokia 5110 cell phone or two pairs of shows testified about by the complainant, which were also stolen from him. In fact, the charge against the accused only makes reference of 2 x pillows; 2 x duvets; 1 x duvet cover and 1 x bedcover. This corresponds with the items returned to the complainant by the police as per form Pol 41. To this list of items Sergeant Mukuwe in his evidence added another duvet cover also

[4] At 211E-F (para [71])

found with the accused; but under cross-examination said that it was 2 x pillow cases (not pillows). According to him this was in March 2011 while Sergeant Ngashipau said it was in January 2011 – the latter being the more likely version. A material difference in their evidence, however, is that according to Sergeant Ngashipau the accused was found with 2 x blankets and 2 x pillows only. On a leading question put to him by the prosecutor he changed it to say that it was 2 x duvets. Their evidence that one of the duvets was blue/green/white striped, corroborates the complainant's evidence, but again differs in the sense that the complainant did not refer to pillows, but pillow cases. To confuse matters further, neither of these two police officers were present when the complainant's property were returned to him and were therefore in no position to state whether it was the same items seized during his arrest. In my view, there should have been doubt in the court's mind as to whether or not the State has succeeded in proving whether the items handed over to the complainant by the police as per the Pol 41 form, were the same items found with the accused. Without this uncertainty having been cleared up, there was a possibility that what was returned to the complainant is not what the accused was found with on the date of his arrest.

[11] Excluding the evidence of the police officers pertaining to the alleged pointing out and admissions made by the accused, his possession of linen belonging to the complainant and which were unlawfully removed from his home, would have been the only link between the accused and the crime. The uncertainty around this part of the evidence, however, weakens the link to

the extent that it cannot be said beyond reasonable doubt that the accused was found in possession of the complainant's property.

[12] In the result, the conviction and sentence are hereby set aside.

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LIEBENBERG, J

I concur.

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TOMMASI, J