

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

SPECIAL REVIEW JUDGMENT

<b>Case Title:</b> The State v Mervin Katjirua	<b>Case No:</b> HC Special Review No.:1386/2023 CR 96/2023
	<b>Division of Court: High Court</b> Main Division
<b>Heard before:</b> Honourable Justice Liebenberg <i>et</i> Honourable Lady Justice Shivute	<b>Delivered on:</b> 6 October 2023
<b>Neutral citation:</b> <i>S v Katjirua</i> (CR 96/2023) [2023] NAHCMD 621 (6 October 2023)	
<b>Order:</b> <ol style="list-style-type: none"><li>1. It is legally permissible under the circumstances for the Prosecutor-General to amend her decision retrospectively to be in line with the charges the accused had pleaded to.</li><li>2. There will be no prejudice to be suffered by the accused. The Prosecutor-General exercised her discretion in line with the principle of a fair trial as enshrined in Article 12 of the Namibian Constitution.</li><li>3. The proceedings are valid and the matter is remitted to the court a quo to proceed from where the proceedings ended and the matter to be brought to its natural</li></ol>	

conclusion.

Reason for order:

Shivute J (Concurring Liebenberg J)

[1] This matter comes before me pursuant to special review proceedings in terms of section 20(c) of the High Court Act 16 of 1990 (the Act).

[2] The background to this matter is contained in the court a quo's covering letter requesting for review and may be summarised as follows:

(a) The accused in this matter was arraigned in the Regional Court for trial in accordance with the Prosecutor-General's decision dated 3 December 2020, which is central to this special review. The accused made his first court appearance in the Regional Court on 14 May 2021.

(b) On that occasion, the State was represented by Ms Nangoro and the court was presided over by Mr Shuuvani, while the accused was represented by Mr Brockerhoff who stood in for Mr Tjituri.

(c) As it can be gleaned from the record of proceedings of the 14 May 2021, when the accused made his first appearance, the record is silent on whether his attention was drawn to the content of the Prosecutor-General's decision. Furthermore, the Prosecutor-General's decision was not handed up to the court. The matter was postponed to 26 October 2021 for plea and trial.

(d) On 26 October 2021 the accused appeared before magistrate Nyazo who was seized with the matter. He is also the magistrate who referred this matter for special review. Regrettably, on that day, upon perusal of the record he did not detect that the Prosecutor-General's decision was not attached to the record.

(e) Subsequently, the accused pleaded to the charges against him on 8 June

2022. The accused pleaded not guilty to one main count of fraud and alternative count of forgery and uttering. It slipped Mr Nyazo's mind to request for the Prosecutor-General's decision prior to the accused tendering his plea in order for the court a quo to verify whether the accused is indeed pleading to the charges as per the Prosecutor-General's decision.

(f) After the trial commenced on 8 June 2022, it was heard on intermittent dates until 9 June 2023. During closing remarks the court a quo realised that the Prosecutor-General's decision was not part of the record or not attached to the record of proceedings. The learned magistrate raised a query with the prosecutor concerning its whereabouts. The matter was stood down to enable the prosecutor to find the Prosecutor-General's decision because the matter was transferred from the Windhoek District Court to the Regional Court.

(g) The content of the Prosecutor-General's decision was brought to the attention of the court a quo as well to that of the defence. There was material difference between the Prosecutor-General's decision and the charges the accused pleaded to and stood trial on.

(h) According to the Prosecutor-General's decision that was produced in the court a quo, the instructions were that the accused be arraigned in the Regional Court, Windhoek on charges of:

- (i) Five (5) counts of fraud alternatively one (1) count of theft.
- (ii) Contravening section 6 of the Prevention of Organised Crime Act 29 of 2004 – Acquisition, possession or use of proceeds of unlawful activities.

(i) The above charges are materially different from the charges the accused pleaded to on 8 June 2022.

