

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: <i>The State v Gerson Rico Swartbooi</i>	Case No: CR 122/2022
High Court MD Review No: 1168/2022	Division of Court: Main Division
Heard before: January J <i>et Usiku J</i>	Delivered on: 13 April 2023
Neutral citation: <i>S v Swartbooi</i> (CR 122/2022) [2023] NAHCMD 187 (13 April 2023)	
The order: <ol style="list-style-type: none">1. The conviction and sentence on count one are confirmed.2. The closing of the State's case in relation to the second count is set aside.3. The matter is remitted to the trial court with the direction to proceed to trial in respect of count two.	
Reasons for order:	
January J (concurring Usiku J): [1] The case was submitted from the Omaruru Magistrate's Court for automatic review pursuant to s 302(1) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).	

[2] The Magistrate explained the accused's rights to legal representation at his first appearance. The accused opted to apply for legal aid. On a subsequent appearance, the public prosecutor put the charges to the accused whereupon he was asked to plead. Nothing about the option to apply for legal aid is reflected from the record.

[3] The accused was charged with two counts of housebreaking with intent to steal and theft. He pleaded guilty on the first charge and not guilty to the second charge. The magistrate applied s 112(1)(b) of the CPA in respect of the guilty plea. The magistrate, however entered a plea of not guilty because the accused denied having broken in and in addition, denied the value of the property stolen.

[4] The magistrate applied s 115 of the CPA in relation to the second charge. The accused opted to remain silent and not to disclose his defence. The public prosecutor thereafter requested the court to apply the competent verdicts for housebreaking with intent to break and enter in relation to count one. The magistrate explained to the accused that he could be convicted of a competent verdict in accordance with the provisions of s 263(1)(a) of the CPA. There was no explanation that he could be convicted of the competent verdict of theft. The State then accepted the plea of guilty to theft on the reduced value of N\$300 and closed its case in respect of both counts.

[5] Although it is not wrong to warn an accused of the competent verdict provided for in s 263(1)(a) of the CPA, in our view, the appropriate provision in the circumstances would have been the provisions of s 270 of the CPA.

[6] Section 263 provides as follows:

'(1) If the evidence on a charge for the statutory offence in any province of breaking and entering or of the entering of any premises with intent to commit an offence specified in the charge, does not prove the offence of breaking and entering or of entering the premises with

intent to commit the offence so specified but the offence of breaking and entering or of entering the premises with intent to commit an offence other than the offence so specified or of breaking and entering or of entering the premises with intent to commit an offence unknown, the accused may be found guilty-

(a) of the offence so proved; or

(b) where it is a statutory offence within the province in question to be in or upon any dwelling, premises or enclosed area between sunset and sunrise without lawful excuse, of such offence, if such be the facts proved.

(2) If the evidence on a charge for the statutory offence in any province of breaking and entering or of the entering of any premises with intent to commit an offence to the prosecutor unknown, does not prove the offence of breaking and entering or of entering the premises with intent to commit an offence to the prosecutor unknown but the offence of breaking and entering or of entering the premises with intent to commit a specific offence, The accused may be found guilty of the offence so proved.'

It is clear that this section provides specifically for competent verdicts of housebreaking with a specific intent or an intent to the prosecutor unknown. It does not include the substantive crime of theft but crimes where breaking and entering are committed.

[7] Section 270 provides as follows:

'270 Offences not specified in this Chapter

If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.'

[8] After the pleas were recorded, the State accepted the plea on the reduced value of stolen property to the value of N\$300 whereas the initial alleged value was N\$500. The magistrate convicted the accused for theft and sentenced him to a fine of N\$1000 or

three months' imprisonment wholly suspended for 12 months on condition that the accused is not convicted of the offence of theft, committed during the period of suspension.

[9] The magistrate did not deal with the second count of housebreaking on which the accused pleaded not guilty. In the circumstances, the accused was entitled to a verdict thereto. I consequently directed a query in the following terms

'1.The magistrate must explain how the proceeding were continued with in circumstances where the accused indicated that he wanted to apply for legal aid and it reflects nowhere in the record that he abandoned that intention.

2. Does it not amount to an unauthorised stopping of proceedings where the public prosecutor closed the State's case without leading evidence on count 2?'

