

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Hendrick Gawagab</i>	<b>Case No:</b> CR 71/2023
<b>High Court MD Review No:</b> 657/2023	<b>Division of Court: High court</b> Main Division
<b>Heard before:</b> D Usiku J et Christiaan AJ	<b>Delivered on:</b> 7 July 2023
<b>Neutral citation:</b> <i>S v Gawagab</i> (CR 71/2023) [2023] NAHCMD 392 (7 July 2023)	
<b>The order:</b>  (a) The conviction is confirmed. (b) The sentence imposed is hereby set aside with a direction that the matter is remitted to the learned magistrate to hear the evidence or submissions of the complainant in terms of s 25 of the Combating of Domestic Violence Act 4 of 2003, before sentencing the accused afresh according to law.	

**REASONS FOR ORDERS**

CHRISTIAAN AJ and Usiku J (concurring)

[1] This matter was submitted to this court for review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA) as amended.

[2] The accused appeared in the magistrate's court for the district of Gobabis, charged with the offence of assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003. ("the Act")

[3] The charge sheet contains the following particulars:

'In that upon or about the 12 day of March 2023 and at or near Informal Settlement location in Aminius in the district of Gobabis the accused did wrongfully, unlawfully and intentionally assault Sophia Coetzee by beating her with intent to cause the said Sophia Coetzee, with whom the accused was in a domestic relationship to wit boyfriend/girlfriend as defined in section 1 of act 4 of 2003, grievous bodily harm.'

[4] The accused pleaded guilty to the charge. The court proceeded with section 112(1) (b) questioning and found that all the elements of the offence were admitted, the court convicted the accused as charged. On the same day, the court heard mitigating factors from the accused, after which the state presented submissions before sentence. The court, without hearing evidence or submissions from the complainant in terms of s 25 of the Act, sentenced the accused to 24 months' imprisonment.

[5] The conviction is in accordance with justice and is confirmed.

[6] A query in respect of the sentence was directed to the presiding officer in the following terms:

'After the accused was convicted on 15 March 2023, there is no indication on the record that the complainant made submissions in terms of section 25 of the Act. Can the learned magistrate

please explain?’

[7] The learned magistrate responded to the query and conceded that due to an oversight on her part she did not afford the complainant an opportunity to make submissions before sentence as provided for in s 25 of Act.

[8] Section 25 of the Act regulates complainants’ submissions at sentencing stage and provides as follows:

**‘25 Complainant's submission in respect of sentence**

(1) The court must, if reasonably possible and within a reasonable time, notify the complainant or the complainant's next of kin, if the complainant is deceased, of the time and place of sentencing in a case of a domestic violence offence against the complainant.

(2) At the time of sentencing, the complainant, the complainant's next of kin, if the complainant is deceased, or a person designated by the complainant or the complainant's next of kin has the right to appear personally and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation.

(3) A complainant, or the complainant's next of kin, if the complainant is deceased, who is unwilling or unable to appear personally at sentencing has the right to inform the court of his or her views on an appropriate sentence by means of an affidavit.’ (Our emphasis)

[9] From the reading of the above, it is clear that at sentencing, the trial court was compelled to comply with the provisions of s 25 of the Act and notify the complainant of the date, time and place of sentencing where the complainant has the right to express views in respect of the crime, the accused, the impact of the crime on the complainant and the need for restitution and compensation. Failure to notify the complainant as aforesaid contravenes the provisions of s 25 and constitutes an irregularity which is fatal to the sentencing proceedings. Where the accused is convicted of an offence that involves domestic violence, then the trial court must comply with s 25 of the Act.

[10] It is accepted that the magistrate correctly conceded. I wish to add my voice to what Sibeya J remarked in the matter of *S v Hamalwa*<sup>1</sup>, when the magistrate remarked that it was an oversight on their part to comply with the provisions of s 25 of Act 4 of 2003:

‘The explanation of an oversight for the irregularity committed leaves a bitter test. Presiding officers must be vigilant at all times to ensure compliance with the law and to further ensure that no party is unnecessary prejudiced. It is elementary that parties must be heard by a court before a decision that may affect such a party is made. In *casu*, over and above the said requirement, it is the duty of the court to hear the complainant in terms of s 25 of the Act 4 of 2003. Failure to carry out such duties constitutes material irregularities.’

[11] In the premise, the sentence imposed on the accused cannot be allowed to stand and therefore falls to be set aside. The learned magistrate must conduct sentencing proceedings according to law and sentence the accused afresh.

[12] In the result, it is ordered:

(a) The conviction is confirmed.

(b) The sentence imposed is hereby set aside with a direction that the matter is remitted to the learned magistrate to hear the evidence or submissions of the complainant in terms of section 25 of the Act, before sentencing the accused afresh according to law.

P CHRISTIAAN ACTING JUDGE	D USIKU JUDGE

<sup>1</sup> *S v Hamalwa* (CR 01/2022) 2022 NAHCMD 26 (01 February 2022).