

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

REVIEW JUDGMENT

Case no: CR 13/2019

In the matter between:

THE STATE

v

ABSALOM ESTHER NAMUTENYA

HIGH COURT NLD REVIEW CASE REF NO: 657/2018

Neutral citation: *S v Absalom* (CR 13/2019) [2019] NAHCNLD 22 (26 February 2019)

Coram: JANUARY J et SALIONGA J

Delivered: 26 February 2019

Flynote: Review — Criminal law — Abortion contravening section 10(1) (a) of the Abortion and Sterilisation Act 2 of 1975 — What constitutes — Not sufficient to admit abortion of a foetus using tablets — Court from its questioning must be satisfied that the perpetrator is not a medical practitioner and that there was intention to kill a live foetus — Charge must contain all elements, including reference to the definition of abortion in

section 1 of the Act. Prosecutors must ensure that all elements of the offence are covered. Magistrates must ensure before an accused pleads, that the charge is not defective.

Summary: The accused was charged with the statutory crime of abortion in contravention s 10(1) (a) of the Abortion and Sterilisation Act 2 of 1975. She pleaded guilty to the charge and was convicted upon her own admission of guilt. She was sentenced to N\$2000 or six months imprisonment wholly suspended for a period of 3 years on conditions (1) accused is not convicted of contravening s 10(1) (a) of Act 2 of 1975 and (2) accused performs a total of 100 hours community service to be performed at the Ministry of Health and Social Service, Outapi State Hospital. On review the court held that the charge is defective and the conviction and sentence is set aside.

ORDER

1. The conviction and sentence are set aside
2. The matter is remitted to the Magistrate to properly question the accused in terms of section 112(1) (b) of Act 51 of 1977 as per the guidelines stated in this judgment.

JUDGEMENT

SALIONGA J (JANUARY J concurring):

[1] Accused appeared at Outapi Magistrate's Court charged with contravening section 10 (1) (a) of the Abortion and Sterilisation Act 2 of 1975 read with section 1, 2, 3, 5, 6 and 11 of the same Act. It is alleged that on the 23 May 2018 at Erf 1436 in Outapi town, Outapi district the said accused not being a medical practitioner, did wrongfully and unlawfully procure an abortion. The accused pleaded guilty and after she

was questioned in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977, was convicted as charged. She was sentenced to 100 hours community service.

[2] When the matter came before me on automatic review, I directed queries to the learned Magistrate as follows:

1. How could the Learned Magistrate have satisfied herself that the accused person admitted all the elements of the offence if the accused person is charged with; contravening s10 (1) (a) of the Abortion and Sterilisation Act 2 of 1975, in that accused not being a medical practitioner did wrongfully and unlawfully procure an abortion, and;
2. Whether the condition of suspension was not vague?

[3] The learned magistrate responded to my first query that his satisfaction was due to the fact that, the accused person indicated to have used tablets to abort the foetus. He further responded that he was moved to conclude that she was not a medical practitioner when the accused indicated that she was on holiday during April and was busy with her education.

[4] The accused person who was not legally represented, seems to have pleaded to a defective charge. The charge does not make reference to section 1 of the Abortion and Sterilisation Act, nor did the charge contain the elements in the definition of abortion. This is a case where the accused person suffered prejudice which was not cured by either questions asked by the court a quo nor by answers given by the accused. Accused during questioning did not admit that she was not a medical practitioner, that she had intentionally procured an abortion nor did she admit that at the time of the abortion, the said foetus was alive. The learned Magistrate conceded stating it was an oversight on his part.

[5] In this instant case an old annexure to the charge sheet that does not comprehend all the elements of the offence charged was used and must be rectified as a matter of urgency. The authority in this regard is *S v Haimbondi* 1993 NR 129 (HC) where O' Linn J sat out a "specimen charge" for future use as appears in Hunt's *South African Criminal Law and Procedure* Vol 11 2nd ed (rev) at 329 as follows:

'That the accused is guilty of the offence of contravening s10 (1) (a) read with s1 of Act 2 of 1975; in that upon or about.....at...in the district of...the said X,not being a registered medical practitioner, did unlawfully administer a certain drug to Y,a female there residing, who was then pregnant with living foetus, with intent thereby to procure the miscarriage of the said Y,and did as a result of the administration of the said drug cause the death of the foetus and its expulsion from the body of the said Y.'

[6] It is the duty of the prosecutor to ensure that the annexure attached to the charge sheet comprehends all the elements of the offence the accused is charged with. If the prosecutor fails to do this, the presiding magistrate should point out to the prosecutor that the charge is defective and must be rectified any time before the accused is convicted. The above specimen was drafted in the hope that; if followed the accused persons will be fully alerted to all the essential elements of the offence and the case which has to be met. This was not done in the instant case.

[7] As far as the second query is concerned, the learned magistrate in his reply convincingly tried to explain the vagueness of the condition to say; '...this is read with the fact that the community service report is read to the accused and indicated the available work that needs to be done, to which the accused needs to agree with the recommendations, so that the accused is able to perform the service before the end of the year, so as not to interfere with her further studies'. In my view the learned magistrate lost track of what the query was all about or misunderstood my query as the condition did not specify when and for which period the service was to be performed.

[8] I agree with Unengu AJ in the matter of *S v Clemens* (CR 27/2014) [2014] NAHCMD 190 (19 June 2014) where he states that the order made by the Magistrate

for the accused to perform 500 hours community service at the Bukalo Traditional Authority as a condition of suspended sentence 'is vague due to lack of particularity'. In my view the learned magistrate in the instant case did not specify the type of work to be performed and the timeline within which the service is to be performed.

[9] For the aforesaid reasons the conviction and sentence cannot be allowed to stand and must be set aside.

[10] In the result I make the following orders:

1. The conviction and sentence are set aside;
2. The matter is remitted to the Magistrate to properly question the accused in terms of section 112(1) (b) of The Criminal Procedure Act 51 of 1977 as per the guidelines stated in this judgment.

J T SALIONGA
JUDGE

I agree

H C JANUARY
JUDGE