

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Moses Johannes</i>	<b>Case No:</b> CR 31 /2021
<b>High Court MD Review No:</b> 602 / 2021	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Mr Justice Liebenberg <i>et</i> Lady Justice Claasen	<b>Delivered on:</b> 10 May 2021
<b>Neutral citation:</b> <i>S v Johannes</i> (CR 31 /2021) [2021] NAHCMD 214 (10 May 2021)	
<b>It is hereby ordered that:</b>  The conviction and sentence are set aside.	

**Reasons for the order:**

[1] This is a review matter which came before me in terms of section 302 (1) and section 303 of the Criminal Procedure Act 51 of 1977.

[2] The accused appeared in the magistrate's court for the district of Karibib, held at Usakos, on a charge of assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The accused pleaded not guilty to the charge and the matter went to trial. After evidence was heard he was found guilty as charged. The nature and manner in which the sentence imposed is drafted will be addressed below.

[3] In a query directed to the presiding magistrate, it was brought to his attention that with the accused's first appearance on 15 August 2019, the record reflects that he opted for instructing private counsel. When the matter proceeded to trial on 11 November 2020 the accused was unrepresented. The learned magistrate was asked if the court satisfied itself that the accused had changed his mind in the meantime and decided to conduct his own defence, as that is not borne out by the record of the proceedings. In response the learned magistrate stated that the accused 'did not apply nor bring any legal representative despite saying so'. He further added that on 11 November 2020 the accused indicated that he was ready to plead and did not tell the court that he wanted to wait for legal representation; had he so indicated, the matter would have been remanded.

[4] The first issue does not concern the explanation of an unrepresented accused's rights, but rather to assist the accused in securing legal representation by either private instruction or by legal aid instructed counsel.

[5] In the matter of *Haipinge v The State*,<sup>1</sup> the appellant raised the ground that the court *a quo* erred in allowing the trial to proceed without legal representation. The

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<sup>1</sup> *Haipinge v The State* (CA 03/2016) [2017] NAHCNLD 94 (28 September 2017).

appellant applied for legal aid and a legal representative was appointed. Counsel however failed to turn up at court and withdrew from the matter shortly before it was enrolled for trial. The accused thereafter applied for a postponement to obtain another legal practitioner. The State prosecutor erroneously informed the court that another legal practitioner was appointed. This practitioner was however appointed to represent the appellant in another matter. The court *a quo* incorrectly put it to the appellant that he had opted to represent himself whereas, in fact, he did not waive his right to legal representation. The court proceeded with trial without inquiring whether the appellant was able to obtain the services of another legal practitioner. On appeal it was held that the appellant's right to be represented by a legal practitioner was infringed and that the appellant was prejudiced to the extent where the irregularity vitiated the entire proceedings. The conviction and sentence were set aside.

[6] Similarly, in a matter for special review of *S v Wendeinge*,<sup>2</sup> it was held that the right to legal representation is a fundamental right. The accused's right to legal representation was explained on his first appearance whereupon he elected to apply for legal aid. On his third appearance he did not waive this right or his election to apply for legal aid. As a result of an omission to peruse the previous court record by the magistrate and, seemingly, also the prosecutor, the trial proceeded in the absence of a legal representative. The accused asked no questions to witnesses. On review of the proceedings the court found that in the circumstances the proceedings are vitiated by the irregularity and the proceedings were set aside.

[7] In light of the above stated principles, the magistrate in the present circumstances should not have allowed the proceedings to continue based on an assumption that the accused has decided to be unrepresented. The court ought to have satisfied itself that the accused has changed his mind with regard to securing legal representation and decided to appear in person. This could have been determined by posing a question to the accused and obtaining a specific answer from him. This should

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<sup>2</sup> *S v Wendeinge* (CR 7/2017) [2017] NAHCNLD 68 (24 July 2017)

have been reflected in the record without ambiguity. The court's failure to do so undoubtedly infringed on the rights of the accused as guaranteed by Article 12 of the Namibian Constitution which, in imperative terms, states that all persons shall be entitled to be defended by a legal practitioner of their choice. A failure to afford an accused such opportunity amounts to an irregularity which has the effect of vitiating the proceedings. Consequently, the conviction and sentence fall to be set aside on that basis alone. There are however other issues deserving comment.

[8] Another point raised in the query is that, despite the accused challenging the record of previous convictions, the court summarily admitted it and relied on the alleged previous convictions for purposes of sentencing. In light thereof the magistrate was asked if the state is not required to *prove* any previous conviction against an accused and on what authority did the court rely when accepting the record of previous convictions by its mere production. In response the learned magistrate stated that he concedes that the accused initially had a problem with the record of previous convictions, but because it was a bare denial it was overruled by the court.

[9] Section 271 of the CPA states the following in relation to the proving of previous convictions:

'The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.

(2) The court shall ask the accused whether he admits or denies any previous conviction referred to in subsection (1).

(3) If the accused denies such previous conviction, the prosecution may tender evidence that the accused was so previously convicted.

(4) If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.'

[10] Section 271 of the CPA obliges the court to take into account a previous conviction only if such previous conviction is not disputed by the accused. If disputed,

evidence should be led by the state to prove the previous conviction in question. In the present matter, the court misdirected itself when the accused disputed the previous convictions but the court, nevertheless, proceeded to overrule the objection on the basis that it is a bare denial. Instead, the court should have called upon the state to lead evidence which could prove the previous convictions, as required by section 271 of the CPA. Only thereafter would the court have been in a position to decide whether or not the previous convictions have been duly proved. If the previous convictions have indeed been proved, the court should then take those into consideration in the process of determining the appropriate sentence.<sup>3</sup>

[11] In the present matter it did not happen that way and the procedure adopted by the court constitutes a material irregularity upon which the sentence may be set aside. It is apparent from the sentencing judgment that the magistrate relied upon the previous convictions to a greater extent in determining the sentence imposed upon the accused.

[12] In the result, it is ordered that the conviction and sentence are set aside.

<b>J C LIEBENBERG</b> <b>JUDGE</b>	<b>C CLAASEN</b> <b>JUDGE</b>

<sup>3</sup> See *State v Noabeb* (CC 09/2014) [2016] NAHCMD 147 (18 May 2016)