

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

<b>Case Title:</b> <i>The State v Petrus Engelbrecht and two others</i>	<b>Case No:</b> CR 66/2023
<b>High Court Review No:</b> 45/2023	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Liebenberg J et January J	<b>Delivered on:</b> 16 June 2023
<b>Neutral citation:</b> <i>S v Engelbrecht</i> (CR 66/2023) [2023] NAHCMD 329 (16 June 2023)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence of accused 1 is confirmed.</li><li>2. The closing of the state`s case in respect of accused 2 and 3 is set aside and the matter is remitted to the trial court with directions to proceed to trial in respect of accused 2 and 3 in the event that the prosecutor is unable to obtain authorisation from the prosecutor-general to stop prosecution.</li></ol>	
<b>Reasons for order:</b>	

JANUARY J (LIEBENBERG J concurring )

[1] The case was submitted from the Keetmanshoop Magistrate's Court for automatic review pursuant to s 302(1) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[2] The three accused persons were charged with theft. It is alleged that upon or about the 26<sup>th</sup> day of October 2022 and at or near Keetmanshoop, the said accused did wrongfully, unlawfully and with intention, steal cash and 1x purse to the value of N\$2 600 the property or in the lawful possession of Mariana Kooper.

[3] Accused one pleaded guilty whereas accused two and three pleaded not guilty to the offence before a magistrate other than the one who submitted the case for review. On request by the public prosecutor, that magistrate applied s 112(1)(a) of the CPA and convicted accused one on his plea of guilty. He applied s 115 of the CPA in respect of accused two and three. The record of proceeding reflects that accused two stated: 'I plead guilty because I did not commit the offence.' This must be a typing error because this accused indicated in no uncertain terms that he wanted to plead not guilty. Accused two stated that he pleaded not guilty because he did not commit the offence and that he was not part thereof.

[4] The public prosecutor then closed the case against accused two and three. The magistrate merely allowed them to stand down without any verdict.

[5] The court proceeded with mitigation in relation to accused one. During his address, the accused stated that there was no money in the wallet and in addition he requested the court to view a video recording. Further, although he pleaded guilty, he questioned on what basis the court will find him guilty. The magistrate applied s 113 of the CPA and entered a plea of not guilty. The matter was then postponed for trial. Bail was granted to accused one. Accused two's bail money was refunded and a warrant of liberation was granted for accused three. The NAMCIS record of proceedings reflects on the status of the accused

that accused one was remanded in custody, accused two and three's status reflects not guilty and discharged. This reflection, in my view, is a fact after the matter appeared in court and does not show that the magistrate in fact gave a verdict of not guilty in respect of accused two and three who were entitled to a verdict after their pleas of not guilty.

[6] On the subsequent appearance, a senior magistrate and head of the Magistrates Offices at Keetmanshoop presided. Only accused one appeared. The trial could not proceed because the witness, who is the complainant, was not available as she was booked off sick.

[7] When the matter eventually was enrolled for trial of accused one, the same senior magistrate was again presiding. The trial proceeded and the accused was convicted after evidence was led. He was sentenced to a fine of N\$4000 or in default of payment 24 months' imprisonment of which N\$1000 or six months are suspended for a period of five years on condition that he is not convicted for theft, committed during the period of suspension. We have no qualms with the conviction and sentence and will confirm it.

[8] The record is silent as to whether or not the prosecutor obtained the necessary consent from the Prosecutor-General (PG) in terms of s 6 (b) of the CPA, to close its case against accused two and three after they have pleaded not guilty. It is similarly silent as to whether or not the presiding magistrate at the time enquired from the prosecutor if such consent was obtained. The J15 charge sheet, signed by the senior magistrate, reflects the verdict of guilty and sentence in relation to accused one, however there is no verdict on accused two and three. It reflects as follows: '04/11/2022, Guilty Acc. 1 & 174 granted Acc. 2 & 3' seemingly by the initial magistrate at the beginning of the case and '03/04/2023, Guilty as charged = Acc.1 seemingly by the senior magistrate.

[9] Consequently, I directed a query to the magistrate who submitted the matter for review as follows;

'1. Considering the judgment in *S v Katemo* (CR 33/2014) [2014] NAHCMD 205 (3 July 2014), the Magistrate must explain if the closing of the State's case after the pleas of accused 2 and 3 does not amount to an unauthorized stopping of prosecution.

2. In addition, without an acquittal, is the procedure thereafter, in relation to accused 2 and 3, in

accordance with justice?’

