REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 37/2012

In the matter between:

THE STATE

and

PIETER JOHANNES FOURIE

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 829/2012)

Neutral citation: *The State v Fourie* (CR 37/2012) [2013] NAHCMD 338 (15 November 2013)

Coram: VAN NIEKERK J *et* MILLER AJ *et* UEITELE J
Heard: 27 July 2012
Delivered: 15 November 2013

Flynote: Criminal Procedure – Stopping of prosecution by the prosecutor – Intention of prosecutor of great importance to be determined as a matter of fact. If prosecutor does not intend to stop the prosecution but adopts a neutral attitude such does not amount to a stopping.

ORDER

The decision of the magistrate to acquit the accused is confirmed.

JUDGMENT

MILLER AJ (VAN NIEKERK, J and UEITELE, J concurring :

[1] The accused, whose age at the relevant time was stated in the charge sheet to be 21 years was arraigned in the Magistrate's Court at Usakos upon a charge of theft. It was alleged that on 25 January 2011 he had stolen a gas bottle, a spanner and a piece of pipe, the property or in the lawful possession of a certain Adriaan Alex Benade. The value of the items stolen was alleged to be N$950.00.

[2] The accused made his first appearance in court on 4 February 2011 consequent upon his arrest the previous day. On that date the matter was postponed initially to 9 February 2011.

[3] The accused was detained in custody. On 9 February 2011 bail was set at N$500.00 and the case was further postponed to 20 April 2011.

[4] Further postponements were granted and ultimately the matter was once more postponed to 21 February 2012 for the trial to commence.

[5] By then, I pause to add, the magistrate before whom the accused had pleaded, had resigned with the result that another magistrate, one Jasmaine Muchali was to conduct the trial. Nothing turns on that aspect for the purposes of this judgment.

[6] When the matter was called before magistrate Muchali on 21 February 2012 the prosecutor addressed the court in the following terms:

'The state witness, the complainant, contacted the state and indicated that he is no longer interested in continuing with the case, the state closes its case'.

[7] The magistrate thereupon acquitted the accused.

[8] Come to 22nd of March 2012 the magistrate believed that she may have acted irregularly. Her belief stems from the fact what she perceived to be the following:

‘

(a) The decision on the part of the prosecutor to close the state’s case amounted to a stopping of the prosecution.
(b) The prosecutor did not inform the court that he had the consent of the Prosecutor-General to stop the prosecution.
(c) She did not investigate whether the consent of the Prosecutor-General had been obtained by the prosecutor concerned.’

[9] The Magistrate thereupon availed herself of the provisions of Section 304 (4) of the Criminal Procedure Act, Act 51 of 1977 (‘The Act’) and submitted the papers to this Court for purposes of reviewing and setting aside the acquittal of the accused.

[10] In a memorandum prepared by the magistrate and which accompanied the papers it becomes apparent that she reasons that:

‘

(a) Section 6 (b) of the Act prohibits a prosecutor, once an accused had pleaded to the charge, from stopping the prosecution without the consent of the Prosecutor-General and
(b) She considered herself bound, correctly so, by the judgment of Liebenberg J (Tomassi J concurring) in the matter of *S v Samuel Ekandjo,* delivered in the Northern Local Division of this Court on 23 April 2010. (*S v Ekandjo* CR 04/2010, not reported).

[11] In *Ekandjo* the Court held that:

‘It is clear from s. 6 (b) of the Act that when an accused had pleaded, the proceedings may only be stopped if the Prosecutor-General or any person, authorized thereto by the Prosecutor-General has consented thereto. Once an accused has pleaded, the prosecutor no longer has control over the case and the Court then takes control. The only way to take the case out of the court’s hands is for the Prosecutor-General to act in terms of s. 6 (b) thereby terminating (“stopping”) the prosecution. The accused is then entitled to be acquitted. Where the prosecutor no longer wishes to proceed with a charge

against the accused is is incumbent upon the magistrate to enquire of the prosecutor whether the Prosecutor-General has consented thereto because without such consent the stopping is void.
(*S v van Niekerk* 1985 (4) SA 550 (BG); *du Toit* et al.
Commentary on the Criminal Procedure Act at 1-5.'

[12] The Judge President upon receipt of the papers directed that the issues raised in the case and the matter generally be argued before a Full Bench of three judges of this Court.

