CASE NO.: CR 57/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

NICOUSER BEUKES

(HIGH COURT REVIEW CASE NO.:467/2008)

CORAM: **MULLER, J *et* NDAUENDAPO, J**

Delivered on: **28 May 2008**

REVIEW JUDGMENT

MULLER, J. :

[1] The accused was convicted of assault with the intent to do grievous bodily harm by stabbing the complainant with a knife. He was sentenced to pay a fine of N$2000.00 or 12 months imprisonment on 31 December 2007.

[2] The cover sheet of the review indicated that the accused was not released. The reasons for my judgment are set out hereinafter.
[3] I addressed the following query to the magistrate:

> *"It was established that the accused is in prison and did not pay the fine.*
>
> *Please clarify the following:*
>
> ***1. According to the charge sheet the accused was 16 years old at the time the offence was committed on 26 November 2004 and the trial***

commenced only on 18 July 2007 almost 2½ years later. Except for the absence of the accused's witness on 27 March 2007 and apparently also the 30th July 2007 the delays in bringing the case to court seem not be the accused fault. Please explain.

2. On 18 July 2007 the case was postponed at the request to 07 April 2007 to be able to call a further State witness. (record p 28). After apparently several postponements the case resumed on 31 October 2007. Nothing is recorded about the State witness to be called and the State closed its case. The prosecutor proceeded immediately with the defence case (p 28). Please explain.

3. In the light of the accused's evidence in mitigation, his age when the offence was committed, the relationship between him and the complainant after the incident, his clean record, and that his unable to pay a fine of more than N$500.00 and that he was a student at Namcol, would a suspended sentence or a suspension of part of sentence not have been more appropriate in the circumstances. (See: S v Mynhardt; S v Kuinab 1991 NR 336 (HC); S v Vekuemimina & Others 1992 NR 255 (HC); S v van Wyk 1992 NR 267 (HC))

4. Was the refusal to allow the accused to call a defence witness not irregular? (See: S v Haita 1992 HC 368 (HC)).”

[4] On 15 April 2008 the magistrate responded by a letter, which was only received on 22 May 2008 as follows:

“1. I do agree that the case took almost 2½ years to be finalized. I also agree that the fault in bringing the case to an end does not lay with the accused. The accused was placed, on his defense on the 27/3/07 at the end of the state's case. From that date up to the 31/10/07 the case has been coming for defense case. There were for remands for defense. It is not clear as to why the case was remanded by the assistant magistrate or by Mr Shuuveni on numerous occasions.

2. It is clear that the accused was not placed on his defense at all. That serious oversight was cultivated by the changed of prosecutor and failure to read the record before proceedings.

3. Since the irregularity occurred at the stage were the state's case was presumably closed. I feel that everything that follows is an irregular and as such cannot stand.

4 I thus request that failure to put accused on his defense renders everything irregular. Therefore, request that the proceedings be quashed."

[5] On page 28 the record clearly indicates that the matter was postponed on 18 July 2005 to 07 April 2006 for the purpose to call a further State witness. <u>The State did not close its case.</u> This was a postponement for more than 8 months. It is an unreasonable long period, particularly if one takes into account that the offence was allegedly committed on 26 November 2004, when the accused was only 16 years old and that there had already been several postponements before the trial commenced on 18 July 2005. Not only was the accused seriously prejudiced, the State witnesses were also negatively influenced by these delays.

[6] The trial did not resume on 07 April 2007 and there is no explanation therefore on the record. The trial apparently only resumed on 31 October 2007. Consequently there was a delay of more than a year and 4 months. No explanation for this delay appears on the record. According to the notes of the magistrate, there were several postponements between 07 April 2006 to 31 October 2007, but without the State closing its case.

[7] However, what occurred at the resumption of the trial on 31 October 2007 is even more serious. In response to my queries the trial magistrate conceded that the non-closure of the State's case and the fact that the accused was put on his defence

caused an irregularity which vitiated the entire proceedings to such an extent that the accused's conviction has to be set aside. The magistrate confirmed this to be the situation. Despite this fatal irregularity, the trial proceeded with the accused giving evidence and being subjected to cross-examination. The accused even intended to call a defence witness, but after interference of the trial magistrate, agreed not to do it and commenced with his evidence. The undefended accused was furthermore apparently confused with the procedure, but the magistrate told him to continue with his evidence. What happened after the commencement of the proceedings on 31 October 2007 (without the State having closed its case) is recorded as follows:

> ***"MS HISHIKUSHITJA: PUTS PARTICULARS ON RECORD***
>
> ***Your Worship, this matter today was remanded for the purpose of the Defence case. Your Worship, I believe that the Accused person, when I asked him today, so that he was not ready for the Defence case as his Witness was still not present. Despite this, Your Worship, the matter had been remanded, I believe, on the 30th of July for the Defence case, but on that specific day he also said his Witness was absent. But today, Your Worship, when also asked he said he said that his Witness is at a funeral. Your Worship, I believe it is a delaying tactic and as this matter is an old case from 2004 the State submits that this matter be finalised. As it pleases the Court.***
>
> ***COURT:*** *Yes, where is the Witness?*
>
> ***ACCUSED:*** *Your Worship, that Witness is currently in Ovitoto and I contacted him and he informed me that he might be coming down to Gobabis for the funeral and he also further stated that he will be here during the December holiday, until next year February, Your Worship. That's the time when he will be available.*
>
> ***COURT:*** *Do you know that you were given a chance to bring the Witness on the 27th, first on the 27th of March 2007?*
>
> ***ACCUSED:*** *Yes, Your Honour.*

COURT: *Good. So the State opposed to the further remand and I feel the objection is justifiable, because the matter was registered in December 2004, as you were arrested on the 3rd of December 2004. You pleaded on the charge in July 2005. So the matter could have been finalised but it has been dragging on because of your Witness. So I agree with the State that the reason for the absence of your Witness is not good enough. So it is refused and the matter is ordered to proceed. It, yes?*

ACCUSED: *I understand, Your Worship.*

COURT: *Will you go to the Witness box then?*
NICOUSER BEUKES: *S.S*
COURT: *Will you go ahead and tell the Court briefly what you know about the case?*

INTERPRETER: *Your Worship, maybe the Witness forget what is going on today. Maybe we must go back and remind him again.*

COURT: *You must remind him. He forget that he is charged with the offence of assault with intent to do grievous bodily harm.*
INTERPRETER: *It seems to me at this stage he does not know whether he should go on his defence or whether he should talk about the Witness, on which the Court already made a ruling, Your Worship.*
COURT: *He has been sworn in to testify about the charge…"*

(Record p 29-31)

[8] In her judgment the trial magistrate took the accused's testimony into account and extensively dealt with his evidence, before rejecting it and finding that the State has proved its case beyond reasonable doubt. The accused was accordingly convicted and sentenced.

[9] I agree with the magistrate that this serious irregularity was committed after the last State witness gave her evidence. The entire proceedings are vitiated by it and the conviction of the accused has to be set aside.

[10] In the result, the conviction and sentence of the accused are set aside.

MULLER, J

I concur

NDAUENDAPO, J