(j) After the above revelation came to the court a quo's attention, the court a quo invited the State and the defence to address it on the anomaly that had presented itself. Counsel for the State was directed to find out from the Office of the Prosecutor-General whether the Prosecutor-General's decision could be revised to be in alignment with the actual charges upon which the accused pleaded and stood trial. The matter was then postponed to 26 June 2023 for the feedback from the Prosecutor-General's Office.

(k) When the matter returned to court on 26 June 2023, the prosecutor handed up a revised Prosecutor-General's decision dated 23 June 2023. The revised decision of the Prosecutor-General reads as follows:

'In accordance with the provisions of section 122 (1) of the Criminal Procedure Act 51 of 1977, I hereby instruct that: Mervin Upahe Katjirua be arraigned in the Regional Court, Windhoek on charges of:

1. Fraud
2. Forgery
3. Uttering a forged instrument.'

#### *The law*

[3] Faced with the two Prosecutor-General's decisions, the court a quo requested counsel for the State and counsel for the defence to do research whether it was permissible in law for the Prosecutor-General, where an accused had pleaded to charges and evidence had been led, to amend or revise her decision with reference to case law.

[4] When the matter returned to court both counsel could not find any precedent on the issue raised by the court a quo.

[5] Through the court a quo's own research it found precedents, which are distinguishable from the circumstances in the present matter. In *Kennedy v S* (CC 1/2018) [2019]

NAHCMD 165 (17 May 2019) the court was seized with the question of whether to suspend the prosecution of the applicant in the High Court, pending the determination of another matter in which the applicant sought a declaratory order to review and set aside the Prosecutor-General's decision to transfer the applicant's case from the district court and indict him in the High Court. However, it turned out that there was no such application before any court to review the Prosecutor-General's decision to prosecute.

[6] The Court stated the following at paras 12-13:

[12] The powers of the Prosecutor-General to institute criminal proceedings are derived from the Constitution and the relevant provisions of the Criminal Procedure Act 51 of 1977. The Prosecutor-General is empowered both by the Constitution and the Criminal Procedure Act to institute prosecutions on behalf of the public and in the name of the State. It also includes the powers to terminate proceedings instituted either before the accused pleaded by withdrawing the charges or by stopping the prosecution once the accused had pleaded. In limited instances a private prosecution may be instituted but once the Prosecutor-General has issued a certificate authorising a private person to institute a prosecution and even in that event the Prosecutor-General is empowered at any stage to intervene and take over the prosecution so to speak.

[13] The sum total of all these is that the Prosecutor-General's power to institute a prosecution is a fundamental corner stone of the criminal trial itself, since without it, no prosecution can legitimately take place, except in those limited instances as I have indicated where private prosecution is authorised.'

[7] In the case of *S v Kamanda* (CR 26/2022) [2022] NAHCMD 178 (08 April 2022) the court on review discussed the irregular procedure that was followed by the District Court in convicting the accused on charges which were not in tandem with the Prosecutor-General's decision where the court stated at paras 14 – 15:

[14] The fact of the matter is that the instructions of the Prosecutor-General were not complied with by both the public prosecutor and the magistrate. These are serious misdirections. In addition the procedure followed by simply confirming the 119 procedure and then convicting the accused as quoted above, cannot be condoned and is another misdirection. The accused should have been invited to plead afresh as per the instruction of the Prosecutor-General and questioned afresh, if he pleaded guilty. The convictions as they stand are for dealing in the prohibited 20x

hippopotamus tusks and contravening section 7 of the Immigration Control Act 7 of 1993 contrary to the instruction of the PG. In the circumstances the convictions and sentence fall to be set aside.

