

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

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| <b>Case Title:</b><br><i>The State v Immanuel Erastus</i>   | <b>Case No:</b><br>CR 48 /2021             |
| <b>High Court MD Review No:</b><br>720 / 2021   | <b>Division of Court:</b><br>Main Division |
| <b>Heard before:</b><br>Mr Justice Liebenberg <i>et</i><br>Mr Justice January   | <b>Delivered on:</b><br>27 May 2021        |
| <b>Neutral citation:</b> <i>S v Erastus</i> (CR 48 /2021) [2021] NAHCMD 259 (27 May 2021)   |  |
| <b>It is hereby ordered that:</b><br><br>(a) The convictions and sentences on counts 1 and 3 are set aside.<br>(b) Any part-fine paid in respect of counts 1 and 3 is to be reimbursed. |  |

**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 Windhoek in which he faced the following charges: Count 1: Common Assault; Count 2: Indecent Assault, and Count 3: Crimen Injuria. He pleaded not guilty on all the three counts and the matter proceeded to trial. After evidence was heard he was acquitted on Count 2 but convicted on counts 1 and 3. He was subsequently sentenced to fines of N\$2000 or 6 months' imprisonment on each count.

[3] When the accused made his first appearance in court on 13 January 2020 his rights to legal representation were explained to him where after he elected to apply for legal aid. The record subsequent thereto is silent as to whether the accused in fact did apply for legal aid, the outcome thereof, or whether he abandoned his application for legal aid. That observation was noted in a query directed to the magistrate and he was asked to provide reasons for having proceeded to trial in the circumstances whilst the accused was unrepresented.

[4] In response, the learned magistrate acknowledged her failure to find out from the accused about the status of his legal aid application and attributes this unfortunate situation to an oversight on her part.

[5] In the matter of *S v Wendeinge*,<sup>1</sup> it was held that the right to legal representation is a fundamental right. The accused's right to legal representation was explained on his first appearance whereupon he elected to apply for legal aid. On his third appearance he did not waive this right or his election to apply for legal aid. As a result of an omission to

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

peruse the previous court record by the magistrate and, seemingly, also the prosecutor, the trial proceeded in the absence of a legal representative. The accused asked no questions to witnesses. On review the court found that in the circumstances the proceedings are vitiated by the irregularity and the proceedings were set aside.

[6] Similarly in the current proceedings the convictions are tainted by the same irregularity and the proceedings cannot be found to be in accordance with justice. The trial court should have sought an answer from the accused on whether he wishes to pursue or abandon his application for legal aid before the trial commenced. The record should reflect the accused's decision. Under Article 12 of The Namibian Constitution the right to legal representation of an accused person is guaranteed and must be upheld in a court of law. On that basis the convictions fall to be set aside.

[7] In the result, it is ordered:

- (a) The convictions and sentences on counts 1 and 3 are set aside.
- (b) Any part-fine paid in respect of counts 1 and 3 is to be reimbursed.

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| <b>J C LIEBENBERG</b><br><b>JUDGE</b> | <b>H JANUARY</b><br><b>JUDGE</b> |