

REPUBLIC OF NAMIBIA



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

Case Title: The State v Stephanus Christiaans	Case No: CR 53/2022
High Court MD Review No: 1868/2022	Division of Court: Main Division
Heard before: Judge January <i>et</i> Judge Claasen	Delivered on: 08 May 2023
Neutral citation: <i>S v Christiaans</i> (CR 53/2023) [2023] NAHCMD 242 (08 May 2023)	
The order: <ol style="list-style-type: none">1. The conviction and sentence on the charge of possession of cannabis are confirmed.2. The closing of the State`s case in respect of the charge of resisting a member of the police is set aside.3. The matter is remitted to the trial court with the direction to proceed to trial in respect of the charge of resisting a member of the police and bring the matter to its natural conclusion if the prosecutor is unable to obtain the consent of the Prosecutor-General to stop prosecution.	
Reasons for order:	
January J (concurring Claasen J)	

[1] The case was submitted from the Keetmanshoop Magistrate's Court for automatic review pursuant to s 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The record of proceedings consists of the review coversheet, a typed J15 charge sheet and a handwritten J15 charge sheet without any annexures reflecting the charges. The handwritten J15 charge sheet reflects a charge of resisting a member of the Namibian Police without any reference to the particular section of any Act or section alleged. On the first appearance the public prosecutor informed the court that the accused was appearing on a charge of possession of 15 grams of cannabis valued at N\$750 and resisting a member of the police. The omission of the record containing any annexures with the charges is irregular as the effect is that an incomplete record is submitted for review. It is again emphasised that it is ultimately the responsibility of the magistrate to submit a complete record for review.

[3] It appears that when the charges were put, the accused pleaded guilty to both possession of cannabis and resisting a member of the police. The magistrate applied section 112(1)(b) of the CPA in relation to the possession of cannabis and convicted the accused. When the magistrate wanted to question the accused in terms of section 112(1)(b) of the CPA on the second charge, the accused indicated that he pleaded not guilty to the charge of resisting a member of the police. The magistrate then applied s 115 of the CPA and the accused gave a plea explanation. When the magistrate asked for a date for trial, the public prosecutor closed the case in relation to the second charge of resisting a member of the police. The case was then finalised and the accused was sentenced to 30 months' imprisonment of which four months are suspended for a period of five years on condition that the accused is not convicted of possession of cannabis committed during the period of suspension. The accused had three previous convictions for possession of cannabis and one for assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

[4] The conviction and sentence of possession of cannabis are in accordance with justice and will be confirmed. We, however have qualms with the proceedings in relation

to the charge of resisting a member of the police. It is clear that the accused pleaded to the charge and gave a plea explanation thereto. In the circumstances the accused was entitled to a verdict thereto.

[5] 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 *S v Fourie*¹. The court referred to *S v Samuel Ekandjo*², delivered in the Northern Local Division of this Court on 23 April 2010 and *S v Katemo*³ where the court endorsed what was stated as follows:

'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 is incumbent upon the magistrate to enquire of the prosecutor whether the Prosecutor-General has consented thereto because without such consent the stopping is void. The unauthorised stopping of prosecution would amount to a nullity (*S v van Niekerk* 1985 (4) SA 550 (BG); *du Toit et al. Commentary on the Criminal Procedure Act at 1-5.*'

[6] 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

[7] In the matter at hand, the prosecutor stopped the prosecution in no uncertain terms perceivably in terms of s 6(b) of the CPA. The magistrate did not enquire if it was

¹ *S v Fourie* (CR 37/2012) [2013] NAHCMD 338 (15 November 2013).

² *S v Ekandjo* CR 04/2010, not reported.

³ *S v Katemo* (CR 33/2014) [2014] NAHCMD 205 (3 July 2014).

⁴ *S v E* 1995 (2) SACR 547 (A).

⁵ *S v Bopape* 1966 (1) SA 145 (C).

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 with the magistrate's decision.

[8] It is clear from the record of proceedings that the prosecutor in the present instance did not obtain the Prosecutor-General's consent prior to the closing of the State's case and, in view of what has been stated in the *Katemo* and *Ekandjo* cases supra, it thus follows that the stopping was a nullity. It being a nullity, the matter should proceed to trial on the second charge, in the event that the prosecutor is unable to obtain consent from the Prosecutor-General to stop prosecution.

[9] In the result:

1. The conviction and sentence on the charge of possession of cannabis are confirmed.
2. The closing of the State's case in respect of the charge of resisting a member of the police is set aside.
3. The matter is remitted to the trial court with the direction to proceed to trial in respect of the charge of resisting a member of the police and bring the matter to its natural conclusion if the prosecutor is unable to obtain the consent of the Prosecutor-General to stop prosecution.

H C JANUARY
JUDGE

C M CLAASEN
JUDGE