REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: *The State v Wesley Haraseb*	**Case No:** CR 34 /2021
High Court MD Review No: 605 / 2021	**Division of Court:** Main Division
Heard before: Mr Justice Liebenberg *et* Lady Justice Claasen	**Delivered on:** 10 May 2021
Neutral citation: *S v Haraseb* (CR 34 /2021) [2021] NAHCMD 217 (10 May 2021)	
It is hereby ordered that: 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 person appeared in the Magistrate's Court for the district of Karibib, held at Usakos, where he faced two counts of house breaking with intent to steal and theft, first alternative being theft, and second alternative being found in possession of suspected stolen property on each count.

[3] On his first appearance the accused informed the court that he would like to apply for legal aid and the matter was postponed several times for that reason. Specifically on 7 November 2019 the matter was on the roll for legal aid and the accused informed the court that he had not applied for legal aid yet. The matter was then postponed to 26 November 2019 for the same reason. The record reflects that thereafter the accused appeared in court on 4 March 2020 when the charges were put to him and he pleaded not guilty to two counts (the record not reflecting which of the counts), where after the matter proceeded to trial. The record does not reflect if the accused changed his mind and decided not to pursue his legal aid application before he pleaded to the charges.

[4] The accused was subsequently found guilty and the issue in relation to specificity of the offence he has been convicted of will be addressed herein. He was then consequently sentenced to 36 months' imprisonment of which 12 months' are suspended for a period of 3 years on condition that the accused is not convicted of theft, committed during the period of suspension.

[5] In a query directed to the learned magistrate an observation was noted that the evidence relied upon by the court is inconsistent with the testimony of the two witnesses called by the prosecution and that the judgment forming part of the record of the case appears to relate to another matter, not the case submitted for review. The learned magistrate was asked to furnish reasons explaining the different facts relied upon by the court in convicting the accused.

[6] He was further asked if the offence of housebreaking with intent to steal and theft was proved and also to specify on which of the two counts the accused was convicted, as

this is not apparent from the judgment.

[7] An observation was also brought to the attention of the learned magistrate that, to add insult to an injury, the review cover sheet reflects that the accused was convicted on both counts of the main and alternative charges, a total of six distinct offences.

[8] In response the learned magistrate stated that the record of proceedings initially submitted for review is wrong, and resubmitted a record with corrections.

[9] It was explained that the offence of housebreaking was not proven by the state and that the accused was convicted of theft on the doctrine of recent possession. The magistrate added that the accused pleaded on both count one and two, but he was only convicted on the first alternative count, that is theft. The magistrate informed the court that there was an oversight on his part and asked that the sentence be confirmed.

[10] Various judgments of the High Court have reiterated that it is very important for the magistrate to proof read the record before it is sent for review.[1] That is said in light of the fact that the record submitted for review is not properly paginated and makes it very difficult for one to follow the record of the proceedings in a chronological order. It is further marred by typos and other glaring errors, like some missing pages. In short, the record is in shambles.

[11] In relation to the preparation of a record for review, Van Niekerk J pronounced herself as follows in *S v Kamudulunge,*[2] as summarized in the headnote at p 433 at G-H:

‘Headnote: The clerk of the court who prepares the cases for review and the magistrate who takes final responsibility for the preparation of the record should take more care when these tasks are executed. The prosecutor should take care that the information on the charge-sheet corresponds with an annexure to the charge-sheet. Alternatively he/she should draw the line through the initial charge indicated on the charge-sheet and write 'As per annexure A'.’

[1] *S v Kamenye* (CR 9/2019) [2019] NAHCNLD 31 (26 March 2019).
[2] *S v Kamudulunge* 2007 (2) NR 608 (HC).

[12] Damaseb JP also dealt with the issue of records in appeal matters in the unreported case of *Coetzee v S.*[3] I find the same approach to be applicable to review matters. In that case he found that the record was in shambles, and stated that the record of proceedings must be prepared in accordance with '*Chapter XIII of the Codified Instructions: Clerk of the Criminal Court'* issued by the Permanent Secretary for Justice to create certainty about proceedings in fairness to an accused and the State. He further held that the ultimate responsibility rests on the presiding magistrate to ensure that the record is a correct reflection of proceedings that took place before him or her.[4] In the current matter, the learned magistrate could have done more to fulfil that responsibility.

