

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<b>Case Title:</b> The State v Elrico Namiseb and McDonald !Gawaseb	<b>Case No:</b> CR 124/2022
<b>High Court MD Review No:</b> 1412/2022	<b>Division of Court:</b> Main Division
<b>Heard before:</b> January J et Usiku J	<b>Delivered on:</b> 13 April 2023
<b>Neutral citation:</b> <i>S v Namiseb &amp; Another</i> (CR 124/2022) [2023] NAHCMD 189 (13 April 2023)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. The conviction of robbery is amended and the accused are both convicted of robbery with aggravating circumstances.</li><li>2. The sentences are confirmed.</li></ol>	
<b>Reasons for order:</b>	
JANUARY J (Usiku J concurring):  [1] This review matter stems from the Grootfontein Magistrates Court and is submitted in terms of s 302(1) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).	

[2] The accused persons were charged with robbery with aggravating circumstances. The annexure label to the charge sheet refers only to robbery but the particulars of the charge are as follows:

'In that on or about 22h00. the 25<sup>th</sup> day of March 2022 and at or near Sundowner bar, Uis in the district of Omaruru the accused did unlawfully and with the intention of forcing him into submission, assault/threaten to assault Uiseb McNulty by punching him on the face with the fist and threaten to stab him with a knife and unlawfully and with the intent to steal take from him a bottle of J & B 750ml with a value of N\$220-00, the property of or in the lawful possession of the said Uiseb McNulty.

And that aggravating circumstances as defined in s 1 of Act 51 of 1977 are present in that the accused were during the commission of the crime in possession of a dangerous weapon, to wit 2 x knife.'

[3] Initially, the accused persons both pleaded not guilty. They opted to remain silent and not to disclose their defences. Subsequently, at the commencement of the trial on 20 July 2022, the accused persons addressed the court and made admissions to the court. These admissions were recorded in terms of s 220 of the CPA.

[4] Accused one's admissions reflect as follows: 'To start with I pleaded not guilty knowing that I have committed the offence of robbery. I knew from the onset that my conduct is unlawful, wrong and against the law and that I could be punished for it by the authorities however I am the one that unlawfully and intentionally forced the complainant, McNulty Uiseb, into submission by threatening to stab him with a knife on 25<sup>th</sup> March 2022 at Sundowner bar in Uis, which is in the district of Omaruru. I than unlawfully and with the intent to deprive him took a bottle of J & B 750 ml to the value of N\$220 from the complainant, which alcohol I have consumed with my friend. It is true that I had a knife at the commission of the offense.'

[5] Accused two's admissions are as follows: 'On the 25<sup>th</sup> March this year, I was acting in common purpose with my co-accused in robbing Uiseb McNulty of his J & B 750 ml

bottle of Whiskey. I did that by threatening to stab him, forcing him in submission and took the bottle by force from him unlawfully and with the intent) to steal the bottle from him, to drink it myself. This happened in Uis, in the Omaruru district at Sundowner bar around 22:00 and the bottle of Whisky that I took from the complainant is worth N\$220 in the bottle store. I knew what I was doing was very wrong and unlawful and that I could be prosecuted for it, as it is happening now.'

[6] The magistrate appropriately explained the consequences of the admissions to the accused persons. The State thereafter closed their case. The magistrate explained to the accused their rights after the close of the State's case. They opted to remain silent and the accused were both convicted for robbery only.

[7] I directed a query why the accused persons were convicted for robbery only whereas the allegation in the charge and the admissions by the accused justify a conviction for robbery with aggravating circumstances. The magistrate conceded that the accused persons should have been convicted for robbery with aggravating circumstances.

[8] The accused persons were sentenced to twenty four (24) months' imprisonment of which 12 months were suspended for a period of three (3) years on condition that the accused is not convicted of the offence of robbery committed during the period of suspension. We have no qualm with the sentence.

[9] In the result, it is ordered:

1. The conviction of robbery is amended and the accused are both convicted of robbery with aggravating circumstances.
2. The sentences are confirmed.

<b>H C JANUARY</b> <b>JUDGE</b>	<b>D USIKU</b> <b>JUDGE</b>