[13] We are indebted to Mr. Phatela, a member of the Society of Advocates, who submitted Heads of Argument and appeared *amicus curiae* to argue the matter, and Mr. Marondedze of the office of the Prosecutor-General who likewise submitted Heads of Argument and appeared to argue the matter, for their assistance.

[14] In my view the enquiry before us is twofold. Firstly it requires a determination as to whether or not the actions of the prosecutor amounted to a stopping of the prosecution. If it did not that is the end of the enquiry.

[15] Only if it did will the need arise to decide whether it is a matter that should be left to the Prosecutor-General to take such action as is deemed fit in the circumstances, and what if any role the Court must play.

[16] In *S v E* 1995 (2) SACR 547 (A) the following passage appears at p. 553:

'On appeal Corbett J, with whom Banks J concurred said at 148 E-G that whether a prosecutor's conduct amounts to the stopping of a prosecution is a question of fact to be decided with reference to all the facts.'

[17] In *S v Bopape* 1966 (1) SA 145 (C), Corbett J stated the position to be the following in a passage appearing at p. 149:

'It seems to me that there are three possible attitudes a prosecutor may adopt towards a prosecution. He may press for a conviction, or he may stop the prosecution, or he may adopt an intermediate neutral attitude whereby he neither asks for a conviction nor

stops the prosecution but leaves it to the Court to carry out the function of deciding the issues raised by the prosecution.'

[18] The facts of this case show some resemblance to the facts in *Attorney-General v Additional Magistrate Middledrift and Others* 1987 (4) SA 914 (CK).

[19] In that case there were likewise a number of appearances before the magistrate. At one of the appearances the accused pleaded not guilty. Apart from that the trial was postponed on each occasion, with the proceedings not continuing any further.

[20] At the last appearance the magistrate presiding made the following entry on the record:

'PP: Witnesses not present in Court and therefore the State abandons the prosecution.'

[21] In deciding the issue whether the action of the prosecutor constituted a stopping of the prosecution, Pickard ACJ, with whom Claassens AJ concurred in a separate judgment said at p. 920 F that:

'If I am correct in the aforementioned conclusions it seems safe to conclude that in order to constitute a "stopping of the prosecution" as envisaged by s 6(b) the action of the prosecutor (however it is worded and however it occurs) would have to constitute an act or omission of whatever nature, intentionally done by the prosecutor, to terminate the proceedings in such a fashion as to invoke irrevocably the consequences of a so-called "stopping of the prosecution" as envisaged by s 6(b). That the intention of the prosecutor is of the greatest importance as to a large extent supported by the remarks of Corbett J in *S v Bopape* (supra) at 148 B – 150 A.'

[22] At p. 923 the Court expressed itself further by saying that:

'Without prejudging this issue, I may state that it seems very likely that the prosecutor in this case never intended to invoke s 6(b) when he abandoned the prosecution. He was for the umpteenth time stranded without his witnesses in court. Save for accused no. 1, none of the accused had pleaded. Whether he even remembered that one of them had pleaded is

doubtful. By a previous so called “final remand” the court had shown displeasure at the number of postponements. He may well have intended to do no more than to withdraw the case for the time being on the assumption that they could all be charged again. If this is so, then surely he could not be accused of attempting to usurp the prerogative of his principal, the Attorney-General, to stop the prosecution with the concomitant consequences of s6(b). It is doubtful that he, in the circumstances, ever considered whether or not his action required the consent of the Attorney-General; a thought that would not have crossed his mind unless he intended to act in terms of 6(b).’

[23] In my view the prosecutor in the case before us found himself in a similar situation. The case had dragged on with one postponement upon the other. In the end the complainant became disinterested and from the words used by the prosecutor I infer that the complainant had decided not to attend the proceedings, but had sent a message instead.

[34] I must infer, given the limited facts as to the intention of the prosecutor which indicate the contrary that at that stage the prosecutor saw no prospects in continuing with the prosecution, given the obvious reluctance on the part of the complainant to continue with the case. Rather than waste further time and effort the prosecutor adopted the “neutral attitude”, referred to in *Bopape* (supra).

[35] I conclude that the actions of the prosecutor did not amount to a stopping of the prosecution. In the result there is no need to interfere with the magistrate’s decision. Insofar as it is necessary the decision of the magistrate is confirmed.

[36] There is likewise no need to discuss and deal with the second leg of the enquiry I mentioned earlier. It is best left for another day.

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K VAN NIEKERK

Judge

I agree

P J MILLER

Judge

I agree

S F I UEITELE

Judge

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