

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Steven Urikhob</i>	Case No: CR 14/2024
High Court MD Review No.: 1212/2023	Division of Court: Main Division
Heard before: Shivute J et Christiaan J	Delivered on: 21 February 2024
Neutral citation: <i>S v Urikhob</i> (CR 14/2024) [2024] NAHCMD 66 (21 February 2024)	
Order: <ol style="list-style-type: none">1. The conviction and sentence of 18 months' imprisonment are set aside.2. The accused should be released forthwith.	
Reasons for order:	
SHIVUTE J (Concurring Christiaan J): [1] This matter originally came before Justice Liebenberg, who is now retired, for automatic review in terms of s 302 (1) and s 303 of the Criminal Procedure Act 51 of 1977, as amended (the CPA).	

[2] The accused person appeared in the District of Windhoek on a charge of entering an enclosed kraal contravening s 4 of the Stock Theft Act 12 of 1990, as amended.

[3] He was convicted as charged and sentenced to 18 months' imprisonment. Justice Liebenberg directed the following query to the magistrate:

'The record sent on review does not include trial proceedings, only a transcript of the proceedings of 15 March 2023 which refer to the closing submissions. Could the presiding magistrate please explain why the record of the proceedings was certified on 30 May 2023 if the record is in complete and why this went unnoticed.'

[4] The magistrate responded to a query that was received on 4 September 2023, that he confirmed that the record of proceedings, as originally sent was complete, hence the record is returned.

[5] The reviewing Judge again raised another query as follows:

'The NAMCIS record of 23 November reflects with regard to the court record that it is attached. No such record is attached, except for what appears to be the magistrate's notes. If these are representative of the record of proceedings, the magistrate is requested to explain the following which is not borne out by the record:

(a) Did the witness Veronica Gomgos testify under oath or affirmation?

(b) Were the accused's rights to cross-examination explained to him?

(c) At the close of the State's case were the accused's rights explained to him?

If any of the above mentioned questions are answered in the affirmative, kindly indicate in the record where this is reflected.'

[6] The learned magistrate again responded to the query on 15 December 2023 that he was confirming that the record of proceedings was complete. He did not address the questions raised in the query. Instead, he attached to his response what

appears to be the magistrate's notes but now modified to read rather cryptically as follows: "Veronica Gomgos speaking under oath, in Damara>Nama rights to cross-examination (before witness testifies) rights at the close of the State's case and accused testifying under oath in Damara>Nama."

[7] The latter version was not certified to be a true and correct transcript of the proceedings. It appears from the transcriber's certificate that the proceedings of 15 March 2023 were also digitally recorded, but the transcriber experienced some problems with the recording thereof. However, the clerk of court certified what appears to be the magistrate's notes to be a true copy of the original and that there was no indication that any unauthorised alterations had been made to the original document.

[8] The magistrate had also confirmed by affixing his signature to the review sheet and by stating:

'I certify the annexed record to be the record of the proceedings in the above mentioned case tried before me on the said date.'

[9] For the magistrate to certify the record, he must have satisfied himself that what is reflected on it is what transpired in court. Therefore, the magistrate cannot come up with another version of the record, especially if there was no reconstruction of the record.

[10] From the certified record of proceedings, it is reflected that the accused's rights to cross-examination and rights of election were not explained to him. Furthermore, witness for the State, Veronica Gomgos gave evidence not sworn to nor affirmed and so did the accused.

[11] Article 12 of the Namibian Constitution provides that every accused person is entitled to a fair trial. This includes the right to legal representation, to call witnesses

and to give evidence and cross-examine witnesses called by the State. A judicial officer is obliged to inform the accused of these basic procedural rights.

[12] Considering the present matter, it is not apparent from the record that an oath or affirmation was administered on witness Veronica Gomgog, or the accused when they testified as prescribed by the Criminal Procedure Act, in sections 163, in the case of oath and 164 in the case of affirmation.

[13] It is also apparent from the record that the presiding officer failed to keep a proper record as required of him. In *S v Heibeb* 1994 (1) SACR 657 (Nm) at 663i-j it was held that:

‘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.’

[14] It is obvious from the record of proceedings that the accused was undefended. In *S v Willemse* 1990 NR 344 at 345B Levy J had this to say:

‘Where, as in this case, it is quite clear that the accused does not understand his or her rights, the magistrate is obliged to inform the accused of such rights and must write in the record that he has done so. He must also explain to the accused the purpose of cross-examination and not only give her such opportunity to cross-examination. At the end of the State case he must ask the accused if she wishes to give evidence and explain the legal consequences if she fails to do so.’

[15] In the present matter, the presiding officer did not keep a proper record of proceedings and he failed to accord the accused a fair trial by failing to explain to the accused his basic procedural rights.

[16] The court a quo had also allowed State witness Gomgog and the accused to be cross-examined without them having testified under oath or affirmation. These are

serious irregularities that vitiate the proceedings. I reiterate that magistrates ought to take extra care to ensure that evidence is recorded accurately and the accused's rights are explained properly, to avoid a situation where guilty persons may be acquitted for the failure to ensure a fair trial.

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

1. The conviction and sentence of 18 months' imprisonment are set aside.
2. The accused should be released forthwith.

N N SHIVUTE JUDGE	P CHRISTIAAN JUDGE