

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**ELIFA HANDUKEME**

(HIGH COURT REVIEW CASE NO. 734/07)

**CORAM:** MAINGA, J et VAN NIEKERK, J

Delivered: 10 August 2007

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**SPECIAL REVIEW**

**VAN NIEKERK, J:**

[1] In this matter the accused was originally charged and convicted in ordinary trial proceedings which commenced in the district court at Oshakati on a charge of rape in contravention of section 2(1)(a) of the Combating of Rape Act, 8 of 2000, and on a second charge of assault with intent to do grievous bodily harm. The accused, who pleaded guilty, was represented by Mr Nambili. Thereafter the matter was sent to the regional court for sentence purportedly in terms of section 114(1)(a) of the Criminal Procedure Act, 51 of 1977. The learned regional magistrate noticed that the matter had not been referred to him as a result of a decision by the Prosecutor-General. Having discussed the matter with Mr Sibeya, counsel in the Office of the Prosecutor-General, he sent the matter to this Court on special review,

asking that the proceedings be set aside for the matter to start afresh in the district court.

[2] The district court does not have jurisdiction to hear a charge of rape under the common law (sec 89(1) of the Magistrates' Courts Act, 32 of 1944). The fact that the accused in this matter was charged with the statutory crime of rape under Act 8 of 2000, which does not expressly exclude the district court's jurisdiction, to my mind, does not change the position.

[3] The only way that an accused could be asked in a district court to plead to a charge of rape, whether under the common law or under Act 8 of 2000, is if he is asked to do so in terms of section 119 of the Criminal Procedure Act ("the Act"). He would then do so on either the general or the specific instructions of the Prosecutor-General. If he pleads guilty, the provisions of section 121 of the Act must be followed. He must be questioned in terms of section 112(1)(b) (see sec 121(1)) and if the district magistrate is satisfied that the accused admits the allegations stated in the charge, he or she must stop the proceedings (sec 121(2)(a)) and adjourn them pending the decision of the Prosecutor-General (sec 121(3)), who may, *inter alia*, arraign the accused for sentence in the regional court (sec 121(3)(a)).

[4] In this case the accused was not asked to plead to the charge of rape in terms of section 119. He was in fact tried for that offence by the district magistrate and convicted on his plea of guilty. It is clear that the proceedings in this case were conducted without any jurisdictional basis; that they are entirely irregular; and are null and void. They fall to be set aside.

[5] This can not be done by review in terms of section 304(4) of the Act, as this section requires that there must have been a sentence imposed in the magistrate's court. However, it would be untenable to refer the matter back to the regional magistrate to first sentence the accused while knowing that the original proceedings upon which the sentence is based, are a nullity. In terms of section 20(1)(a) of the High Court Act, 16 of 1990, this Court may review the proceedings of a lower court on the grounds that that court had no jurisdiction to conduct those proceedings, as is the case here. Although the correct procedure has not been followed in terms of the rules of the High Court, this Court may regulate its own procedure. There can be no good purpose served by referring the matter back merely for the rules to be followed. This will only prejudice the accused in whose interests it is that this matter be dealt with as expeditiously as possible. There can be no prejudice to the State, as the Prosecutor-General's representative has already agreed that the proceedings be set aside.

[6] I accordingly make the following order:

1. The entire proceedings in the district court from the stage where the charges were put to the accused (including the conviction of the accused), up to and including the stage that the accused was transferred to the regional court for sentence, are set aside.
2. The accused remains in custody and must be brought before the district court, Oshakati, without delay to be dealt with further according to law.

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**VAN NIEKERK, J**

I agree.

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**MAINGA, J**