



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 6/2020

In the matter between:

THE STATE

and

HENEDRICO SAAL

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 111/2020)

Neutral citation: *S v Saal* (CR 6/2020) [2020] NAHCMD 19 (24 January 2020)

Coram: USIKU J and UNENGU AJ

Delivered: 24 January 2020

Flynote: Criminal Procedure – Special Review in terms of s 304(4) of the Criminal Procedure Act 51 of 1997 – Accused having pleaded not guilty to the charges and making formal admissions in terms of s 220 of the Criminal Procedure Act – After which the prosecutor brought an application for the matter to be withdrawn in terms of s 6(a) of the Criminal Procedure Act – Court realising that the accused had already pleaded to the charge, and as such was entitled to a verdict.

Summary: The matter was submitted by the Magistrate of Mariental on special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977.

The accused was charged with the crime of theft where after the accused pleaded not guilty to the charge on the 26 February 2019. He made admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 as amended.

The case was postponed on several occasions in order to get the original case record which appear to have been either misplaced or missing. On the 15 November 2019, when the matter came before court, the prosecutor, unaware that a plea of not guilty has already been taken, brought an application to have the matter withdrawn in terms of s 6(a) of the Criminal Procedure Act 51 of 1977. The court granted the application. Thus, the reason for the magistrate to have sent this matter on special review.

ORDER

- a) The withdrawal is hereby set aside.
- b) The matter is referred back to the Mariental Magistrate Court before the Magistrate who recorded the plea of not guilty to hear the evidence and should the State fail to adduce evidence, to prove the allegations, the accused should be found not guilty and acquitted on the charges preferred against him.

REVIEW JUDGMENT

USIKU J, (UNENGU AJ concurring)

[1] This matter has been sent for Special Review by the Magistrate of Mariental with an accompanying letter which reads as follows:

'I am hereby sending this matter on special review, the delay in the matter was a result that our secretary was on leave. Hence, the accused, Henedrico Saal pleaded not guilty on the 26/02/19 and the accused had made, formal admission in terms of section 220 of the Criminal Procedure Act 51 of 1977 as amended.

Subsequently, the matter was then remanded for the original case record and the State Prosecutor on the 15/11/19 brought an application for the matter to be withdrawn in terms of section 6(a) of the Criminal Procedure Act 51 of 1977 as amended. The court had made an oversight and granted the State Prosecutor a withdrawal on the matter. Afterwards, the court had realized that the accused had pleaded not guilty and accused person is entitled to a verdict.

The Honourable court will need the Honourable Justice guidance in this regard. May the Registrar of the High Court place this review case before a reviewing Judge.'

[2] It is trite that withdrawal of cases can only occur before an accused has pleaded to the charges, the reason being that at that stage, the prosecutor is still *dominus litis* – and has full control over the charges.

[3] However, once an accused has pleaded, the case is out of the hands of the prosecutor and falls under the control of the court.

[4] In *casu*, the accused had already pleaded not guilty to the charge, before a request for the withdrawal of charges by the prosecutor was made. The court was then obliged to bring out a verdict of not guilty if the State did not adduce evidence to prove the allegations against the accused.

[5] I am of the view that the concessions made by the magistrate are correctly made. Section 6(a) of the Criminal Procedure Act provides:

'Any (attorney general) in our case the Prosecutor-General or any person conducting a prosecution at the instance of the state or anybody or person conducting a prosecution under s 8, may;

- (a) Before an accused pleads to the 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 the prosecution is conducted by a person other than an attorney general (Prosecutor-General) or a body or a person referred to in s 8, the prosecution shall not be stopped unless the (Prosecutor-General) or any person authorised thereto by the (Prosecutor-General) whether in general or in any particular case, has consented thereto'

[6] It is common cause that the Prosecutor-General is responsible for all prosecutions in Namibia. A clear distinction must therefore be made between the terms withdrawal of a charge and the stopping of prosecution. The latter can only occur when the Prosecutor-General, acting in terms of express legal authority to that end. The stopping of the prosecution shall therefor entitle an accused to an acquittal.

[7] It must further be noted that it is the Prosecutor-General who must personally authorise the stopping of the prosecution, because this is an encroachment on the court's powers. The stopping of the prosecution thus have the effect of taking the case out of the hands of the court. The court is then obliged to bring out a verdict of not guilty.

[8] In the light of the above, the withdrawal of the charges against the accused after the plea of not guilty had been entered is clearly not in accordance with justice and it was an irregularity committed by the magistrate.

[9] As a result the following order are made:

a) The withdrawal is hereby set aside.

b) The matter is referred back to the Mariental Magistrate Court before the Magistrate who recorded the plea of not guilty to hear the evidence and should the State fail to adduce evidence, to prove the allegations, the accused should be found not guilty and acquitted on the charges preferred against him.

D N USIKU
Judge

E P Unengu
Acting Judge