

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Ronaldino Oubiteb</i>	Case No: CR 36 /2021
High Court MD Review No: 603 / 2021	Division of Court: Main Division
Heard before: Mr Justice Liebenberg <i>et</i> Lady Justice Claasen	Delivered on: 10 May 2021
Neutral citation: <i>S v Oubiteb</i> (CR 36 /2021) [2021] NAHCMD 219 (10 May 2021)	
It is hereby ordered that: The conviction and sentence are set aside.	
Reasons for the order:	
[1] This is a review matter which came before me in terms of section 302 (1) and	

section 303 of the Criminal Procedure Act 51 of 1977.

[2] The accused appeared in the magistrate's court for the district of Karibib, held at Usakos, on a charge of housebreaking with intent to steal and theft to which he pleaded guilty and convicted in terms of section 112 (1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) . He was then sentenced, and the nature of that sentence imposed and the manner in which such a sentence was crafted will be addressed herein.

[3] An observation was noted in a query directed to the magistrate that the record of the proceedings does not reflect that the accused person was informed of his rights to legal representation and asked if an omission to explain those rights to an unrepresented accused, would taint the conviction. In response the learned magistrate confirmed and conceded that the record does not reflect that the accused was informed of his right to legal representation. It was further explained that the accused was initially charged in another case, from which the current matter was separated when the accused indicated that he wanted to plead guilty.

[4] In relation to the duty to explain the rights to legal representation to an accused, it was held in *S v Wendeinge*¹ as follows:

[4] It by no means follows that where there is a failure to afford legal representation there must necessarily be a failure of justice resulting in the proceedings being vitiated. In the case of *S v Mwambazi* 1990 NR 353 at 356B, Levy J went on to refer with approval to the following passage from the judgment of Hoexter JA in *S v Mabaso and Another* 1990 (3) SA 185 (A) at 204C:

"Where a general duty rests upon a judicial officer to inform an unrepresented accused that he has a right to be legally represented, the failure to discharge that duty does not inevitably involve the commission of an irregularity in the judicial proceedings involved. Whether or not an irregularity has been committed will

¹ *S v Wendeinge* (CR 7/2017) [2017] NAHCNLD 68 (24 July 2017).

always hinge upon the peculiar facts of the case; and it need hardly be said that much depends upon the extent of the accused's own knowledge of his rights.”

[5] In *Akim v S*² it was held that alleged irregularities committed during the trial must be decided on what is apparent from the record, and held further that whether same constitutes irregularities and the effect thereof should be determined based on the circumstances of the case considered.

[6] Damaseb JP dealt with the issue of records in appeal matters in the unreported case of *Coetzee v S*³ and I find the same approach to be applicable to review matters. In that case the court found that the record was in shambles and stated that the record of proceedings must be prepared in accordance with ‘*Chapter XIII of the Codified Instructions: Clerk of the Criminal Court*’ issued by the Permanent Secretary for Justice to create certainty about proceedings in fairness to an accused and the State. He further held that the ultimate responsibility rests on the presiding magistrate to ensure that the record is a correct reflection of proceedings that took place before him or her.⁴

[7] Even though the present matter is as a result of a separation of trial after the accused indicated that he would like to plead guilty, the accused’s rights to legal representation should have been explained to him in the separated matter while the record should have reflected that fact. The separated matter stands on its own and its record is submitted independently for review. The absence of an explanation to the unrepresented accused about his rights to legal representation and his choice thereof taints the conviction and puts the reviewing court in a difficult position to find the conviction to be in accordance with justice. The explanation of an unrepresented accused’s rights to legal representation is of paramount importance at the start of criminal proceedings to ensure compliance with Article 12 of the Constitution which states that all persons shall be entitled to be represented by a legal practitioner of their choice, and

² *Akim v S* (HC-NLD-CRI-APP-CAL-2019/00017) [2019] NAHCNLD 79 (8 August 2019).

³ *Coetzee v S* (CA 52/2009) [2011] NAHC 72 (11 March 2011).

⁴ See also *S v Kamenye* (CR 9/2019) [2019] NAHCNLD 31 (26 March 2019).

when they wish to conduct such proceedings in person, it must be indicated expressly and recorded accordingly. Failure to explain the rights of an accused to legal representation, or failure to record such rights, taints the conviction. Consequently, the proceedings in this case cannot be found to be in accordance with justice.

[8] In light of the conclusion reached herein, it has become superfluous to address the other issues raised in the query directed to the magistrate.

[9] In the result, the conviction and sentence are set aside.

J C LIEBENBERG JUDGE	C CLAASEN JUDGE