



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 191/2015

In the matter between:

MBAENOVANDU KATITI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Katiti v S* (CA 51 / 2017) [2017] NAHCNLD 82 (15 August 2017)

Coram: TOMMASI J and JANUARY J

Heard: 15 June 2017

Delivered: 15 August 2017

Flynote: Appeal – Criminal Procedure – Trial – Postponement – Guidelines for the court when confronted with application for postponement in *S v Acheson* 1991 NR 1

(HC) – Failure by magistrate to properly consider postponement to secure a material witness and resultant refusal constituted a vitiating irregularity.

Summary: The appellant was charged with theft of a cow. The court *a quo*, relying on the doctrine of recent possession, convicted the appellant of stock theft and sentenced him to four years' imprisonment. One of the appellant's grounds was that the magistrate's refusal to grant him the opportunity to secure the attendance of a material witness amounted to an infringement of his right to a fair trial. The court held that the application by the appellant for a postponement was poorly motivated but that there was a duty on the magistrate to exercise her discretion in a judicial manner. It was not evident from the magistrate's reasons that she properly considered the application and the court held that the failure by magistrate to properly consider the appellant's postponement to secure a material witness and resultant refusal constituted a vitiating irregularity. The appeal was upheld and the conviction and sentence set aside.

ORDER

1. The appeal is upheld and the conviction and sentence is hereby set aside.
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JUDGEMENT

TOMMASI J (JANUARY J concurring)

[1] This is an appeal against sentence and conviction. The appellant was convicted of stock theft and was sentenced to 4 years' imprisonment on 24 November 2015. He filed his notice of appeal on 15 December 2015.

[2] The respondent took issue with the fact that the appellant filed his notice of appeal one day out of time and failed to apply for condonation. The Notice of Appeal was drafted and filed by Ms Amupolo who had in the meantime left the employ of the Directorate of Legal Aid and joined the offices of the respondent. Mr Tjiteere was appointed *amicus curiae*. It would not be proper for Ms Amupolo, under these circumstances, to assist the appellant to explain why the notice of appeal was filed one day out of time. Given the short delay and the peculiar circumstances of this matter, this court decided to hear the matter on the merits.

[3] The appellant raised numerous grounds of appeal and there is no point to rehash all of them. The main thrust of these grounds is that the learned magistrate erred by:

- (a) infringing on the appellant's constitutional right to a fair trial by refusing a further postponement for the appellant to secure the attendance of a crucial witness;
- (b) arriving at conclusions which were not supported by the evidence adduced;
- (c) failing to consider the defense as reasonably possibly true;
- (d) taking judicial knowledge of the behavior of animals;
- (e) erroneously relying on the doctrine of recent possession; and
- (f) finding that the onus shifts to the accused.

[4] A summary of the State's case is as follows; the complainant in this matter lost 8 cows. After a week he spotted one of the cows grazing with other cattle approximately 40 km from his homestead. He noticed that the cow had given birth but there was no calf with her. He alerted the police who recognized the other cattle as the cattle of the appellant. One police officer went to the house of the appellant but did not find him there. He found one, Katweyi, an employee of the appellant, and took him with to the place where appellant's cattle were grazing. Katweyi separated the appellant's cattle from two heads of cattle which according to him did not belong to the appellant. He

questioned Katweyi in respect of the whereabouts of the calf of the cow of the complainant given the fact that it was evident that the cow had given birth and had been nursing the calf. The answer he gave constituted hearsay evidence as he did not testify.

[5] The police officer was called by the appellant later that same day and according to the police officer the appellant admitted that the cow and calf had been at his place for four days. They agreed to meet in order for the appellant to give him the calf. The police officer and the complainant arrived at the house of the appellant that same evening but did not find him there. They collected the appellant from a nearby place and returned to his home. The complainant testified that they only asked him when the calf came to his kraal and the appellant replied that he did not know. The police officer however testified that he asked the appellant whether he reported that the cattle came to his house to the headman or police and he said 'No'. The appellant handed them the calf of the cow which belonged to the complainant. The appellant was not taken into custody at the time. Four of the complainant's cattle were later found in Angola and a person by the name of Karembé disclosed the identity of the person who gave them the cattle. The state was unable to trace this witness and the testimony of the police officer in respect of what he informed them is thus inadmissible hearsay evidence.

