

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Rustun Vries Accused 1 Rickey Oupa Rob Kenda Accused 2 Gordon Kusie Rhom Accused 3	Case No: CR 27/2024 High Court Review No: 199/2023 Division of Court: High Court, Main Division
Heard before: D Usiku J et Christiaan J	Delivered on: 28 March 2024
Neutral citation: <i>S v Vries and 2 others</i> (CR 27/2024) [2024] NAHCMD 138 (28 March 2024)	
ORDER:	
<ol style="list-style-type: none">1. The conviction in respect of each accused is set aside.2. The sentence of a fine of N\$ 1500 or 6 months imprisonment imposed on each accused is set aside.3. The accused persons must be released forthwith, unless lawfully detained.	

REASONS FOR ORDER:

D USIKU J (CHRISTIAAN J CONCURRING):

[1] The matter before us is an automatic review from Windhoek Magistrate's Court in terms of s 302 of the Criminal Procedure Act 51 of 1977 (the CPA), as amended.

[2] The accused persons appeared before the Windhoek Magistrate's Court, jointly charged with the offence of Nature Conservation Ordinance- Hunting huntable game, contravening section 30(1)(a) read with sections 1,30(1)(c),85,89 and 89 A of Ordinance 4 of 1975, as amended, and further read with sections 90 and 250 of Act 51 of 1977.

[3] When the matter came on review, the record of proceedings was found to be in summary form as regards to the testimony of the state witness and the accused persons and it was not recorded in first person.

[4] The following query was directed to the learned magistrate:

'The record of proceedings on 27 January 2023 is in summary form as regards the testimony of the state witness and the accused persons and not recorded in the first person. If accuse gave evidence on oath, where is the record of such proceedings?

The sentences as reflected on the review cover sheet does not correspond with the sentence imposed as per the record of proceedings and must be corrected.'

[5] The learned magistrate in her reply stated as follows:

'I digitally recorded the court proceedings at Seeis Periodical Court, Mungunda Court in Court A2 and the Maintenance Court. It appeared that the recording machine malfunction. The transcript's and clerk tried to retrieve those recording without any success, therefore, there was a delay in responding to the query.

On my part, I have tried my possible best to retrieve court record. In addition, I have tried

to request reconstruction to be done jointly with all the parties involved and there was no success.

In *S v Mbangu*¹, it was held on review that in circumstances where there is no reliable and valid reconstructions of the record, the conviction, sentences and additional orders given in these criminal matters cannot be confirmed and are set aside. As a result, I request that both convictions and sentence must be set aside.'

[6] The concessions by the learned magistrate are indeed correctly made. In *Soondaha v State*² it was held:

'This court must be placed in a position to evaluate the evidence in conjunction with the reasons of the learned magistrate in order to decide if the convictions were just and in accordance with justice or if the alleged misdirections have any merit. This court is not in a position to do that without a proper record or proper reconstructed record of those proceedings. The missing record in relation to cross-examination may be material to the appeal and in my view to decide the appeal in the absence thereof may be detrimental to both he appellants and the respondent.'

[7] It must be noted that although the above cited dicta were made in the context of appeal cases, the principles enunciated and the powers of the review court (opposed to that of a court of appeal), remain the same.

[8] This court is unable to confirm the proceedings merely on the strength of the summaries of the magistrate. Under normal circumstances, the court would have considered the evidence that is available to assess to what extent it provides proof beyond reasonable doubt for the conviction. This court declines to do so in this case, as it would in any event not be able to endorse the matter as one that is in accordance with justice, in the absence of the record.

[9] The learned magistrate and court support officials were supposed to ensure that the recording machine is working properly before the court could proceed with the trial. In *S v Heibeb*³, it was held that:

¹ *S v Mbangu and Others* (CR 24/2022) [2022] NAHCMD 174 (05 April 2022)

² *Soondaha v S* (CA 28 /2013) [2016] NAHCNLD 76 (22 August 2016) at 28.

³ *S v Heibeb* 1994 (1) SACR 657 (Nm) at 663i-j.

'It is the duty of the presiding officer in a criminal trial to keep a proper record and record the proceedings in a clear and intelligible manner in the first person and also to record the explanation of the rights of the accused fully and clearly.'

[10] This court is of the view that, it cannot consider the learned magistrate's summaries of the proceedings, because they are not sufficient to determine whether the conviction and sentence imposed on the accused persons is in accordance with justice. Considering such summaries, will be a great miscarriage of the law.

[11] In the result, the following order is made:

1. The conviction in respect of each accused is set aside.
2. The sentence of a fine of N\$ 1500 or 6 months imprisonment imposed on each accused is set aside.
3. The accused persons must be released forthwith, unless lawfully detained.

D USIKU JUDGE	P CHRISTIAAN JUDGE