

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: Lukas Conrad v The State	Case No: HC-MD-CRI-APP-CAL-2022/00030
Heard before: Lady Justice Shivute et Mr Justice January	Division of Court: Main Division
	Delivered on: 12 May 2023
Neutral citation: <i>Conrad v S</i> (HC-MD-CRI-APP-CAL-2022/00030) [2023] NAHCMD 258 (12 May 2023)	
The order: <ul style="list-style-type: none">a) Condonation is granted.b) The appeal is upheld.c) The conviction and sentence are set aside.	
Reasons for order:	
January J (concurring Shivute J)	

[1] The appellant appeared before the Magistrate sitting at Bethanie on a charge of Stock Theft taking into consideration the provisions of the Stock Theft Act 12 of 1990, as amended, with an alternative charge of possession of suspected stolen stock in contravention of s 2 read with ss 1, 11(1)(a), 15 and 17 of the Stock Theft Act, as amended. He was undefended and the Magistrate explained his rights to legal representation. He opted to conduct his own defence where after the matter was postponed for further investigation.

[2] Eventually, the appellant was asked to plead upon which he pleaded not guilty. After evidence was led, he was convicted on 18 November 2021 and sentenced to two years' imprisonment.

[3] The appellant is represented by Mr Andreas and the respondent by Mr Lilungwe.

[4] This appeal is against conviction. The appellant filed his notice of appeal about three months and seven days late. He consequently applied for condonation with a supporting affidavit.

[5] He stated that he was represented by a legal representative in the court a quo. After conviction and sentencing the legal representative, however withdrew. The appellant stated that he wanted to appeal and indicated that in court to the legal representative. He was challenged to obtain the court record. In addition, he stated that he is a lay person and had difficulty to find examples of a notice of appeal and an application for condonation. Consequently, he could find examples on 25 January 2022 and finalised the application and notice of appeal on 27 January 2022. The date stamp of the clerk of court reflects that the documents were only certified as correct on 08 April 2022.

[6] Mr Lilungwe submitted that the application for condonation should be dismissed as the appellant's explanation is not reasonable and he did not pass the first hurdle in that he needed to provide a reasonable explanation for the delay and secondly, convince

the court that he has reasonable prospects of success in accordance with the trite principles in an application for condonation.

[7] Mr Andreas submitted that the explanation for the delay is reasonable considering that the court was in recess during December 2021 and the applicant completed the application in January 2022. He pointed out that the date stamp of 08 April 2022 reflects the date when the record was certified as a true copy of the original and not the date of filing. The record of proceedings further reflects that the Magistrate only certified the proceedings to be accurate and provided additional reasons on 11 March 2022. In addition, the case originated in Bethanie but was finalised in Keetmanshoop. This fact in all probability contributed to further delays which cannot be ascribed to inaction of the appellant.

[8] In the circumstances, we accepted the explanation to be reasonable.

[9] With reference to the prospects of success on appeal, Mr Andreas submitted that it is evident from the record of proceedings that the magistrate omitted and failed to explain to the appellant his right to disclosure of evidential material which the State intended to use against him in the trial. Further, that it is evident from the record that, in fact, the undefended appellant was not provided with disclosure. Counsel submitted, correctly so, that it has become an entrenched legal principle that the appellant's fundamental rights include the right to disclosure. Consequently, a presiding officer has a duty to inform an unrepresented accused of his right to apply for disclosure.

[10] It is evident from the record of proceedings that the appellant was unrepresented at the stage of plea and indicated that he was conducting his own defense. Subsequent thereto, the prosecution led the evidence of the complainant and a second witness when the appellant was still undefended. His legal representative only came on board on a date thereafter when the second State witness had to be cross-examined. It was only during the course of these proceedings that the legal representative requested for disclosure and the record of previous proceedings for perusal. It is evident that the Magistrate at no

stage before informed the accused about his right to disclosure.

[11] It is further clear from the record that there was no disclosure of the content of the police docket to the appellant before the trial commenced. We alerted Mr Lilungwe to this omission and the right to a fair trial. He conceded that the accused in the circumstances did not receive a fair trial.

[12] The omission to inform the accused of his right to disclosure and to ensure that the docket is disclosed constitute serious misdirections infringing the constitutional right to a fair trial. We agree and in the circumstances the appellant has good prospects of success on appeal. We therefore granted condonation.

[13] Both counsel made submissions in relation to the merits of the appeal. Mr Andreas raised various grounds of appeal amongst others the ground dealt with above. This omission in relation to the right to disclosure is so fundamental that the appellant did not receive a fair trial. In the circumstances it is not necessary that we deal with the remaining grounds of appeal.

[14] We agree with Liebenberg J, Damaseb JP concurring, where they stated as follows at page 4 paragraph 6 in *State v Floyed Kahevita*,¹ :

‘This clearly suggests that the content of the police docket was not disclosed to the accused before the trial had started. It is not only legal practitioners, representing accused persons in criminal cases, who have the right to disclosure of witness statements and other documents the State intends relying on during the trial, but also the unrepresented accused. They are equally entitled to disclosure of all witness statements and other documents relied on by the State at the trial; and where the accused is unsophisticated and unaware of such right, the court should explain it to the unrepresented accused, and when necessary, make an appropriate order, compelling the State to comply. In the present case it is clear that the accused, at the commencement of the trial, was not put in the position where he knew what case he had to face, so that he could properly prepare his defence or give proper and full instructions to his legal

¹ *State v Floyed Kahevita* Case No.: CR 11/2011, delivered on 14th February 2011.

representative (*S v Nassar 1994 NR 233 (HC)*). He therefore could not be said to be ready for trial - least, to conduct his own defence.'

[16] In these circumstances where the Magistrate failed to explain a fundamental right to disclosure, the appeal ought to succeed.

[17] In the result, it is ordered:

- a) Condonation is granted.
- b) The appeal is upheld.
- c) The conviction and sentence are set aside.

H C JANUARY JUDGE	N N SHIVUTE JUDGE