REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE NO: CA 116/2015

In the matter between:

RUBEN KUUME **APPELLANT**

vs

THE STATE **RESPONDENT**

Neutral citation: *Kuume v State* (CA 116/2015) [2016] NAHCMD 144 (13 May 2016)

Coram*:* SIBOLEKA J and USIKU J

Heard on: **18 March 2016, 18 April 2016**

Delivered on: **13 May 2016**

Flynote: Criminal law: Warning statement not genuinely reflective of the actual choice made by the then unrepresented appellant.

Summary: Metro Cash & Carry Swakopmund was burgled from the inside resulting in several boxes of Richeleu brandy and Dunhill cigarettes valued at N$60 000 stolen.

Held: Appellant's involvement in the crime not proved beyond reasonable doubt.

Held: The appeal is upheld, the conviction and sentence are set aside.

ORDER

In the result the appeal is upheld, the conviction and sentence are set aside.

APPEAL JUDGMENT

SIBOLEKA J (USIKU J concurring):

[1] At the hearing of this matter the appellant was represented by Mr Namandje and Ms Moyo appeared for the respondent. The court appreciates both counsel's valuable arguments in this regard.

[2] In this matter the appellant was convicted of attempted theft in the Magistrate's Court, Swakopmund on 18 August 2015. On 21 August 2015 he was sentenced to N$5 000 or two years imprisonment plus six months imprisonment wholly suspended for five years on the usual condition of good behavior. He now appeals against both conviction and sentence.

[3] On 28 September 2015 the appellant filed his notice of appeal on the following grounds:

"1. The learned Magistrate erred in finding that there was evidence supporting the conviction on an attempted theft charges.
2. The State erred in its evaluation of evidence and should it have carefully considered the totality of evidence a(s) required in law it would have acquitted the appellant.
3. The learned Magistrate erred that the evidence was sufficient to prove beyond reasonable doubt that the appellant was guilty of a charge of attempted theft."

[4] The appellant's additional grounds of appeal are as follows:

"1. The court *a quo* erred by admitting evidence of the Police Officer F. Negumbo to the effect Accused 1 orally unequivocally implicated himself in the commission of the crime and the appellant when such admission amounts to a confession which is inadmissible as it was not done in terms of section 217 of the Criminal Procedures Act.
2. The court further erred in using the Co-Accused's extra-curial statement against the appellant.
3. The Court erred in admitting and relying on evidence in a form of a warning statement allegedly made by the appellant when such statement should not have been admissible alternatively should not have been relied upon in that the content was disputed by the appellant, and it was clear that the appellant has made it clear to the Police that he wanted to remain silent (and on that basis the Police was not entitled to take a statement from him). Further there was no independent evidence confirming (assuming the appellant voluntarily gave the statement) that what was read to the appellant was exactly what the Police Officer was told by the appellant and wrote down given the fact that the appellant does not speak English).
4. The court further erred in admitting evidence of the Police Officers Haimbodi and Negumbo in relation to the alleged self implication by the appellant when there was a complete lack of proper and competent representation by the respective defence counsels during the trial. In this respect the trial was unfair and incompatible with Article 12 of the Namibian Constitution.
5. The court erred in finding that the vehicle alleged to have been at the scene was properly identified as that of the appellant.
6. The court erred in convicting the appellant on the alternative count."

[5] The respondent raised two points *in limine*, these were: that the record of proceedings was incomplete, secondly that the appeal was filed two weeks out of time and no application for condonation for the late filing of the notice was made. In the light of the above shortcomings, the respondent requested the court to struck the matter from the roll for the reason that it was not properly before court.

[6] On perusal of the record it appears that the appellant was charged in the Magistrate's Court, Swakopmund, on the names "Ruben Kuume", his notice of appeal was issued under totally different names "Phillemon Kuume Ndatega Ruben". It is my considered view that Court processes should never be altered in between just like that because it causes a lot of confusion to all the parties involved and in particular the processing office clerk to know who the appellant is. Due to this mix up of names two separate appeal files were opened resulting in the appeal documents not reaching the respondent counsel's active file timeously. I should mention here that for proper service delivery appellants should always stick to the names they have provided to the police officer charging them and should remain on those names right through all the processes they intend engage themselves in.