[6] The appellant, in his plea explanation, stated that the cow was a stray cow which ended up with the rest of his stock. He testified that he did not know about the presence of the cattle at his homestead. He was not at home the entire day and he does not know where the calf was found and when it was placed in the kraal. He was telephonically informed by Katweyi that he saw a cow and a calf outside his yard that morning. He was however only informed about this after Katweyi took the two cattle which they found grazing with his cattle to the police station.

[7] The appellant called the police officer who advised him to find the calf. He instructed Katweyi to look for the calf. Later that evening the police officer collected him from a nearby cuca shop and they drove to his house. He telephonically confirmed from Katweyi that he found the calf and they proceeded to his house where the calf was returned to the complainant.

[8] The matter was postponed to afford the appellant the opportunity to secure the attendance of his witness, Katweyi. Ms Amupolo, the appellant's legal practitioner, was unable to telephonically locate the appellant's witness and she applied for a further postponement which was refused by the court *a quo*.

[9] The learned magistrate, in a detailed judgment set out the facts which she found was common cause i.e. that eight cattle went missing, one was found amongst the appellants; the cow had given birth to a calf which was retrieved from the kraal of the appellant. The learned magistrate concluded that the appellant knew about the calf at the time he was questioned by the complainant and the police; and he failed to report the presence of the cow and the calf to authorities before the complainant and the police enquired.

[10] The court referred to the common practice amongst cattle owners in the northern regions that unknown stock must be reported to the headman and she indicated that: 'It's common sense, that animals who give birth are not known to leave their young and thus the argument relates that as long as the calf is entrapped or kept in a kraal the cow will come back. The cow will graze but return at the end of the day to feed the calf who is suckling. This is common sense to any person who farms including the accused who is no layman but a farmer.' It was this remark which formed the basis of the ground of appeal that the learned magistrate took judicial notice of the conduct of animals.

[11] The learned magistrate stated that: 'The state has the onus to proof beyond all reasonable doubt but the onus shifts when the state establishes a *prima facie* case and the accused is placed on his defense.' The court *a quo* concluded that, in the absence of Katweyi's evidence, the doctrine of recent possession applies. She found that the appellant failed to raise any criminal defense and his version was rejected as untruthful. The learned magistrate did not add any further reasons in her statement in terms of Rule 67 of the Magistrate's Court Rules.

[12] Mr Gaweseb, counsel for the respondent submitted in their heads that the court was entitled to rely on the doctrine of recent possession and referred the court to the following citation from *S v Kapolo* 1995 NR 129 (HC) at 130D - F:

'It is correct that where a person is found in possession of recently stolen goods and has failed to give an explanation which could reasonably be true, a court is entitled to infer that such person had stolen the article or that he is guilty of some other offence. (See Hoffmann and Zeffert the SA Law of Evidence 4th ed at 605 - 6.) I also agree with the magistrate that there are instances where a lapse of 14 days or longer was still regarded as recent possession. The test to be applied in this regard was laid down in *R v Mandele* 1929 CPD 96 where the following was stated at 98, namely:

“. . . is the article one which could easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief?" [my emphasis]

He submitted that the magistrate correctly applied the law to the facts at hand and correctly found the appellant guilty as charged.

[13] I shall first consider the ground that the magistrate's refusal to grant a further postponement amounted to an infringement of the appellant's constitutional right to a fair trial.

[14] The matter was postponed for 19 days for the defense to secure their witness. On the return date Ms Amupolo, counsel for the appellant, placed the following before the court *a quo* in support of the application for a postponement:

'We intended to call Katweyi however upon attempting to get hold of him the number has been off for 2 days and we cannot secure the witness. Considering the court has been transferred, I apply for a remand to try and ensure the attendance of Katweyi'.

The Public Prosecutor had no objection to the application of the appellant. The learned magistrate's thereafter recorded the following:

'Court has been transferred to Oshakati and is going on annual leave in 2 weeks' time. Both parties are well aware of this. Defense had ample time since 5/11/15 to ensure the witness is present. If the number is off there is no guarantee given to court that he will be traced by next court date whilst accused remains in custody. This is a 2011 case and it is not in the interest of justice to grant a remand to January 2016 as I will not be available during December 2015. Application for remand not granted.'

Not surprisingly the defense closed its case.

[15] The application by the appellant was poorly motivated. In *S v Acheson* 1991 NR 1 (HC) Mahomed AJ (as he then was) stated at page 8 that: 'An adjournment of a criminal trial is not to be had for the asking. It must be motivated in terms of the Criminal Procedure Act on the grounds that it would be necessary or expedient to do so.' [my emphasis] The appellant was required to properly motivate the application for a postponement in order to enable the learned magistrate to take a well informed decision.

