

REPUBLIC OF NAMIBIA



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

<b>Case Title:</b> The State v Daniel Stefanus	<b>Case No:</b> CR 82/2023
<b>High Court MD Review No:</b> 2143/2022	<b>Division of Court:</b> Main Division
<b>Heard before:</b> January J et Christiaan J	<b>Delivered on:</b> 21 July 2023

**Neutral citation:** *S v Stefanus* (CR 82/2023) [2023] NAHCMD 428 (21 July 2023)

**The order:**

1. The proceedings after the closing of the State's case, the conviction and sentence are set aside.
2. The matter is remitted to the Katutura Magistrates Court to continue with the case from after the closing of the State's case.
3. In the event that the accused is convicted, the trial court should take into account the part of sentence already served.

**Reasons for order:**

January J ( Christiaan J concurring ):

[1] The case was submitted from the Katutura Magistrate's Court for automatic review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[2] The accused was charged with housebreaking with intent to steal and theft. He pleaded guilty to the charge, however upon questioning by the Magistrate in terms of s 112 (1) (b) of the CPA, it became evident that the accused denied breaking in. He stated that the window was already broken and that he simply entered through it. He admitted having stolen the items, i.e. a television and packets of meat as alleged in the charge.

[3] The Magistrate correctly proceeded to enter a plea of not guilty in terms of section 113 of the CPA on behalf of the accused.

[4] The matter was postponed for trial in respect of the element of breaking in. The trial proceeded on the date of postponement. Upon the closing of the State's case, the magistrate explained the effect of the closing of the State's case; that he may testify, call witnesses or remain silent. Further the record verbatim reflected as follows before it was remitted by this court with a query: 'How will you proceed, will you speak or will you remain silent? The answer was; 'I will speak.'

[5] Surprisingly, when the case record was resubmitted for review, it was amended with the words; 'under oath', inserted with a black pen after the initial question 'will you speak?' Likewise the words 'under oath' were inserted after the answer from the accused; "I will speak Your Worship". In addition the following was inserted: 'Court: Accused placed under oath.'

[6] The Magistrate warned the accused that he could be convicted on a competent verdict if the charge of housebreaking was not proved. The accused opted to testify. The record, however, reflects that the accused was not sworn in as a witness but simply was requested to proceed after he indicated that he had no witnesses to call.

[7] After he testified, without taking the oath, the accused was acquitted on the offence of housebreaking but was convicted for theft and sentenced to 24 months imprisonment of which 12 months were suspended for a period of five years on condition that the accused shall not be convicted of theft during the period of suspension. The word

'committed', on which there are numerous judgments from this court, was omitted from the sentence, rendering it an incomplete sentence. Moreover, the review cover sheet reflects that the accused was convicted for housebreaking with intent to steal and theft.

[8] I consequently directed a query to the magistrate as follows:

'1 The review cover sheet reflects that the accused was convicted of housebreaking with intent to steal and theft whereas the record of proceedings reflects that he was convicted of theft.  
2. The J15 charge sheet reflects the sentence with part of it being suspended on condition, however omitting the word 'committed'  
3. These defects must be corrected.  
4. The magistrate must explain why the accused was not sworn in as a witness. In addition the magistrate must explain, in the circumstances, what the effect of the unsworn evidence of the accused is.'

[9] The magistrate responded as follows;

'2. The accused was not convicted of housebreaking as the state did not prove housebreaking, but accused was convicted of theft which is a competent verdict of housebreaking. The accused had entered and selected the said items and the items were recovered from the accused.

3. I apologise for the typing mistake, it was an oversight on my part, shall not happen again.

4. The J 15 should read as follow: and the word "committed is inserted:" Accused is sentenced to 24 months imprisonment of which 12 months are suspended for 5 years, on conditions that accused shall not be convicted of theft, committed during the period of suspension".

5. I apologies for the omission of the word "omitted".

6. The accused was sworn in the recorder may have been off, I apologise.

...'

[10] In hindsight, I realise that the directive to correct defects may have been interpreted

by the Magistrate that he should correct the mistakes and omission in the record. The directive, however refers to the wrong review coversheet reflecting that the accused was convicted for housebreaking with intent to steal and theft. Be that as it may, the insertion or changing a court record in substance, constitutes tampering unless it is corrected where, for instance, there is a spelling error, something indistinct or reconstruction of it.

[11] The Magistrate's reply that the accused was sworn in and that the recording may have been off while the swearing in was done, is not accepted. This is highly unlikely, especially considering the fact the recording had been working right before the witness was to be placed under oath and right thereafter. It is clear that the accused was simply not sworn in. The magistrate was silent on the question directed to him as to the effect of unsworn evidence. It is thus important to deal with that aspect first.

[12] We agree with what was stated in the matter of *Teofelus v S*<sup>1</sup>, Munsu AJ (as he then was) with Kessler AJ (as he then was) concurring, stating that;

'... where an accused testifies without an oath or affirmation having been administered to him, an irregularity occurs and is of such a grave nature that a failure of justice occurs.

...Having expressed his intention to testify, it was incumbent upon the court to assist the appellant in order to understand why he was required to testify under oath and the consequences for failure to do so. One may add that, all that the law requires is that evidence should be under oath. This happens once an oath or affirmation is administered.

[13] It is evident from the record that the accused was desirous of giving evidence upon closing of the State's case and it was the duty of the presiding officer to place the accused under oath so as to ensure the admissibility of the evidence provided by the accused. The failure by the presiding officer to place the accused under oath after he indicated his intention to testify, constitutes an irregularity with the effect that all the accused stated became inadmissible.

[14] The irregularity only occurred from the stage after the close of the State case. As

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<sup>1</sup> *Teofelus v S* ( HC-NLD-CRI-APP-CAL-2020/00014) [2022] NAHCNLD 44 (22 April 2022).

such, there is no reason to interfere with the proceedings up until then. We therefore will remit the matter to the trial court with a direction that the matter proceeds from the stage after the close of the State case.

[15] In the premise, the following orders are made;

1. The proceedings after the closing of the State's case, the conviction and sentence are set aside.
2. The matter is remitted to the Katutura Magistrates Court to continue with the proceedings from after the closing of the State's case.
3. In the event that the accused is convicted, the trial court should take into account the part of the sentence already served.

<b>H C JANUARY JUDGE</b>	<b>CHRISTIAAN J JUDGE</b>