

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Naseb Ervin</i>	CR No.: 09/2020 Case No: TSU-CRM-2395/2019
	Division of Court: Northern Local Division
Heard before: Honourable Mr Justice January J et Honourable Ms Justice Salionga J	Delivered on: 31 January 2020
Neutral citation: <i>S v Ervin</i> (CR 09/2020) [2020] NAHCNLD 18 (31 January 2020)	
The order: 1. The conviction and sentence for theft is set aside.	
Reasons for the order:	
JANUARY J (SALIONGA J concurring): [1] The accused was charged, convicted and sentenced for theft of copper cables valued at N\$970.94, the property of Road Contractor Company/Dundee Precious Metals. Alternatively; Possession of suspected stolen property.	

[2] The case was remitted to the magistrate with a query in the following terms:

'The Magistrate is directed to explain the following: Theft is committed where property is taken with intention to deprive the owner thereof permanently of his/her property; when accused was questioned in terms of section 112 (1)(b), he stated that he found the wires in the bush; the sole witness called by the State testified that he was with the accused in the bush when Accused person cut wires from a big machine and took the wires to the scrap yard;

1. From which evidence was it established that the property belongs to the complainant and that accused intended to deprive the owner of his property?
2. Upon what evidence was it established that the machine from where the wire were (sic) cut is the property of the complainant and in absence of such evidence on what basis could the accused be convicted?'

[3] The magistrate resubmitted the case for review with a concession that there was no evidence that the property belongs to the complainant as alleged in the charge annexure. He further responded that the accused ought not to have been convicted.

[4] The magistrate, however, tried to justify the conviction with reference to case law; *R v Mlambo* 1957 (4) SA 727 at 738 cited in *Beyer v S* (CA 134/2017) [2017] NAHCMD 267 delivered on 15 September 2017 where it was stated, amongst others, that there is no obligation upon the crown to close every evidence of escape which may be said to be open to an accused.

[5] The magistrate also referred to the fact that proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt.

[6] In my view, the abovementioned principles of law do not apply in the case. It is evident from the evidence that the machine from where the cable/ wires were cut was in the bush. There is no evidence what the condition of the machine was and it could have

been an old machine, abandoned by the owner(s), *res derelictus* or not belonging to anybody, *res nullius*.

[7] The concession that the accused should not have been convicted is correct.

H C JANUARY JUDGE	J T SALIONGA JUDGE