[13] There are two main issues with the record in its present state. The first issue is that in the resubmitted record, (although corrected as stated) it is not borne out by the record whether the accused decided to abandon his application for legal aid and conduct his own defence, and when he made that decision.

[14] In *S v Wendeinge*[5] it was held as follows:

'[4] It by no means follows that where there is a failure to afford legal representation there must necessarily be a failure of justice resulting in the proceedings being vitiated. In the case of *S v Mwambazi* 1990 NR 353 at 356B, Levy J went on to refer with approval to the following passage from the judgment of Hoexter JA *in S v Mabaso and Another* 1990 (3) SA 185 (A) at 204C:

> "Where a general duty rests upon a judicial officer to inform an unrepresented accused that he has a right to be legally represented, the failure to discharge that duty does not inevitably involve the commission of an irregularity in the judicial proceedings involved. Whether or not an irregularity has been committed will always hinge upon the peculiar facts of the case; and it need hardly be said that much depends upon the extent of the accused's own knowledge of his rights."'

[15] In relation to the duty of a magistrate to ensure a proper and comprehensive

[3] *Coetzee v S* (CA 52/2009) [2011] NAHC 72 *(*11 March 2011).
[4] See also *S v Kamenye* (CR 9/2019) [2019] NAHCNLD 31 (26 March 2019).
[5] *S v Wendeinge* (CR 7/2017) [2017] NAHCNLD 68 (24 July 2017).

record of the court proceedings as they transpired, it was held in *S v Frederick*[6] that a magistrate has a duty to keep an unrepresented accused informed of procedural rights and to keep record thereof.[7] In that case, the magistrate failed to record the explanations of the procedural rights, merely recording that rights in cross-examination, mitigation rights, and review and appeal rights were explained to the accused, without recording or stating the exact and detailed explanation given to the accused. In that case it was held that the details of the explanations should appear *ex facie* the record,[8] which was not properly done in that matter and the court found that it amounts to a further irregularity.

[16] Although the present matter does not concern the explanation of the accused's rights *per se*, the court failed to establish whether the accused changed his earlier decision to apply for legal aid and record his response. To have simply assumed that the accused afterwards opted to conduct his own defence and commence trial proceedings constitutes an irregularity. In the absence of such information, it is impossible for this court to find that the proceedings were conducted in compliance with Article 12 of the Constitution and the conviction falls to be set aside for that reason alone.

[17] The second issue is that the record is vague in respect of the counts to which the accused pleaded. The record reflects that the accused pleaded to two counts, without showing which of the counts were put to him and whether he also pleaded to the alternative counts. In the absence of such clarity from the record, the accused was nonetheless convicted on what the learned magistrate referred to as the 'first alternative count of theft' without specifying whether that is under count one or two, or under both counts.

[18] The accused should have pleaded to the two main counts and the alternative charges as well,[9] with the record of court proceedings clearly reflecting that. The record of

[6] *S v Frederick* (CR 76/2020) [2020] NAHCMD 459 (6 October 2020).
[7] Section 4(1) of Magistrates Court Act No 32 of 1944 as amended provides that every court is a court of record.
[8] *S v Daniels* 1983 (3) SA 275 A.

the proceedings should have also clearly indicated the offence that the accused has been convicted of, taking into consideration the fact that the accused faced two main charges of housebreaking with intent to steal and theft, and under each of those two counts there were two alternative charges, one of theft and one of being found in possession of suspected stolen property. In such circumstances, ensuring clarity should have been of paramount importance.

[19] The court a quo in its judgment concluded that the state proved its case on both counts but imposes only one sentence. Furthermore, the conviction on count 1 is not supported by the facts as the complainant in that count never testified. The court clearly relied on inadmissible hearsay evidence when coming to the conclusion as it did.

[20] Consequently, it cannot be said that the accused was afforded a fair trial as the irregularities committed are such that it vitiates the proceedings.[10]

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

J C LIEBENBERG **JUDGE**	**C CLAASEN** **JUDGE**

[9] See *The State v Tjipetekera* (CR 75/2012) [2012] NAHCMD (11 September 2012).

[10] See *S v Shikunga* (SA-1995/6) [1997] NASC 2 (20 August 1997).