

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Kaluwe Mubiana</i>	Case No: CR 2 /2021
High Court MD Review No: HC 132 /2020	Division of Court: Main Division
Heard before: Mr Justice Liebenberg <i>et</i> Mr Justice Miller (Acting)	Delivered on: 21 January 2021
Neutral citation: <i>S v Mubiana</i> (CR 2 /2021) [2021] NAHCMD 4 (21January 2021)	
The order: The conviction and sentence are set aside.	

Reasons for order:

LIEBENBERG J (concurring MILLER AJ)

- [1] This is a review matter in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 (CPA).
- [2] The accused person appeared in the Magistrate's Court for the district of Katima Mulilo on a charge of housebreaking with intent to steal and theft.
- [3] The charge sheet alleges that on or about 29 September 2017, at or near Mumbone village in the district of Katima Mulilo, the accused did unlawfully and intentionally break and enter the shop of Sihela Tawana Cavin with intent to steal and did unlawfully steal the listed items and cash, with a total value of N\$ 4449.00, the property of or in the lawful possession of Sihela Tawana Cavin.
- [4] Amongst the alleged stolen items, it is only the generator that was recovered and allegedly found in possession of the accused.
- [5] The accused person pleaded not guilty to the charge and the court proceeded in terms of section 115 of the Criminal Procedure Act 51 of 1977.
- [6] In a statement indicating the basis of his defence, the accused indicated that he denies the charge because he bought the generator from someone whom he saw once in 2017, and that after his arrest, he does not know the whereabouts of that person. He further stated that he acknowledges that he is guilty of being in possession of suspected stolen property, for which he did not have a receipt. I pause to observe that the latter was merely an opinion expressed by the accused. Neither was the accused asked to explain or

elaborate on why he considered himself to be guilty of being in possession of suspected stolen property.

[7] The State called one witness, a certain Mr Comos Mukutoi Lishebo, the arresting officer. He testified that he received a call that the accused is selling a generator, which he found in possession of the accused. According to him, it matched the description of a generator mentioned in a case that was opened on 29 September 2017. He testified that the accused presented no document to show proof of ownership. Thereafter, he arrested the accused on a charge of housebreaking with intent to steal and theft.

[8] The accused chose to remain silent and did not call any witness.

[9] Relying on the doctrine of recent possession, the learned magistrate convicted the accused and sentenced him to three years' direct imprisonment, of which two years are suspended for a period of five years on condition that the accused is not convicted of the offence of housebreaking with intent to steal and theft, committed during the period of suspension.

[10] I posed two questions in my query to the learned magistrate. The first question is in relation to the fact that the record of the proceedings reflects that on 4 July 2019, the proceedings adjourned to the following day for continuation of trial and one witness was warned. However, with the continuation of trial on 5 July 2019, the Public Prosecutor (being the same person from the previous day) informed the court that the trial is to continue with the defence case. There is nothing on record showing that the State closed its case. I asked the learned magistrate if the State abandoned calling the witness warned for court and the basis upon which the court proceeded with the defence case if the State case was still open.

[11] In his reply, the learned magistrate indicated that the Public Prosecutor closed the State's case and the witness was excused from the proceedings on 5 July 2019, and that the court proceeded to explain the rights of the accused at the end of the State's case after the State had closed their case. He further added that there was an omission in the typing of the record.

[12] In *S v Lukas*¹ it was held as follows:

'The effect of an incomplete record is that the reviewing court has no basis to determine whether the convictions were in accordance with justice.² However incomplete the record may be, a reviewing court may also determine whether, despite the incomplete record, all the evidence is before the Court for the Court to make a decision on review and whether the accused person was prejudiced because of the incomplete record of the proceedings.³'

[13] The record of the current proceedings is incomplete to the extent that the record does not specifically reflect the stage at which the State closed its case and what happened to the second State witness that was warned for court. Furthermore, the record does not tell whether the rights of the unrepresented accused person at the close of the State's case were explained to him. In light of the authority cited above, the incompleteness of the record leaves the reviewing court with no basis upon which it can determine whether the conviction of the accused is in accordance with justice. For that reason, the conviction and the sentence imposed fall to be set aside.

¹ *S v Lukas* (CR 64/2019) [2019] NAHCMD 322 (5 September 2019)

² *S v Lukas* (CR 58/2008) [2008] NAHC 48 (3 June 2008) , para 3.

³ *S v Vries* (CR 33/2019) [2019] NAHCMD 107 (17 April 2019), para 4.

[14] Apart from the incompleteness of the record, it appears that the learned magistrate did not proof-read the record, in that the record has typos, some dates are incorrect/repetition, and some pages that have a signature space are not signed.⁴

[15] The second question I posed to the learned magistrate is in relation to the principle that in order to invoke the doctrine of recent possession for purposes of convicting on the predicate offence (housebreaking with intent to steal and theft), the evidence must at least prove that the offence charged had been committed. I asked the learned magistrate whether the offence of housebreaking and theft was proven and whether the court was entitled to rely on the hearsay evidence of the arresting officer as far as it concerns a complaint made with the police by the complainant.

[16] The learned magistrate in reply conceded that the predicate offence of housebreaking with intent to steal and theft was not proven, and that the state witness only informed the court that he found the accused in possession of a generator which was matching the description of one of the items in another case opened.

[17] The state called one witness only, the arresting officer who could only testify about the events that led to the arrest of the accused person. The remaining portion of his testimony concerning the housebreaking and theft remains hearsay evidence. In his closing arguments, the accused correctly argued that he expected the complainant in the case to testify because no one saw him breaking into the house and that no evidence was put before court that a house was broken into. He further added that he does not know that an item bought in the street can have a receipt.

[18] In relation to the doctrine of recent possession, the court held in

⁴ See *S v Kamenye* (CR 9/2019) [2019] NAHCNLD 31 (26 March 2019).

*Shekunangela v S*⁵ that ‘where a person is found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, a court is entitled to infer that such person is the person who committed the offence of housebreaking with the intent to steal and theft.’ In the present case, the accused explained that he bought the generator from someone else, but the learned magistrate rejected his version and found that the accused failed to give a satisfactory account of where he obtained such a generator, thereby convicting him of housebreaking with intent to steal and theft, relying upon the doctrine of recent possession.

[19] Before he invoked the doctrine of recent possession for purposes of convicting the accused on the predicate offence of housebreaking with intent to steal and theft, the learned magistrate should have heard evidence on the housebreaking and theft charge and make a determination on whether the offence of housebreaking with intent to steal and theft has been proven. Failure to do so amounts to a misdirection, which warrants the conviction and the sentence imposed to be set aside.

[20] In the result, I make the following order:

The conviction and sentence are set aside.

J C LIEBENBERG JUDGE	PJ MILLER ACTING JUDGE

⁵ *Shekunangela v S* (HC-NLD-CRI-APP-CAL-2018/00004) [2019] NAHCNLD 5 (24 January 2019)