

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

CR no: 5/2018

In the matter between:

THE STATE

v

UUTONI ELIA

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: 302/2017

Neutral citation: *S v Elia* (CR 5/2018) [2018] NAHCNLD 6 (25 January 2018)

Coram: TOMMASI J and JANUARY J

Delivered: 25 January 2018

Flynote: Review – Criminal Procedure – Plea of guilty – Plea of not guilty entered in terms of section 113 of the Criminal Procedure Act 51 of 1977 (the CPA) – Public prosecutor allowed to examine accused to extract admissions – State’s case closed thereafter – Alien procedure – Conviction and sentence set aside.

Summary: The accused pleaded guilty in this matter on a charge of stock theft. The magistrate applied section 112(1)(b) of the CPA but correctly entered a plea of not guilty. The public prosecutor thereafter applied to examine the accused to extract further admissions. Surprisingly the magistrate granted the application. The prosecutor questioned the accused and thereafter closed the State's case. The accused remained silent. He was convicted and sentenced. This is an alien procedure. The conviction and sentence is set aside. The irregularity is so serious that it vitiates the entire proceedings.

ORDER

The conviction and sentence are set aside.

JUDGMENT

JANUARY J (TOMMASI J concurring)

[1] The accused was charged with theft, taking into consideration the provisions of sections 11(1)(a), 1, 14, and 17 of the Stock Theft Act, Act 12 of 1990 as amended. 'In that on or about the 12 day of June 2017 and at or near Oshandumbala village in the district of Outapi the accused did unlawfully and intentionally steal and kill stock, to wit 1x donkey male valued at N\$800-00, the property of or in the lawful possession of Victor Johanna.'

[2] The accused pleaded guilty to the charge. I find it necessary to quote the proceedings *verbatim* to illustrate why I come to my eventual conclusion. The record reflects as follows:

'Public prosecutor: Accused indicated he intends to plead guilty.'

Q: Accused are you pleading guilty to the charge?

A: Yes

Q: The charge may be put.

(Public Prosecutor: charge put, explained by court Annexure "B" hereto)

Q: Accused do you understand the charge of the unlawful and intentional taking of one donkey with intent to permanently deprive Victor Johanna as alleged?

A: Yes

Q: How do you plead?

A: Guilty

Public Prosecutor: Section 112(1)(b)

Q: On 12 June 2017 and at or near Oshandumbala village, district of Outapi did you take one donkey (male) the property of the complainant as alleged?

A: Yes

Q: You accept the value of N\$800-00 of this donkey?

A: Yes

Q: Did you intend to permanently deprive the complainant of the donkey?

A: No

Q: You did not intend to permanently deprive the complainant of the donkey?

A: No, I beat the donkey because it came up to eat my mahangu

Q: You are facing the charge of theft as explained by the court. Do you understand?

A: Yes

Q: Did you take the donkey as alleged?

A: No I did not steal the donkey. It came into my field and ate my harvested mahangu

Q: You did not take the donkey

A: No

Q: You did not intend to permanently deprive the complainant of his animal

A: No

Plea altered to not guilty

Public Prosecutor: May the state put questions to the accused to seek admissions

By court

Q: Accused the public prosecutor wishes to put questions to you so that you may admit certain issues or facts

A; Yes

Q: I must warn you that you are not forced to admit to anything

A: Yes

Q: However, however, any admissions that you freely make will stand as facts proven against you

A: I understand

ADMISSIONS SOUGHT BY PUBLIC PROSECUTOR

By Public Prosecutor

Q: The incident happened by 12/06/17

A: Yes

Q: At Oshandumbala village?

A: Yes

Q: You killed a donkey?

A: Yes

Q: That donkey belonged to Victor Johanna?

A: Yes

Q: After you killed it you dragged it to your house

A: I slaughtered it?

A: Yes

Q: You did not inform the complainant that you had killed her donkey?

A: No I did not

Q: You only admitted to the killing after you were court by the committing members and questioned you?

A: Yes

Q: You intended to continue the donkey meat?

A: Yes

Q: By eating it you would permanently deprive the complainant of the property?

A: Correct

Q: No further question state case closed

By Court

The state has closed its case. Accused advised of his rights, as per Annexure "C" hereto

(NB: Accused chooses to remain silent (has no witnesses)

Defence case closed)....'

[3] The public prosecutor thereafter addressed the court *ad* conviction. The accused indicated that he had no submissions. The magistrate convicted the accused giving

reasons and imposed a sentence of: '(Two) 2 years' imprisonment of which one year suspended for three years on condition accused is not convicted of stock theft committed during that period. Effective Sentence: 1 year imprisonment.'

[4] I appreciate that magistrates are working under pressure and stress and cannot always ensure that the typing of their handwritten records are correct. They should however appreciate that there is a rationale why typed records are submitted on review and appeals. That is to ease the duty of judges not to decipher what is written in the handwritten records. It is evident from the quotation in this record that the typed record is not a true reflection of the handwritten record and yet the magistrate certified it to be correct. Magistrates are encouraged to see to it that the typing is correct at all times.

[5] The magistrate correctly entered a plea of not guilty and the relevant section of the Criminal Procedure Act, Act 51 of 1977 (the CPA) is section 113. This section provides as follows:

'113 Correction of plea of guilty

If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.' (my emphasis)

[6] The public prosecutor in this case applied for an alien procedure of examining (cross-examining) the accused to extract admissions whereas section 113 of the CPA does not provide for it once a plea of not guilty is entered. The section requires the prosecution to proceed with prosecution in calling witnesses to prove the state's case. Surprisingly the magistrate granted the application and allowed the prosecutor to

examine the accused. This is a serious irregularity by both the prosecution and magistrate.

[7] Magistrates are independent, should know the law, has a judicial discretion and should not and must not slavishly adhere to and slavishly follow submissions and prayers of prosecutors. Their duty is to apply the law correctly.

[8] The proceedings adopted are not in accordance with justice. It infringes the accused's right to a fair trial and is so serious that it vitiates the entire proceedings. The magistrate should have instructed the public prosecutor to continue with the trial. It was then within the discretion of the prosecutor to present evidence or close his case without leading evidence. Both the conviction and sentence stand to be set aside.

[9] In the result:

1. The conviction and sentence are set aside.

H C JANUARY
JUDGE

I agree

M A TOMMASI
JUDGE