[15] I endorse and reiterate what was quoted in *S v Poppas* (CR 48/2020) [2020] NAHCMD 287 (16 July 2020) with reference to *S v Mafadza* paras 5-7; *S v Mushange*; *S v Nghishidimbwa*:(CR 55/2019)[2019] NAHCMD 295 (20 August 2019) para 15:

“The magistrate appears to have simply followed the charge as presented by the prosecutor. It should be understood that prosecutors are essential to the attainment of justice in the criminal justice system. They should thus draft charges with professionalism, precision and where the offence is statutory the charge should reflect the wording preferred in the statutory provision with the correct and valid legislation establishing the offence. Magistrates should also carefully examine charges to ensure that such charges are valid and not objectionable in terms of section 85(1) (a) of the CPA. Failure to examine the correctness of the charge may result in incurably defective proceedings. Accused persons should be correctly charged. Incorrect charges defeat the whole purpose of the criminal justice system. A question comes to mind that what would be the purpose of subjecting an accused person and the costly State functionaries to tedious court proceedings based on a wrong or repealed charge. It is a waste of the valuable time and resources of the court, State functionaries and the accused.”

### *Legal issues*

[8] The legal questions arising from the circumstances of this case before the court a quo are the following:

1. Is it permissible in law for the Prosecutor-General where an accused has pleaded to charges other than those in the Prosecutor-General's decision and evidence has been led to retrospectively amend or revise a Prosecutor-General's decision to fall in line with the charges to which an accused had pleaded?
2. If the answer to the above question is in the affirmative, would there be any prejudice suffered by the accused?
3. If one was to reason by analogy and apply the reasoning of the court in *S v Kamanda* supra to the circumstances of the present matter where the accused

pleaded to charges which were not in accordance with the Prosecutor-General's decision and evidence led, does it mean the plea and the subsequent trial proceedings were null and void?

[9] As evident from the record, an irregularity was committed by both the prosecutor and the court a quo. They both ignored the Prosecutor-General's decision and allowed the accused to plead on charges of fraud and alternative counts of forgery and uttering which are materially different from the Prosecutor-General's decision which instructed the accused to be arraigned in the Regional Court for trial on five (5) counts of fraud alternatively one (1) count of theft and contravening section 6 of the Prevention of Organised Crime Act 29 of 2004 – Acquisition, possession or use of proceeds of unlawful activities. The prosecutor committed an irregularity by not familiarising himself with the decision of the Prosecutor-General and by failing to produce it before court. The court had also committed an irregularity by not demanding the Prosecutor-General's decision to be produced and be part of the record. Such negligence should be guarded against and need to be avoided in future.

[10] It is the duty of the court to see to it that accused persons plead to the correct charges especially where the matters involved required the Prosecutor-General's decision and should not just allow the accused to plead to charges he pleaded to in terms of s119 of Act 51 of 1977 without making sure that those charges are in line with the Prosecutor-General's decision. Putting incorrect charges to accused persons, may result in the interest of the administration of justice being defeated.

[11] Coming to the legal issues raised by the learned magistrate, I deem it necessary to first deal with the question whether it is permissible in law for the Prosecutor-General to retrospectively amend or revise her decision to fall in line with the charges the accused had pleaded to and in respect of which the evidence had been led.

[12] The State is *dominus litis* which means that the Prosecutor-General who derives her authority to institute criminal proceedings from both Article 88 of the Namibian Constitution and the relevant provisions of the Criminal Procedure Act is 'the master of the suit.' This maxim refers to the principle that a party who initiates a legal action has control over the

proceedings and has the right to make decisions about how the case is conducted. The decision to be made should not be an arbitrary one. It has to be in line with the interest of the administration of justice that includes the principle of a fair trial as enshrined in Article 12 of the Namibian Constitution.

[13] Although the prosecution is *dominus litis*, it can only exercise its discretion where it is legally permissible to set criminal proceedings in motion, such as determining the charges, date and venue of the trial. However, a measure of residual control by the courts over decisions taken by the prosecution being *dominus litis*, remains essential. Fairness to the accused is an important guideline in exercising this control. (See: Du Toit et al *Commentary on the Criminal Procedure Act*, [Service 36 2006] at 1- 4K under the heading 'Prosecution as Dominus Litis.'