[10] The magistrate responded to the above query in a letter dated 22 May 2023 as follows;

‘ ... Firstly I wish to draw the Court`s attention to the fact that although I convicted and sentenced Accused 1 on 03/04/2023, all Accused pleaded before my colleague Magistrate Masuku on 04/11/2022. Thus, although the proceedings may be silent on the said acquittal to a certain extent, from the face of the charge sheet and the NAMCIS Court order of 04/11/2022 is clear that both Accused 2 & 3 were acquitted on 04/11/2022 as their status is indicated as “Not guilty and discharged”; see page 9 of the typed record to this effect. Hence, when the Accused 1 appeared before me thereafter on 17/01/2023 there was only one Accused remaining on the charge sheet. As such, I am thus not the correct judicial officer to answer the query of the Honourable Reviewing Justice.

I however retain that the conviction and sentence of Accused 1 before me, is in order as the State proved its case beyond doubt and ought to thus stand. In the premise, I therefore return the original record for the esteemed consideration of the Honourable Reviewing Court and cannot assist any further in respect of Accused 2 and 3 who did not appear before me since their pleas on 04/11/2022.’

[11] We appreciate that the case was disposed of by two different magistrates. Our understanding is that the magistrate who submitted the matter for review is the head of the Magistrates Office at Keetmanshoop and that the first magistrate who dealt with the matter is under her supervision. The response from the magistrate in these circumstances, not to be the correct person to answer the query, is unacceptable. Firstly, the matter was submitted by her for review and thus she must accept responsibility for it. Secondly, it is her responsibility to supervise, train magistrates under her supervision and point out irregularities; alternatively, to direct the query to the responsible magistrate under her supervision for an answer.

[12] Be that is it may, Magistrates` Courts are courts of record. It is incumbent on a magistrate to keep proper record of what transpires in the trial court. In the absence of the court record reflecting whether accused 1 and 2 were acquitted, the reviewing court is unable to conclude that they were. The case can thus not be certified to be in accordance

with justice.

[13] In addition, the procedure followed by the magistrate in relation to accused two and three is irregular. As already alluded to, they were entitled to a verdict. The correct procedure is to have had their trial separated in terms of s 157 of the CPA on application by the public prosecutor, alternatively to have tried them jointly with accused one after the entering of a plea of not guilty in terms of s 113 of the CPA or for the prosecutor to have obtained consent from the PG to stop prosecution.

[14] The closing of the State's case, after accused two and three pleaded and gave plea explanations, amounted to a stopping of prosecution.

[15] This court in *S v Ekandjo*<sup>1</sup> and endorsed by the court in *S v Katemo*<sup>2</sup> held that:

'It is clear from s. 6 (b) of the Act that when an accused had pleaded, the proceedings may only be stopped if the Prosecutor-General or any person, authorized thereto by the Prosecutor-General has consented thereto. Once an accused has pleaded, the prosecutor no longer has control over the case and the Court then takes control. The only way to take the case out of the court's hands is for the Prosecutor-General to act in terms of s. 6 (b) thereby terminating ("stopping") the prosecution. The accused is then entitled to be acquitted. Where the prosecutor no longer wishes to proceed with a charge against the accused it is incumbent upon the magistrate to enquire of the prosecutor whether the Prosecutor-General has consented thereto because without such consent the stopping is void. The unauthorised stopping of prosecution would amount to a nullity (*S v van Niekerk* 1985 (4) SA 550 (BG); *du Toit* et al. Commentary on the Criminal Procedure Act at 1-5.'

[16] In view of the above, the ostensible acquittal of accused 2 and 3 was a nullity and the prosecutor had to either obtain the consent of the Prosecutor - General to stop the prosecution against accused 2 and 3 or proceeded to lead evidence on the count charged.

[17] In the result, it is ordered:

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<sup>1</sup> *S v Ekandjo* CR 04/2010, not reported.

<sup>2</sup> *S v Katemo* (CR 33/2014) [2014] NAHCMD 205 (3 July 2014).

<p>[18] 1. The conviction and sentence of accused 1 is confirmed.</p> <p>2. The closing of the state`s case in respect of accused 2 and 3 is set aside and the matter is remitted to the trial court with directions to proceed to trial in respect of accused 2 and 3 in the event that the prosecutor is unable to obtain authorisation from the Prosecutor-General to stop prosecution.</p>	
<p><b>H C JANUARY</b></p> <p><b>JUDGE</b></p>	<p><b>J C LIEBENBERG</b></p> <p><b>JUDGE</b></p>