



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 25/2019

In the matter between:

THE STATE

v

LORENZO BAYRAN PIETERSE

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1763/2018)

Neutral citation: *S v Pieterse* (CR 25/2019) [2019] NAHCMD 71 (28 March 2019)

Coram: USIKU, J and UNENGU, AJ

Delivered: 28 March 2019

Flynote: Criminal Produce – Automatic review – Magistrate’s failure to afford State an opportunity to close its case and the accused an option either to testify self and/or to call witnesses to testify on his behalf – failure serious irregularity – conviction and sentence set aside – Matter remitted to the magistrate to follow correct procedure.

Summary: This matter was sent on automatic review after the accused who was charged with assault by threat read with the provisions of the Domestic Violence's Act 4 of 2003 was convicted and sentenced. On review, it was found that the learned magistrate failed to afford the State an opportunity to close its case and the accused to testify self and/or to call witnesses to testify on his behalf. *Held:* The failure to afford the State an opportunity to close its case and the accused an option to either testify self and/or to call witnesses to testify in defence is a serious irregularity affecting the process of the proceedings in the matter. Thus the conviction and sentence set aside and the matter remitted to the magistrate to follow the correct procedure.

ORDER

- (i) The Conviction and sentence imposed by the magistrate on 20 October 2018 is hereby set aside.
 - (ii) The matter is remitted to the same magistrate to allow the state an opportunity to close its case and the accused to choose either to testify self and/or to call witnesses for his case or to close his case without leading evidence in defence.
 - (ii) In the event the accused is convicted, it is directed that part of the previous sentence already served by the accused should be taken into consideration when sentencing him afresh.
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REVIEW JUDGMENT

UNENGU, AJ (USIKU, J concurring):

[1] This matter was sent on automatic review pursuant to s 302 of the Criminal Procedure Act¹ (the CPA).

[2] Initially it was submitted before Siboleka, J, who directed the following query for the attention of the learned magistrate:

- '1. The papers on this matter have not been property sequenced.
2. The matter relates to a charge of assault by threat, suddenly the following page talks about cutting another person with a razor. The record does not properly flow from one page to the next. The pages that follow each other relate to totally different issues.
3. Account for the proper pages on this matter and cause it to be placed before me as soon as possible.'

[3] Siboleka, J while on long leave, the magistrate responded and the matter was allocated to me for review. I also detected that the procedure the learned magistrate followed to finalized the matter was wrong. That being the case, I also queried the magistrate and asked her for reasons why she convicted and sentenced the accused of assault by threat read with provision of the Domestic Violence Act 4 of 2003 without affording him the opportunity to choose either to testify self under oath and/or to call witnesses or to close his case without leading evidence?

[4] The learned magistrate duly complied and had replied by conceding that she followed a procedure which is not in accordance with justice; that after the formal admissions by the accused, the State was supposed to close its case whereafter the accused must have decided either to testify self and/or to call witnesses for his case, alternatively close his case without leading evidence. I agree.

[5] But during the trial proceedings the learned magistrate failed to follow the procedure she has suggested in her response to the query, thereby committed a serious irregularity vitiating the process of the entire proceedings of the matter.

[6] Accordingly, the conviction and sentence imposed cannot be allowed to stand but to be set aside and the matter remitted with a direction to the magistrate to follow the correct procedure in fanalizing the matter.

¹ Act 51 of 1977 as amended.

[7] In the result, and for the reasons stated above, I make the following order:

- (i) The conviction and sentence imposed by the magistrate on 20 October 2018 are hereby set aside.
- (ii) The matter is remitted to the same magistrate to allow the state an opportunity to close its case and the accused to choose either to testify self and/or to call witnesses for his case or to close his case without leading evidence in defence.
- (iii) In the event the accused is convicted, it is directed that part of the previous sentence already served by the accused should be taken into consideration when sentencing him afresh.

E P UNENGU
Acting Judge

D N USIKU
Judge