[16] The learned magistrate, however, had the duty to exercise her discretion whether or not to grant a postponement in a judicious manner. The court's duty when confronted with an application for a postponement has been comprehensively dealt with in *S v Acheson, supra*. In that case the boot was on the other foot as the state applied for a

postponement to secure the presence of witness. At page 9 of the aforesaid judgment Mahomed AJ (as he then was) gave the following guidelines:

'There are two fundamental issues which the Court would ordinarily wish to satisfy itself about where an adjournment is sought in order to call witnesses who are not available in Court:

Firstly: Are the witnesses whom the party seeks to call on the adjourned date material witnesses?

Secondly: Is there a reasonable expectation (not a certainty) that the attendance of such witness will be procured on the adjourned date?

I refer in this regard to *S v Geritis* (supra at 754H-755C); *R v Le Chevalier D'Eon* 97 ER 955; *S v Magoda* 1984 (4) SA 462 (C) at 465-6.

The fact that these two basic requirements are satisfied does not mean, however, that the Court must necessarily exercise its discretion in favour of an adjournment. That discretion has to be exercised with regard being had to all the circumstances of the case. This would include inter alia the following:

- (a) the length of the adjournment sought;
- (b) how long the case has been pending;
- (c) the duration and the reasons for any previous adjournments;
- (d) whether or not there has been any remissness from the party seeking the adjournment and, if so, the degree and nature of such remissness;
- (e) the seriousness of the offence in respect of which the accused is charged;
- (f) the attitude and the legitimate and reasonable needs and concerns of the adversary of the party seeking the adjournment;
- (g) the resources, capacity and ability of the party affected by the adjournment to protect and advance its case on the adjourned date;
- (h) the financial prejudice caused to such party by the adjournment;

- (i) the public interest in the matter;
- (j) whether or not the accused is in the interim to be kept in custody.

Some of these considerations might overlap, and others might sometimes be in conflict with each other. They have to be carefully assessed and weighed in the exercise of a proper discretion'

[17] It is evident that the court omitted to consider a key issue i.e. whether or not this witness was a material witness. The learned magistrate at that stage of the proceedings was well positioned to consider this issue. The court, in the absence of this witness, applied the doctrine of recent possession. In terms of this doctrine the appellant, once it has been established that he had been found in possession of recently stolen goods, will be convicted if he fails to give an explanation which could reasonably possibly be true. Katweyi was a material witness not only for the defense but also for the court as he was the only witness who knew when and how the calf came into the appellant's kraal that day.

[18] The learned magistrate furthermore determined that there was no guarantee that the witness would be found. There was no information placed before the court which justified this conclusion.

[19] It is indeed so that the matter has been pending since 2011 but the magistrate did not indicate whether she considered: the reasons for the postponements; whether or not it was due to the remissness of the appellant; the seriousness of the charges the appellant was facing; the fact that the respondent did not object to the postponement; that the appellant had been granted bail; and the appellant previously applied for the reduction thereof. An important consideration was that it was the appellant and not the state who applied for the postponement.

[20] In *Prosecutor-General of the Republic Of Namibia v Gomes & others* 2015 (4) NR 1035 (SC) the court held that: 'the true content of Act 12 was the right to a fair trial. Like many of the rights entrenched in chapter 3, it was not absolute and unlimited. This depended on the nature and content of the right as purposively construed. The concept of a fair trial was flexible, requiring a balance to be struck between an individual's rights to a fair trial (including that to be presumed innocent) and the state's obligation to protect the interest of the public in effectively combating and prosecuting crime.' The failure to properly consider the appellant's application for a further postponement and the resultant refusal thereof is a fundamental and serious irregularity. In this case it amounted to failure of justice *per se* (See also *S v Shikunga and Another* 1997 NR 156).

[21] The learned magistrate in this matter did not give proper consideration to all the factors. This failure and her refusal to grant a postponement, constitutes a vitiating irregularity. Having concluded thus it would not be necessary for this court to consider the other grounds of appeal raised.

[22] In the result the following order is made:

1. The appeal is upheld and the conviction and sentence are set aside.

MA Tommasi

Judge

I agree

H C January

Judge

APPEARANCE

For The Appellant:

Mr Tjiteere (*amicus curiea*)

Of Dr Weder , Kauta & Hoveka Inc.

For The Respondent:

Mr Gaweseb

Of Office Prosecutor General- Oshakati