



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR: 53/2013

In the matter between:

THE STATE

and

PETRIC AEBEB

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 695/2013)

Neutral citation: *State v Aebeb* (CR 53/2013) [2013] NAHCMD 243 (15 August 2013)

Coram: HOFF J and UNENGU AJ

Delivered: 15August 2013

ORDER

- (a) The conviction and sentence in respect of accused no. 1 are confirmed.
- (b) A copy of this judgment and a copy of the proceedings in the magistrate's court are to be provided to the Prosecutor-General in order for her to decide whether or not to stop the prosecution against accused numbers 2 and 3.

JUDGMENT

HOFF J (UNENGU AJ concurring):

[1] Three accused persons aged 19 years, 18 years and 17 years respectively were charged with theft of N\$10 000 and liquor valued at N\$1500. All three of them were unrepresented. All three accused persons pleaded guilty to the charge. A plea of not guilty in terms of section 113 of Ac 51 of 1977 was entered on their behalf after questioning by the magistrate in terms of s 112(1)(b) on 12 February 2013. The case was thereafter postponed for a number of times.

[2] On 5 April 2013 the prosecutor informed the court that the case is on the roll for 'plea and trial' and the charge was withdrawn against accused numbers 2 and 3.

[3] The charge was again put to accused no. 1 who again pleaded guilty. After questioning by the magistrate in terms of s 112(1)(b) the magistrate again entered a plea of not guilty in terms of s 113. The State called the complainant. During cross-examination accused no. 1 put it to the witness that there was N\$6000 in the bag which the accused admitted taking and not N\$10 000 as testified by the complainant.

[4] A second witness was called and thereafter the State closed its case. The prosecutor then indicated to the court that he wished to address the court in terms of s 174. The magistrate allowed this and thereafter gave a ruling in which he summarised the evidence by the State and gave his reasons why the accused person should be put on his defence. After this ruling the accused testified. At the conclusion of the trial the accused was convicted of theft of N\$6000 and he was sentenced to an amount of N\$4000 or 12 months imprisonment.

[5] I directed the following query to the magistrate:

‘A. Could you please provide me with your reasons why pre-trial reports in respect of minor accused persons were read into the record and received as exhibits prior to the accused persons having been requested to plead to the charge.

B. The three accused persons pleaded guilty and were questioned in terms of the provisions of section 112(1)(b). Subsequent to the questioning pleas of not guilty were recorded in respect of all three accused persons. The matter was then postponed. It appears further on the trial date the prosecutor withdrew the charges against accused number 2 and 3 on “recommendation of the social workers”. The court subsequently informed accused 2 and 3 that the matter had been withdrawn against them. Does the Criminal Procedure Act 51 of 1977 make provision for such a procedure namely a *withdrawal* of the charges by the prosecutor after pleas of not guilty had been recorded? Was the consent of the Prosecutor-General obtained in this regard?

C. Why is it necessary for the State to address the court in terms of section 174 of Act 51 of 1977 when there was no application for a discharge by the accused person or in the absence of the court *mero motu* indicating it considered such discharge? Was it further necessary for the court to make a ruling in terms of section 174 when there was no such application before court?’

[6] One of the reasons provided by the magistrate in respect of the first query was that the pre-trial reports were read into the record before the accused persons

were requested to plead was that a pre-trial report 'has an influence concerning the manner in which the court implement the juvenile diversionary program' in respect of minor accused persons.

[7] The purpose of a juvenile diversionary program, as I understand it, is to prevent a minor accused person (especially a first offender) not to be exposed to the criminal justice system, in short to keep such a juvenile out of court.

[8] It is for this reason where a pre-trial report of a social worker is available to simply withdraw the charge(s) against such an accused person. In view of the purpose of a juvenile diversionary program it is therefore not necessary at all to read a pre-trial report into the record during criminal proceedings. Therefore once a consensus has been reached between the prosecutor and the social worker that an accused person should participate in a juvenile diversionary program such accused person should not even be required to plead to a charge in court, because to do so would defeat the purpose of the juvenile diversionary program.

[9] In respect of the second query the magistrate replied that it was an oversight on his part since he had not noticed that the accused no. 1 had already pleaded and that a plea of not guilty had previously been recorded. The magistrate also readily conceded that the Criminal Procedure Act 51 of 1977 does not make provision for the *withdrawal* of a charge after a plea of not guilty had been entered on behalf of an accused person.

[10] Section 6 of Act 51 of 1977 provides as follows:

'An attorney-general or any person conducting a prosecution at the instance of the State or anybody or person conducting a prosecution under section 8, may –

- (a) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
- (b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge: Provided that where a prosecution is conducted by

a person other than an attorney-general or a body or person referred to in section 8, the prosecution shall not be stopped unless the attorney-general or any person authorized thereto by the attorney-general, whether in general or in any particular case, has consented thereto.'

[11] In terms of s 6(a) the prosecutor could not have *withdrawn* the charge against accused numbers 2 and 3, since a plea of not guilty had already been entered on their behalf. The magistrate therefore could not have informed the accused persons that the case had been withdrawn against them.

[12] In terms of s 6(b) a prosecution may be stopped. In the present matter this could only have been done after the prosecution had obtained permission from the Prosecutor-General or a person authorised by the Prosecutor-General thereto. It must be clear from the record of the proceedings that the prosecutor has permission to stop the prosecution, ie that he or she is abandoning the prosecution and the case.

[13] Since the prosecutor could not have withdrawn the charges against accused numbers 2 and 3 the matter is best left in the hands of the Prosecutor-General in order to decide whether or not to stop the prosecution against accused numbers 2 and 3.

[14] In respect of the last query the magistrate conceded that it was not necessary for the State to address the court in terms of s 174 because no such application was brought by the accused number 1 and neither did the court invite the prosecutor to address the court in this regard.

[15] The magistrates are advised to utilise court time effectively and not by engaging in unnecessary and a futile exercises, which are counterproductive and time consuming.

[16] I am however satisfied that in spite of the aforementioned irregularities that the proceedings in this case against accused no. 1 appear to me to be in accordance with justice.

[17] In the result the following orders are made:

(a) The conviction and sentence in respect of accused no. 1 are confirmed.

(b) A copy of this judgment and a copy of the proceedings in the magistrate's court are to be provided to the Prosecutor-General in order for her to decide whether or not to stop the prosecution against accused numbers 2 and 3.

E P B HOFF
Judge

E P UNENGU
Acting Judge

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