

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT  
PRACTICE DIRECTIVE 61

<b>Case Title:</b> <i>The State v Shafiishuna Mbuende</i>	<b>Case No:</b> CR 39/2023
<b>High Court Review No:</b> 444/2023	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Liebenberg J et Miller AJ	<b>Delivered on:</b> 3 April 2023
<b>Neutral citation:</b> <i>S v Mbuende</i> (CR 39/2023) [2023] NAHCMD 165 (3 April 2023)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence are set aside.</li><li>2. The matter is remitted to the trial court with the direction to proceed to trial and to bring proceedings to its natural conclusion.</li></ol>	
<b>Reasons for order:</b>	
LIEBENBERG J (concurring Miller AJ)	

[1] This review matter emanates from the magistrate's court in the district of Windhoek where accused 3 and two co-accused were arraigned on a charge of robbery. The particulars of the charge read that they used a knife to force the victim into submission when robbing her of her cell phone valued at N\$4800. Following his conviction, accused 3 was sentenced to a fine of N\$1500 or 9 months' imprisonment. He did not pay the fine and is currently serving the alternative term of imprisonment.

[2] In this instance I deem it necessary to invoke the powers vested in me by virtue of the *proviso* under s 304(2)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) which allows a judge to dispense with a statement from the judicial officer who presided at the trial in circumstances where it is obvious that the conviction is clearly not in accordance with justice and that the person convicted will be prejudiced if the record of the proceedings is not forthwith placed before this court for consideration. The reasons for coming to this conclusion are set out below.

[3] With the commencement of proceedings on 4 February 2022 the prosecution withdrew the charge against accused 2, being a minor, and proceeded against accused 1 and 3 by requiring of them to plead to the charge of robbery.<sup>1</sup> Both the accused pleaded not guilty and the court elected not to invoke the provisions of s 115 of the Criminal Procedure Act 51 of 1977 (CPA). The matter was thereafter postponed and when the case was eventually called on 9 February 2023, the prosecutor informed the court that the case would be withdrawn against accused 1, and that accused 3 wished to plead. The court granted the application, clearly ignoring the fact that accused 1 had already pleaded and no explanation proffered by the state as to what the reasons were for stopping prosecution against accused 1. Proceedings were then rolled over to the next day.

[4] On 10 February 2023 the same charge of robbery was again put to accused 3

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<sup>1</sup> Despite it being alleged in the charge that a knife was used in the commission of the robbery, the accused seemed not to have been charged with robbery with aggravating circumstances.

(the accused) who then pleaded guilty. The court invoked the provisions of s 112(1)(b) of the CPA and questioned the accused on the allegations set out in the charge. He *inter alia* admitted that he was having the knife when taking the complainant's cell phone from her. When questioned on the wrongfulness of his actions, the accused said that he did not know that he did wrong because he was under the influence of alcohol and in fact drunk. This compelled the court to enter a plea of not guilty in terms of s 113 of the CPA. The presiding magistrate then advised the prosecutor to only lead evidence 'on the unlawfulness that say he was drunk or whatever the case may be then you finalise your case'. (*sic*) The transcript then reflects that the recording stopped as the matter was stood down.

[5] On resumption, the prosecutor informed the court that the accused would like to address the court. Before he could do so, the magistrate reminded the accused that he disputed the element of unlawfulness and that he claimed not to have known what he was doing, was wrong. The accused responded by saying that he knew his actions were unlawful. The magistrate, without any explanation given to the accused, then enquires whether the accused wanted to make formal admissions in terms of s 220 (of the CPA) regarding the elements that he initially disputed, which he confirmed. The court then practically leads the accused into the making of admissions by asking whether he also admits that he was not given permission to take the cell phone, which he again confirms. The accused then agreed that these could be recorded as formal admissions. After the state closed its case, the accused elected to remain silent. He was convicted as charged and subsequently sentenced.

[6] From a reading of the record, it is evident that the entire proceedings are riddled with irregularities which cannot simply be overlooked on review.

