

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

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| <b>Case Title:</b><br>The State<br><br>v<br>Silas Mapeni<br><br>Accused   | <b>Case No:</b> CR 30/2024<br><br><b>High Court Review No:</b> 480/2024<br><br><b>Division of Court:</b><br>High Court, Main Division |
| <b>Heard before:</b><br>D Usiku J <i>et</i> Christiaan J  | <b>Delivered on:</b><br>22 April 2024   |
| <b>Neutral citation:</b> <i>S v Pameni</i> (CR 30/2024) [2024] NAHCMD 184 (22 April 2024)   |   |
| <b>ORDER:</b>   |   |
| <p>1. The matter is remitted to the court a quo with the instruction that the trial magistrate proceed to hear the outstanding evidence, and should the accused person elect to testify and call witnesses in his defence or opt to remain silent, he should be accorded such opportunity.</p> <p>2. The magistrate is further ordered to bring the matter to its natural conclusion.</p> |   |
| <b>REASONS FOR ORDER:</b>   |   |

D USIKU J (CHRISTIAAN J CONCURRING):

[1] This matter has been sent on special review by the Regional Court magistrate, Swakopmund. The matter was presided over by the magistrate Walvis Bay.

[2] The accused was charged with one count of robbery with aggravating circumstances in that on or about the 5 December 2022 and at or near Walvis Bay, in the Regional District Court of Swakopmund, the accused did unlawfully and with the intention of forcing to assault Shona Naidoo by threatening to stab her with a knife and unlawfully and with intent to steal, take from her cash money N\$113 306,83, USD5441, Euro 1095 total cash N\$226 621.66 the property of or in the lawful possession of the said Shona Naidoo.

[3] Aggravating circumstances as defined in s 1 of Act 51 of 1977 were present in that the accused and/or an accomplice was/were before/after or during the commission of the crime in possession of a dangerous weapon, to wit, a knife.

[4] The accused pleaded guilty to the charge in terms of section 119 of the Criminal Procedure Act 51 of 1977 as amended on 7 December 2022.

[5] The learned magistrate explained s 112(1) of the CPA to the accused and after having satisfied himself that the accused has admitted to all elements of the offence charged, stopped the proceedings.

[6] The matter was transferred to the Regional Court on 20 March 2023 for trial as per the decision of the Prosecutor General dated 19 March 2023.

[7] After several postponements, the accused person was granted legal aid and the matter was set down for trial to commence on 3 November 2023 in the Regional Court. The accused pleaded not guilty to the charges proffered against him.

[8] In the meantime, after the trial commenced and the control public prosecutor brought to the attention of the presiding magistrate and the trial

prosecutor that there was a subsequent Prosecutor General's decision dated 9 August 2023 which was attached to the case record indicating that the accused was to be arraigned in the Regional Court for purposes of sentencing. In *S v Kamanda*<sup>1</sup>, it was held:

'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.'

[9] It was on the basis of this subsequent decision that the learned Regional Court magistrate forwarded this matter requesting a special review.

The request reads as follows:

1. The above-mentioned matter made its first appearance in the Swakopmund Regional Court on 26 May 2023. The accused person had in terms of section 119 (of Act 52 of 1977 – the Act) pleaded guilty in the district court and the matter was transferred to the Regional Court. At the time a Prosecutor General's decision dated 19 March 2023 as attached to the record indicated that the accused was to be arraigned in the Regional Court on a charge of robbery with aggravating circumstances.

2. After several postponements the accused person was granted legal aid and the matter was set down for trial which commenced on 3 November 2023 after the accused person had pleaded not guilty.

3. In late February 2024 the Swakopmund Control Public Prosecutor brought to my attention and to that of the trial prosecutor that a subsequent prosecutor General's decision dated 9 August 2023 was attached to the case record. This second decision reads that the accused was to be arraigned in the Regional Court for purposes of sentencing. By this time the trial had already reached an advanced stage with the State having closed its case and the accused was at all times during the trial legally represented.

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<sup>1</sup> *S v Kamanda* (CR 26) [2022] NAHCMD 178 (08 April 2022).

4. Neither I nor the trial prosecutor were aware of this second decision and nowhere in the record is it reflected that a subsequent amended Prosecutor General's Decision had been filed. I take full responsibility for this oversight.

5 Having discussed the issue with both State and defence counsel it was resolved that the record of proceedings would be forwarded to the High Court for determination. Section 20(c) of the High Court Act 16 of 1990 dictates that proceedings are reviewable on the grounds of gross irregularity. In this matter the irregularity arose when the court failed to take into account the instruction of the Prosecutor General as mandated, her second decision.

6 Two pertinent issues are further reflected in the case record:

- a. The accused person insists that he was coerced into pleading guilty at his first appearance in the district court although this is not reflected in his questioning by the court as per section 112(1)(b) of the Act.
- b. Evidence led by the State during the trial suggests the monetary value involved in the alleged offence is substantially less than the value the accused person initially pleaded guilty to.

7. In light of the above I therefore request that the honourable superior court take up this matter on special review and I stand to be corrected and guided by its decision.'

[10] Special reviews are governed by S 304(4) of the (CPA) which provides:

'(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.'

[11] Ordinarily, incomplete criminal matters are not reviewable, but this court may exercise its inherent powers to interfere with unterminated proceedings in instances of material irregularity, where grave injustice might otherwise result.

[12] In *casu*, the state had led evidence and closed its case. It is upon the accused to decide to either testify in his defence or to remain silent.

[13] It is common cause that it is the presiding officer's duty to satisfy himself or herself of an accused's guilt. The court, is therefore not relieved of this duty.

[14] Having regard to the circumstances of this case, I find no gross irregularity having occurred, neither has the accused been prejudiced. However, it is the duty of the court and public prosecutor to exercise due diligence, especially where the matters involved required the Prosecutor-General's decision.<sup>2</sup>

[15] In the result, the following orders are made:

1. The matter is remitted to the court a quo with the instructions that the trial magistrate proceed to hear the outstanding evidence, and should the accused person elects to testify and call witnesses in his defence or opt to remain silent, he should be accorded such opportunity.
2. The magistrate is further ordered to bring the matter to its natural conclusion.

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| <b>D USIKU<br/>JUDGE</b> | <b>P CHRISTIAAN<br/>JUDGE</b> |

<sup>2</sup> *S v Kamanda* (CR 26) [2022] NAHCMD 178 (08 April 2022).