

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTION 61

<b>Case Title:</b> The State  versus  Elvin John Olifan      Accused	<b>Case No:</b> CR 5/2025
<b>High Court MD Review No:</b> 1244/2024	<b>Division of Court:</b> High Court, Main Division
<b>Coram:</b> Christiaan J <i>et</i> Shivute J	<b>Delivered:</b> 28 January 2024
<b>Neutral citation:</b> <i>S v Olifan</i> (CR 5/2025) [2025] NAHCMD 16 (28 January 2025)	
<b>ORDER:</b> a) The conviction is confirmed.	

- b) The sentence imposed is set aside with a direction that the matter is remitted to the learned magistrate to hear the evidence or submissions of the complainant in terms of s 25 of the Combating of Domestic Violence Act 4 of 2003, before sentencing the accused afresh and in accordance with the law.

### **REASONS FOR ORDER:**

CHRISTIAAN J (SHIVUTE J concurring):

[1] This matter arises from the Omaruru Magistrate's Court, where the accused was convicted of assault by threat, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 ("the Act"). On 26 July 2024 after pleading guilty, the sentence imposed was a fine of N\$1000 or, in default of payment, 6 months imprisonment, wholly suspended for 12 months on condition that the accused is not convicted of assault under the Act during the period of suspension.

[2] On review, the reviewing judge remarked:

'After the accused was convicted on 26 July 2024, no submissions were made in terms of section 25 of the Act, no such submissions appear on the record.'

[3] The response by the magistrate, acuminates to a concession that the provisions of s 25 of the Act were indeed not complied with, and admitted the oversight on his part for failure to record such submission. He opted further that in the absence of the s 25 of the Act evidence, a wholly suspended sentence must be applied.

[4] The provisions of s 25 of the Act are mandatory and provide as follows:

'25. (1) The court must, if reasonably possible and within reasonable time, notify the complainant or the complainant's next of kin, if the complainant is deceased, of the time and

place of sentencing in a case of a domestic violence offence against the complainant. (2) At the time of sentencing, the complainant, the complainant's next of kin, if the complainant is deceased, or a person designated by the complainant or the complainant's next of kin has the right to appear personally and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation. (3) A complainant, or the complainant's next of kin, if the complainant is deceased, who is unwilling or unable to appear personally at sentencing has the right to inform the court of his or her views on an appropriate sentence by means of an affidavit.'

[5] Section 25 of the Act is mandatory and requires strict compliance, it stipulates that the complainant has the right to be notified of the sentencing proceedings and to appear personally in order to express their views on the case, including the impact of the crime and the need for restitution. The failure of the trial court to follow these provisions renders the sentencing proceedings irregular and not in accordance with the law.

[6] The absence of submissions by the complainant during sentencing constitutes a fatal irregularity in the sentencing process. It is critical that the complainant's rights under section 25 of the Act be respected, especially in cases involving domestic violence, where the impact on the victim must be considered during sentencing.

[7] The sentencing proceedings were irregular and not in accordance with justice and thus, fall to be set aside.

[8] In the result, it is ordered:

- a) The conviction and sentence are set aside
  
- b) The matter is remitted to the learned magistrate to hear the evidence or submissions of the complainant in terms of s 25 of the Combating of Domestic Violence Act 4 of 2003, before conviction and sentencing the accused afresh and in accordance with the law.

<b>P CHRISTIAAN JUDGE</b>	<b>N N SHIVUTE JUDGE</b>