

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK****REVIEW JUDGMENT**

Case no: CR 88/2018

In the matter between:

THE STATE

v

JOAO EUSEBIO**ACCUSED****(HIGH COURT MAIN DIVISION REVIEW REF NO. 1193/2018)****Neutral citation:** *S v Eusebio* (CR 88/2018) [2018] NAHCMD 344 (31 October 2018)**Coram:** UNENGU, AJ (USIKU, J concurring)**Delivered:** 31 October 2018**Flynote:** Criminal Procedure – Automatic Review – Magistrate not affording the accused the opportunity to state his case – Gross irregularity vitiating outcome of trial – Both conviction and sentence set aside – Matter remitted to same magistrate to continue with accused's case.

Summary: Criminal Procedure. Automatic Review. The matter was sent for automatic review where it was found that the magistrate did not afford the accused opportunity to state his case. The court:

Held that it is a gross irregularity not to afford the accused person the opportunity to state his case.

Held further that both conviction and sentence could not be allowed to stand. In the result both, conviction and sentence set aside and the matter remitted to the same magistrate to continue with the accused's case.

ORDER

1. The conviction and sentence on both counts are set aside.
2. The matter is remitted to the Magistrate's Court for the district of Otjiwarongo before magistrate H Shilemba to continue with the evidence of the accused.
3. In the event the accused is convicted, the period spent in jail serving the previous sentence (if any), has to be considered and taken into account during sentencing.
4. If the accused paid a part fine such part fine must be refunded to him.
5. The order to declare the accused unfit to possess a fire-arm also set aside.

REVIEW JUDGMENT

UNENGU, AJ (USIKU, J concurring)

[1] The accused was charged in the Magistrate's Court for the district of Otjiwarongo with offences of possession of a fire-arm without a licence contravening section 2 of the Arms and Ammunition Act¹ and possession of ammunition contravening section 38 of the same Act. He pleaded not guilty to both counts but, after a trial, was convicted of both counts and sentenced to pay a fine of N\$2000 or 14 months in default of payment and a fine of N\$1000 or one year imprisonment in default of payment for counts one and two respectively. The two sentences were ordered to run consecutively and the accused was declared unfit to possess a fire-arm for a period of one year.

[2] The matter was submitted for automatic review pursuant to section 302 of the Criminal Procedure Act² and Shivute J directed the following query to the learned magistrate:

'The Honourable Reviewing Judge remarks as follows:

1. The accused was convicted of two counts namely possession of a fire-arm without a licence contravening section 2 of Arms and Ammunition Act 7 of 1996 and possession of ammunition contravening section 33 of the same Act.
2. The accused stated that he would give a statement under oath. However, the magistrate made an order for the matter to stand down. When the matter resumed the accused was not afforded the opportunity to give his evidence under oath. Instead the learned magistrate proceeded with the judgment.
3. Why was the accused not afforded the opportunity to state the side of his story under oath.
4. The accused was sentenced on 14 March 2017 however, the matter was only sent on review on 30 July 2018. Why was the matter not sent on time?'

[3] In her response, the magistrate conceded not affording the accused an opportunity to state his case due to circumstances she cannot recall.

¹ Act 7 of 1996.

² Act 51 of 1977.

[4] To deny an accused person an opportunity to be heard or to state his case is a gross irregularity having the effect of vitiating the outcome of the trial. The learned magistrate was not careful in dealing with the case before her which is why the conviction and sentence on both counts will not be allowed to stand.

[5] Accordingly the following order is made:

1. The conviction and sentence on both counts are set aside.
2. The matter is remitted to the Magistrate's Court for the district of Otjiwarongo before the same magistrate to continue with the evidence of the accused.
3. In the event the accused is convicted, the period spent in jail serving the previous sentence (if any), has to be considered and taken into account during sentencing.
4. If the accused, paid a part fine, such part fine must be refunded to him.
5. The order to declare the accused unfit to possess a fire-arm also set aside.

E P UNENGU
Acting Judge

D N USIKU
Judge