

Case Title: <i>The State v Romano Botha</i>	Case No: CR 8/2020
High Court MD Review No: 2169/2019	Division of Court: Main Division
Heard before: Ms Justice C Claasen J <i>et</i> Ms Justice E Rakow AJ	Delivered on: 05 February 2020
Neutral citation: <i>S v Romano Botha</i> (CR 8/2020) [2020] NAHCMD 38 (05 February 2020)	
The order: <ol style="list-style-type: none"> a) The conviction and sentence is set aside. b) The matter is remitted to the trial court to explain to the right to cross-examination at the end of the evidence in chief of the state witness who testified. c) At the end of the State's case the Magistrate is to comprehensively explain the right at the end of the State's case to the unrepresented accused and bring the proceedings to its natural conclusion. d) In the event of a conviction the court in sentencing must have regard to any sentence already served. 	
Reasons for order:	
Claasen J (Rakow AJ concurring) <ol style="list-style-type: none"> 1. The matter came before court on automatic review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA) as amended, (hereinafter referred to as the CPA). For the reasons set out below I have come to the conclusion that this is an instance where the convicted person may be prejudiced if the record of proceedings is not forthwith placed before the court and where the court may dispense with the obtaining of a statement of the magistrate who presided at the trial. (section 304(2)(a) of the CPA). 	

2. The accused was charged with housebreaking with the intent to steal and theft. The accused was questioned in terms of section 112(1)(b) of the CPA. The court was not satisfied that all the elements of the offense were admitted and changed the plea to not guilty in terms of section 113 of the CPA. Subsequent thereto a trial commenced and a state witness testified. The state closed its case and the accused called no witness. Mitigation and aggravation followed and a sentence of a fine of N\$ 4000.00 or 4 months imprisonment was imposed.
3. The qualms that the court has with the trial is that the right to cross-examination was not explained and the right at the end of the State's case were not adequately explained.
4. As far as cross-examination was concerned, the record merely states "Cross examination." There is no explanation at all, nor was there an indication the accused comprehended what cross-examination entails.
5. At the end of the State's case, the record contains a single sentence that states " It is now your opportunity to testify and/or call witness, which is rather insufficient.
6. It is a firmly entrenched principle of a fair trial that an undefended accused should be informed of the basic procedural rights. Therefor a presiding officer is duty bound to explain these procedural rights to an undefended accused at the appropriate stages with sufficient particularity to enable a judgment to be made on the adequacy thereof.¹
7. Implicit herein is the requirement a magistrate must keep proper record of what transpires in the court. In the absence of the court record reflecting that an explanation was given, the reviewing court in unable to conclude that it was indeed done. The Namibian Supreme endorsed this principle in S v Kau and others² and stated that the magistrate should have recorded the nature of the explanations that were given to the accused persons.
8. The irregularities that is evident from the court record are of serious nature and vitiate the proceedings. Therefore the conviction and sentence cannot stand.

¹ See S v Daniels 1983 (3) SA 275(A)

² 1995 NR 1 (SC)

9. In the result, it is ordered that:

- e) The conviction and sentence is set aside.
- f) The matter is remitted to the trial court to explain to the right to cross-examination at the end of the evidence in chief of the state witness who testified.
- g) At the end of the State's case the Magistrate is to comprehensively explain the right at the end of the State's case to the unrepresented accused and bring the proceedings to its natural conclusion.
- h) In the event of a conviction the court in sentencing must have regard to any sentence already served.

C CLAASEN JUDGE	E RAKOW ACTING JUDGE