[7] In his notice for the application of a postponement, Mr Namandje stated among others' that:

"After I was approached by the appellant I filed a notice of appeal. After that notice … I expected the record to be sent to the Registrar of the High Court and the record to be inspected before the date of hearing is set as it is usually the practice."

According to this counsel he got the date of hearing without having inspected the record. This is unfortunate because an appeal is a matter that is brought to court by the appellant. He must see to it that all is in order. If he is represented like in this case, it is the duty of the counsel to have seen to it that all is in order. Be it as it may, the court decided to condone the late filing of the appeal and told both

counsel to address the court on the merits.

[8] The following satisfied the court to convict the appellant.

[8.1] In its reasons for convicting the appellant, the Court *a quo* stated that it was satisfied that the appellant was one of the two men who were seen loading stolen goods in a white double-cab bakkie at Metro Cash & Carry, Swakopmund. The appellant was seen driving a vehicle that matched with that description in the company of the first accused the next day. By way of circumstantial evidence the appellant was convicted on attempted theft.

[8.2] The evidence of the initial investigation officer Francisco Negumbo in the Court *a quo*:

A certain Megameno Amupadhi was arrested on 23 November 2013 as accused 1 on the matter in the Court *a quo.* On 25 November 2013 the investigation officer took him to his office for questioning regarding the theft of twenty Richeleu brandy boxes; and three Dunhill cigarette boxes valued at N$60 000 at Metro Cash & Carry in Swakopmund. During that interview Megameno Amupadhi told the investigation officer the following:

> 'That at the time of the incident he was an employee of Metro Cash & Carry Swakopmund. On 23 November 2013 at the close of business him and the appellant agreed to steal the goods listed in the charge sheet. To do that, they arranged that the appellant remain inside the shop in order to be locked in, which in fact happened. During the night the appellant broke the inside padlock, all electronic alarm devices and cables were all cut from inside forcing the back door of the business to open. Goods mentioned in the charge sheet were stolen.'

[8.3] On hearing the above information the investigation officer proceeded to arrest the appellant and formally charged him as accused 2 on the matter in the Court *a quo.*

When Megameno Amupadhi gave his evidence under oath in the Court *a quo* he did not repeat the crucial information he verbally told the investigation officer Francisco Negumbo connecting the appellant to the crime but instead exonerated him. Here is what he instead testified in his evidence under oath, in the Court *a quo.* 'On the day of the incident he went to town to look for something for his child. On his way back at Shell Service Station he saw and recognized the appellant driving in the direction of Kuisebmund. He got a lift up to Shop 4. On the vehicle were himself; the appellant; and two other male persons. On their way to Kuisebmund the police stopped them, and were all told to board a police van which they did.' The crux of his evidence is in the following verbatim quotation from the transcribed record at page 157 line 20:

"What did they ask about? --- They asked about us, "who are you, where are you working?" Like me they asked me who I am then I told them my name Megameno Amupadhi, where are you working?" I said "I am working at Metro Cash n Carry". It is when the other police officer Negumbo said "yes maybe this guy has something to do with what happened to Metro Cash & Carry. And then what happened --- then he asked me "do you have any idea what happened to Metro? I said "no I do not know anything about what happened at Metro."

[8.4] From the police station they took Megameno Amupadhi to a house where a search was conducted but they found nothing. He was locked up and he elected to make a statement in Court during the trial of the matter. The above evidence means in the nutshell that all the information Megameno Amupadhi told the investigation officer Francisco Negumbo related to the appellant's role on this crime was rendered hearsay and therefore valueless.