[7] The first issue for consideration turns on the prosecutor's decision to withdraw the case against accused 1 after he has pleaded and the court's granting of the application without enquiring on what basis the application is made. In light of the

outcome of the proceedings under review, there is no need to discuss the applicability or

otherwise of s 6 of the CPA in any detail. Suffice to refer to the *dictum* of the Full Bench decision of *S v Fourie*<sup>2</sup> where it was said that in an instance where the state's case is closed without the leading of evidence, the question whether the prosecutor's conduct amounts to the stopping of a prosecution is one of fact to be decided with reference to all the facts. Unlike the facts in the *Fourie* matter, the prosecutor proffered no explanation when 'withdrawing' against accused 1. By granting the application, the court clearly misdirected itself as there was no legal basis for the granting of the application. In deciding whether the nature and extent of the irregularity is such that there was a failure of justice vitiating the entire proceedings, I am satisfied that it is not the case. See *S v Shikunga and Another*.<sup>3</sup>

[8] The second irregularity turns on the accused having been asked to plead to the same charge for a second time on 10 February 2023 which, in itself, constituted an irregularity. As stated, on this occasion the accused pleaded guilty and when not admitting to the unlawfulness of his actions, the court entered a plea of not guilty. There can be no doubt from the accused's answers to the court's questioning that he raised the defence of intoxication (drunkenness). When the matter at that stage stood down and the accused returning to court, stating that he wanted to address the court and, judging from the interaction between him and the magistrate, was willing to make formal admissions, this complete turnabout within a brief period should have raised the alarm with the magistrate that the accused might have been coerced into making admissions. At this stage it would have been proper for the magistrate to determine what prompted the sudden change of facts and why the accused in the first place raised the defence. Instead of inquiring into these relevant and contradicting statements made by the accused, the magistrate merely enquired whether he wanted to make formal admissions and, when he answered in the affirmative, he was guided in making admissions. This, without any explanation as to the purpose and effect the making of formal admissions

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<sup>2</sup> *S v Fourie* 2014 (4) NR 966 (HC).

<sup>3</sup> *S v Shikunga and Another* 1997 NR 156 (SC).

would have on his defence. These admissions circumvented the leading of witnesses by the state and culminated in the conviction.

[9] When regard is had to the way proceedings developed after the entering of a plea of not guilty up to where the accused shortly thereafter returns to court wishing to make formal admissions, leaves the impression with this court that the accused was coerced in making the admissions. Moreover, where logic dictates that, in light of the defence of intoxication raised, he was not in a position (mentally) to make the admission recorded without providing an explanation which could possibly explain the contradiction in his statement.

[10] The effect of the irregularities set out above is such that, in my view, it cannot be said that the accused was afforded a fair trial. The conviction, therefore, cannot be permitted to stand.

[11] There is however, a further issue that deserves to be addressed which relates to the sentence imposed. Although the sentence will equally fall away, I deem it necessary to make the following remarks: In the present instance the complainant fell prey to an attack by persons who forced her into submission when robbing her of her cell phone, while brandishing a knife. The courts in this jurisdiction have always considered robbery to be of serious nature, for which it has become the norm to impose sentences of direct imprisonment or partly suspended, except where substantial and compelling circumstances dictate the imposition of a lesser sentence. I am unable to see from the present facts what necessitated the imposition of a fine of N\$1500 in circumstances where a custodial sentence was called for. Serious crimes such as robbery, where weapons are used in the commission of the offence, should be met with the full force of the law and, the interest of society to be protected by deterrent sentences on those convicted of robbery. The sentence imposed in this instance, in my view, amounts to a travesty of justice.

[12] Consequently, I am not satisfied that the conviction and sentence in this instance are in accordance with justice and fall to be set aside. To do justice to the accused, the

matter should proceed to trial from the stage where the accused pleaded not guilty on 4 February 2022 and the state to lead evidence. The proceedings of 10 February 2023 are therefore set aside. In the event of a conviction, the court at sentencing must have regard to the term of (the alternative) sentence already served by the accused.

[13] In the result, it is ordered:

1. The conviction and sentence are set aside.
2. The matter is remitted to the trial court with the direction to proceed to trial and to bring proceedings to its natural conclusion.

<b>J C LIEBENBERG</b> <b>JUDGE</b>	<b>K MILLER</b> <b>JUDGE</b>