[10] The response from the magistrate is as follows:

'1.The above matter refers.

2. Kindly place my response to the query by the learned Honourable Justice January.

3.The Honourable Magistrate hereby responds as follows:

I. Magistrate concedes that the record erroneously does not reflect proper procedure concerning the issue it hand followed on that particular day.

II. Directorate of legal aid confirmed that accused/applicant was successful in his legal aid application, subject to a contribution of N\$350-00. That information was obtained telephonically, thus the confirmation was not in writing before court.

III. On hearing the outcome of the application, accused indicated that he is unable to make the required contribution and that he will rather continue conducting his own defence, whereupon proceedings were continued.

4. The legal aid contribution is attached. (Was not available by the time of sending record for review)

5. The Honourable Magistrate apologized to the serious oversight.

.....'

[11] The response from the Directorate of Legal aid is indeed attached to the response. That, however does not solve the issue. Magistrates' courts are courts of record. It does not reflect anywhere in the record that the accused abandoned his application for legal aid and that he could not afford the contribution as required. It is incumbent on a magistrate to keep proper record of what transpires in the court. In the absence of the court record reflecting that an explanation was given and the attitude of the accused thereto, the reviewing court is unable to conclude that it was indeed done. The Namibian Supreme Court endorsed this principle in *S v Kau and others*¹ and stated that the magistrate should have recorded the nature of the explanations that were given to the accused persons and, if we may add, the attitude of the accused.

[12] In addition, the review cover sheet reflects that the accused was convicted for housebreaking with intent to steal and theft, whereas the record of proceedings reflects that he was convicted for theft. The J15 charge sheet only reflects 'guilty' and not for which crime. We again reiterate that it is ultimately the duty of the magistrate to ensure that a correct record and accompanying documents are submitted for review. Otherwise, defective records and documents would cause unnecessary delays.

[13] The magistrate for some or other reason decided not to reply to the query relating to the unauthorised stopping of prosecution. Magistrates should understand that queries are directed to them, not to criticise but as a form of constructive training. As such it is expected to be answered. There is no indication on record that the public prosecutor had obtained the authorisation from the Prosecutor-General (the PG) to stop prosecution on the second charge of housebreaking with intent to steal and theft.

[14] The issue whether the action of the public prosecutor intended or not to stop the prosecution in terms of s 6(b) of the CPA was elaborately dealt with in *The State v*

¹ *S v Kau and others* 1995 NR 1 (SC)

*Fourie*². The court referred to *S v Ekandjo*³, delivered in the Northern Local Division of this Court on 23 April 2010 where the court held:

'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, it is incumbent upon the magistrate to enquire from 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.'

[15] The stopping of a prosecution is a question of fact to be decided with reference to all the facts.⁴ We agree 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.⁵

[16] In the matter at hand, the prosecutor stopped the prosecution in relation to count two in no ambiguous terms perceivably in terms of s 6(b) of the CPA and asked for a conviction on a competent verdict of theft on count one. The magistrate did not enquire if the stopping was done with the consent of the PG. This case is further distinguishable from the facts in *S v Fourie* (supra) where the court found that the prosecutor took a neutral stance and concluded that the actions of the prosecutor did not amount to a stopping of the prosecution. Consequently, in that case, there was no need to interfere

² *The State v Fourie* (CR 37/2012) [2013] NAHCMD 338 (15 November 2013).

³ *S v Ekandjo* CR 04/2010, not reported.

⁴ *S v E* 1995 (2) SACR 547 (A).

⁵ *S v Bopape* 1966 (1) SA 145 (C).

with the magistrate's decision.

[17] It is clear from the record of proceedings that the prosecutor in the present instance did not obtain the PG's consent prior to the closing of the State's case and, in view of what has been stated in the *Ekandjo* case supra, it thus follows that the stopping was a nullity. It being a nullity, the matter should have proceeded to trial and the prosecution to have been directed to lead evidence; in the absence of which, consent must be obtained from the PG to stop prosecution.

[18] In the result:

1. The conviction and sentence on count one are confirmed.
2. The closing of the State's case in relation to the second count is set aside.
3. The matter is remitted to the trial court with the direction to proceed to trial in respect of count two.

H C JANUARY JUDGE	D USIKU JUDGE