[9] I will now examine the arrest of the appellant on this matter. In this regard I will attend to the evidence Sgt. Japheth Haimbodi who was attached to Serious Crime Investigation Unit during 2013 and took over the investigation from Francisco Negumbo. According to this officer he arrested the appellant for two reasons: The vehicle that transported stolen goods at Metro Cash & Carry

matched with the one appellant was driving around: During investigations accused 1 mentioned that the appellant was locked inside Metro Cash & Carry and he broke that shop from the inside. Haimbodi showed the appellant his appointment certificate, explained to him all his legal rights including the right to make a formal application for bail.

[9.1] With regard to the right of remaining silent the appellant made the following choice: "--- At first he opted to remain silent and give his testimony in the Court of law and then at a later stage he changed his mind that he is going to give a statement." The question and answers on this aspect are as follows:

"Question: What is your choice, do you wish to make a statement or do you only wish to answer questions, (after consultation with your legal practitioner) or do you remain silent?
Answer: I wish to give my testimony at Court of law."

It is the last words '… at Court of law' that Haimbodi deleted and made his initials along the side. He did not cause the appellant to do the same despite the fact that he made statement to him. The purported statement the appellant allegedly made to Sgt. Haimbodi was that: 'On Saturday 23 November 2013, at the request of Jossy, an employee of Metro he drove to the said business and helped load his goods on his bakkie.'

[10] Mr Mayumbelo, counsel for the appellant in the Court *a quo* did not object to the handing in of the statement as an exhibit. He however disputed its contents. When the appellant testified under oath in the Court *a quo* he stated that he cannot read English. He further said the choice he made to Haimbodi in the warning statement was to the effect that he will make his statement in Court. This evidence is in accord with what Haimbodi himself initially wrote down there. It therefore nullifies the deletion Haimbodi made to it.

[11] A glaring shortcoming in the same warning statement Pol. 17 exhibit 'B' Haimbodi took from the appellant is spelt out in the following verbatim quotation from one of the questions he put to him:

"4 Question: Are you satisfied with the interpretation by the interpreter from the language into the English language and vice versa (if possible).
Answer: Yes"

The above quotation is materially in conflict with what Sgt. Haimbodi testified under oath in the Court *a quo*. I quote verbatim on page 103 line 20 of the transcribed record of proceedings:

"Which language were you using? --- We were speaking Oshiwambo.
What was the accused (the appellant's home language? --- Oshiwambo.
Did you use an interpreter during the proceedings? --- No, there was no interpreter.
Why? --- Because we understood each other."

The above shows that what the officer testified is not the truth. See the ruling on admissibility of warning statements by this court in the unreported judgment by my brother Mtambanengwe J as he then was, in the matter of *St vs Tjikuejjekuetji Kapika and 10 others* Case No. CC 144/97 heard on 21 November 1997 delivered on 02 December 1997.

[12] The evidence placed before the Court *a quo* to the fact that the appellant was seen driving a 2.7 white double-cab bakkie with a Windhoek registration number similar to the one that he was earlier allegedly seen loading stolen goods at Metro alone does not take the prosecution case anywhere. It is only the registration number confirmed by Natis that can provide conclusive proof as to who owns a particular vehicle at a given time. In the absence of such evidence the identity of the said vehicle as well as its owner remains unknown. Proof would also have been conclusive if the alleged vehicle was impounded with the stolen goods still on board.

[13] From the above it is very clear that the evidence placed before the Court *a quo* does not accommodate the process of applying circumstantial evidence, because the only crucial prosecution witness who according to the evidence of the police gave information connecting the appellant to the crime upon which he was arrested exonerated him from any wrongdoing in his evidence under oath.

[14] It follows from the above therefore that the prosecution in the Court *a quo* did not prove beyond reasonable doubt that the appellant committed the crime of attempted theft.

[15] It is on that basis that the conviction and sentence on the matter cannot be allowed to stand.

[16] In the result the appeal is upheld, the conviction and sentence are set aside.

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A M SIBOLEKA

Judge

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D N USIKU

Judge

APPEARANCES

APPELLANT : Mr. S. Namandje
Directorate of Legal Aid

RESPONDENT: Ms. C. Moyo
Office of the Prosecutor-General, Windhoek