

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Jacobus Dogg van Neel</i>	<b>CR:</b> 66/2022
<b>High Court MD Review No:</b> 1051/2022	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Judge Shivute and Judge January	<b>Delivered on:</b> 10 August 2022
<b>Neutral citation:</b> <i>S v van Neel</i> (CR 66/2022) [2022] NAHCMD 391 (10 August 2022)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The closing of the State's case and the accused's subsequent acquittal in terms of s 174 of Act 51 of 1977 is set aside.</li><li>2. The matter is remitted to the trial court with the direction to proceed to trial when the prosecutor is unable to obtain the Prosecutor General's consent to stop prosecution.</li></ol>	
<b>Reasons for order:</b>	
JANUARY J (SHIVUTE J concurring):	
[1] This matter was sent for special review by the divisional magistrate of	

Keetmanshoop in terms of s 304(4) of the Criminal Procedure Act 51 of 1977, as amended (the CPA). Attached to it was a letter wherein the magistrate requests the reviewing court to set aside the s 174 discharge of the accused due to an irregularity described as a stopping of prosecution.

[2] The accused persons in the matter was charged with the offences of:

1. Assault with intend to do grievous bodily harm. It is alleged that he on 18 April 2020 did wrongfully, unlawfully and intentionally assault Petronella Swartz by cutting her with a beer bottle with intent to do her grievous bodily harm.
2. Assault common; that he on 18 April 2020 did wrongfully, unlawfully and intentionally assault Petronella Swartz by throwing her with a rock thereby causing her some wounds and/or injuries.
3. Assault with intent to do grievous bodily harm; that he on 18 April 2020 did wrongfully, unlawfully and intentionally assault Kallie Isaacks by punching and biting him with intent to cause the said Kallie Isaacks grievous bodily harm; Alternatively; Assault common; that he on 18 April 2020 did wrongfully, unlawfully and intentionally assault Kallie Isaacks by biting him and did thereby cause him some wounds and/or injuries.
4. Assault with intent to do grievous bodily harm read with the provisions of the Domestic Violence Act 4 of 2003; that he on 18 April 2020 did wrongfully, unlawfully and intentionally assault Olga Pienaar by strangling her with intent to cause the said Olga Pienaar, with whom the accused was in a domestic relationship (girlfriend and boyfriend) as defined in s 1 of Act 4 of 2003, grievous bodily harm; Alternatively, on 18 April 2020 did wrongfully, unlawfully and intentionally assault Olga Pienaar, with whom the accused was in a domestic relationship, (girlfriend and boyfriend) as defined in s 1 of Act 4 of 2003, by strangling her and did thereby cause her some wounds and/or injuries.

[3] The accused pleaded not guilty on counts 1 and 2. He pleaded guilty on counts 3 and 4. He gave plea explanations in relation to counts 1 and 2. The magistrate questioned the accused in terms of s 112(1)(b) of the CPA in relation to counts 3 and 4. He was not satisfied that the accused admitted all the allegations and entered pleas of not guilty in relation thereto. The matter was then remanded for trial. Thereafter, it was remanded from time to time because of the unavailability of the magistrate or time constraints. On 25 October 2021, the accused was absent and a warrant for his arrest was issued. The accused appeared on 05 November 2021. The warrant of arrest was cancelled as the accused was in custody during the previous court session.

[4] On 17 March 2022, the case was supposed to commence for trial. The State closed its case because the witnesses were unwilling to continue with the matter. The prosecution called Mr. Kallie Isaacks who informed the court that he wanted to withdraw the case. The public prosecutor withdrew the case against the accused. The court acquitted and discharged the accused in terms of s 174 of the CPA without evidence.

[5] It seems that there was no authorisation by the Prosecutor General (the PG).

[6] The divisional magistrate appropriately noticed the irregularity committed, wherein the prosecutor had no consent from the PG authorizing a stopping of prosecution as prescribed in s 6(b) of the CPA. This is so because it is evident from the record of proceedings that the prosecutor did not inform the court a quo whether she had the required authorisation from the PG to stop the prosecution. Neither did the court a quo enquire whether the prosecutor had obtained such approval.

[7] It is thus apparent from the guidance set forth in *The State v Samuel Ekandjo*<sup>1</sup> that the unauthorised stopping of prosecution would amount to a nullity. The prosecutor has to either obtain the consent of PG to stop the prosecution or proceed to lead evidence on the charge which was put to the accused. Thus, the acquittal of the accused in terms of s 174 of the CPA cannot be allowed to stand.

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<sup>1</sup> Unreported: CR 04/2010 delivered 23April 2010.

<p>[8] In the result, it is ordered:</p> <ol style="list-style-type: none"><li>1. The closing of the State's case and the accused's subsequent acquittal in terms of s 174 of Act 51 of 1977 are set aside.</li><li>2. The matter is remitted to the trial court with the direction to proceed to trial if the prosecutor is unable to obtain the Prosecutor General's consent to stop prosecution and bring the matter to its natural conclusion.</li></ol>	
<p><b>H C JANUARY</b></p> <p><b>JUDGE</b></p>	<p><b>N N SHIVUTE</b></p> <p><b>JUDGE</b></p>