[14] The Prosecutor-General was put in a very difficult position by her subordinate who did not comply with the Prosecutor-General's decision. Since the accused had already pleaded and evidence been led, it would only be fair for the Prosecutor-General to amend her decision to be in line with what the accused had pleaded to, since both parties had already closed their case except for submissions with regard to the verdict. In order for the accused to receive a fair trial, it was imperative for the Prosecutor-General to exercise her discretion as she did under the circumstances, instead of subjecting the accused to be tried in a piecemeal fashion by bringing successive prosecutions.

[15] To answer the question posed by the court a quo in short, whether it is permissible for the Prosecutor-General to amend or revise her decision under the circumstances, the Prosecutor-General is obliged to conduct prosecutions fairly and impartially with due regard to the interest of justice. The Prosecutor-General's discretion under the circumstances was exercised within the remits of the law.

[16] The second question is, if the answer to the above question is in the affirmative, would there be any prejudice suffered by the accused? The answer to that is, the accused will not suffer any prejudice as he had benefitted from the irregularity committed by the Prosecutor-General's subordinate. The Prosecutor-General revised her decision to be in



line with what he had pleaded to and was tried on. The accused had thus been afforded a fair trial.

[17] The third question is whether, if one was to reason by analogy and apply the reasoning in *S v Kamanda* to the circumstances of the present matter where the accused pleaded to charges which were not in accordance with the Prosecutor-General's decision and evidence was led, does it mean the plea and subsequent trial proceedings were null and void?

[18] The facts of the *Kamanda* case, although they appear to be similar to the facts of the present case, are in fact distinguishable. Although in both cases the accused persons did not plead to the charges in accordance with the Prosecutor-General's decisions which is a serious irregularity and misdirection on the part of the court and the prosecutor, in the *Kamanda* matter, the accused did not plead afresh in the Regional Court. The prosecutor misled the court by asking the court to accept the proceedings in terms of s119 of the Criminal Procedure Act and the court fell for it by simply confirming the proceedings and convicted the accused of the offences he was charged with during the preliminary proceedings. The accused was sentenced and the matter came for automatic review in terms of section 302 (1) of the Criminal Procedure Act.

[19] In the present case, the accused pleaded to the charges afresh in the Regional Court, although those charges differed materially from the charges contained in the Prosecutor-General's decision. Evidence was led until both parties closed their cases. The court a quo realised that the Prosecutor-General's decision was not part of the record before it delivered its judgment. The irregularity was brought to the attention of the Prosecutor-General. The Prosecutor-General then revised her decision to be in line with what the accused had pleaded to and was tried on. In the *Kamanda* case, the irregularity was not brought to the attention of the Prosecutor-General for her to amend her decision to fit in with the charges pleaded to. Apart from that, there was a further irregularity committed by the court by simply adopting the proceedings in terms of s119 and convicting the accused. The second irregularity could not be revised or rectified by the Prosecutor-

General.

[20] In the present case, it cannot be said that the proceedings are null and void, because the Prosecutor-General had revised her decision which is legally permissible under the circumstances, in order to avoid the accused being tried in piecemeal. The Prosecutor-General exercised her discretion in accordance with the principle of a fair trial, since she does not only represent the State but the community at large, including the accused and is under an obligation to ensure that the interest of justice is served.

[21] In the result the following order is made:

1. It is legally permissible under the circumstances for the Prosecutor-General to amend her decision retrospectively to be in line with the charges the accused had pleaded to.
2. There will be no prejudice to be suffered by the accused. The Prosecutor-General exercised her discretion in line with the principle of a fair trial as enshrined in Article 12 of the Namibian Constitution.
3. The proceedings are valid and the matter is remitted to the court a quo to proceed from where the proceedings ended and the matter to be brought to its natural conclusion.

NN SHIVUTE JUDGE	J C LIEBENBERG JUDGE