

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Shilongo Nehemia Keukeni</i>	Case No.: CR 40/2022 Outapi (Okahao): 210/2020
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 08 September 2022
Neutral citation: <i>S v Keukeni</i> (CR 40/2022) [2022] NAHCNLD 85 (08 September 2022)	
It is hereby ordered that: 1. The conviction and sentence are set aside.	
Reasons for the order:	
KESSLAU AJ (SALIONGA J concurring): [1] The matter comes before this court on automatic review in terms of Section 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA). [2] The accused, in the Magistrates Court of Okahao, plead not guilty to a charge of	

common assault (read with the provisions of the Combating of Domestic Violence Act 4 of 2003). The trial proceeded before a different magistrate than the one who noted the plea and, after the evidence of the complainant, was convicted as charged. The sentence imposed reads as follows: 'A fine in the amount of N\$ 4 000 or 4 months imprisonment which is wholly suspended for a period of 3 years on condition that accused does not commit the crime of assault common read with the provisions of the Domestic Violence Act 4 of 2003 during the period of suspension'.

[3] A query was directed to the learned magistrate regarding the following:

1. Why was there no entry made in terms of Section 118 of the CPA on the record regarding the unavailability of the Magistrate who has taken the plea before trial proceeded before a different Magistrate?

2. The complainant testified that after the attack with fists and sticks all over her body she received treatment for 'swollen areas' the next day at the hospital. The medical report, compiled the same day, does not mention such 'swollen areas'. In the light of this contradiction in the evidence, how was the Magistrate satisfied that the State proved the allegations beyond reasonable doubt?

3. The condition of suspension does not include the requirement for the accused to be convicted of the offense before the suspended sentence may be activated. Is the sentence therefor not too vague?

4. In which terms were the rights to review and appeal explained to the accused?

[4] The magistrate conceded to the first query admitting an oversight. Section 118 of the CPA reads that: 'If the judge, regional magistrate or magistrate before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court.'

[5] It has been determined that section 118 of the CPA allows for a different magistrate to proceed with trial after a plea of not guilty only if the initial magistrate is unavailable. It is furthermore the duty of the State to place the reason for such

unavailability on record. A failure to comply with the said provision renders the continuation of the trial before another magistrate irregular. In this regard it was stated in *S v Mwalyombu*¹ that the circumstances in each particular case will determine if such irregularity vitiates the entire proceedings.

[6] Regarding the second query the magistrate replied that 'the matter was finalised in regard of assault common and J 88 not needed in this regard'. With all due respect, that does not address the query. From the record it appears that the complainant, as single witness, testified that she was beaten by the accused with sticks and fists all over her body and that she received treatment the next day for 'swollen areas'. In contradiction to her evidence a medical report, compiled the same day that she received treatment, makes no mention of any such 'swollen areas' or any injuries observed. The State submitted, referring to *S v Noble*², that they did not prove the allegations beyond reasonable doubt and requested the court to exercise caution when weighing the evidence of the single witness. The prosecutor furthermore is applauded for adding that: 'The duty of the state prosecutor is to help the court arrive at a fair and just decision and not merely to secure a conviction'.³

[7] The accused from the outset denied assaulting the complainant and repeated his version under oath. In *S v Britz*⁴, confronted with mutually destructive evidence, the court stated that:

'...where a court is presented with mutual destructive versions, it is a rule of practice that the court must have good reason for accepting one version over the other and should consider the merits and demerits of the State and defence case. Furthermore, the evidence presented by the State and the defence must not be considered in isolation as an independent entity when assessing the credibility of the witnesses and the veracity of their versions. The approach the court must follow is to take into account the State's case and determine whether the defence's case does not establish a reasonable hypothesis.'

[8] *In casu* the magistrate in judgement argued that the State studied the docket

¹ *S v Mwalyombu* (CR 58/2017) [2017] NAHCMD 271 (25 September 2017)

² *S v Noble* 2002 NR 67

³ See also *S v Van Den Berg* 1995 NR 23 at p 33 par E-H

⁴ *S v Britz* CC 02/2017 (2017) NAHCMD 326 (16 November 2017) at para 36.

and charged the accused with assault and therefor thought they had a prima facie case and found it puzzling that the same State now turn around to argue that the accused should be acquitted. The magistrate considered that no one in their right mind would open a case of assault for no apparent reason and that the accused failed to justify why the complainant would make such allegations. No mention is made of the apparent contradiction in the evidence of the complainant and the objective medical evidence presented. There is furthermore no mention of the fact that a conviction following the evidence of a single witness should be approached with caution. The trial court's assessment of the evidence was not properly done and not in accordance with justice. It therefor follows that the conviction and sentence cannot stand.

[9] Having reached the above conclusion there is no need to address the rest of the queries addressed to the magistrate which in any event remained unanswered in her reply. The principles surrounding the correct formulation of suspended sentences and the importance of explaining rights to an undefended accused had been discussed *ad nauseam* in recent review cases.⁵

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

1. The conviction and sentence are set aside.

Judge(s) signature	Comments:
KESSLAU AJ	None
SALIONGA J	None

⁵ *S v Afrikaner* (CR 73/2022) [2022] NAHCMD 351 (18 July 2022); *S v Damon* (CR 13/2022) [2022] NAHCMD 132 (24 March 2022); *S v Setson* (CR 31/2022) [2022] NAHCNLD 69 (6 July 2022)