

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

REVIEW JUDGMENT

Case No.: CR 24/2022

In the matters between:

THE STATE

v

ALPHA UWUKHAEB

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (130/2022)

Neutral citation: *S v Uwukhaeb* (CR 24/2022) [2022] NAHCNLD 49 (29 April 2022).

Coram: SALIONGA J and KESSLAU AJ

Delivered: 29 April 2022

Flynote: Criminal Procedure- Automatic Review- Child Offender- Fair-trial- Child needs to be assisted by parent or guardian- Pre-sentence report or social worker's report necessary- Magistrates duty to safeguard interests of minor in Criminal cases.

Summary: The 16 year old accused was convicted and sentenced to 24 months imprisonment, 12 months of which were suspended on usual conditions after pleading

guilty to the crime of housebreaking with intent to steal and theft. On the first appearance when his rights were being explained, he was not assisted by a guardian, the same was the position during the subsequent appearances until the finalisation of the matter. Equally, there was no social worker's report or pre-sentence report which the magistrate had relied before sentencing the accused, prompting this court to send a query in the matter.

Held: that it is the right of a minor accused of a crime to be assisted by their guardian/parent in court.

Held further: that the court has a duty to inform a minor accused of a crime of his/her right to have their parent/guardian to be present at court.

Held further: that there was a duty on the Magistrate to attempt to secure the attendance of a parent/guardian.

ORDER

1. The conviction is confirmed.
2. The sentence is set aside and the matter remitted back to the court a quo to request and consider a pre-sentence report and sentence the accused accordingly.
3. The time spent in custody should be deducted when sentencing the accused afresh.

JUDGMENT

KESSLAU AJ (SALIONGA J concurring):

[1] The matter comes before this court on automatic review.

[2] The 16 year old accused appeared in the Magistrate Court in the district of Tsumeb charged with the offense of housebreaking with the intent to steal and theft. No parent or guardian was present during the proceedings.

[3] The accused plead guilty, was questioned in terms of Section 112(1) (b)¹ after which he was convicted and sentenced to 24 (Twenty-Four) months imprisonment of which 12 (Twelve) months were suspended for a period of 5 (five) years on condition that the accused is not convicted of the offence of housebreaking with the intent to steal and theft, committed during the period of suspension.

[4] I enquired from the learned Magistrate why there was no compliance with Sections 73(3) and 74 of the Criminal Procedure Act 51 of 1977 (CPA) considering that the accused was a minor.

[5] The Magistrate, in his prompt reply, stated:

'(1) The accused at first appearance was asked where his guardian was, and he indicated that she was at home. He was kept in a place of safety pending his guardian who never came to receive the accused in her custody. (2) The guardian being his mother was unable to attend the proceedings and there was no other person to stand with the accused person. As such in order not to delay the matter and the court proceeded in lieu of the guardian. (3) The court is cognizance of Section 73(3) and 74 of the criminal procedure act 51 of 1977 as amended however there was no person willing to come forth for the accused person and assist him during the court proceedings. I stand guided.'(SIC)

[6] Section 73 of the CPA guarantees the right of an accused to be assisted after arrest and in particular subsection 3 states:

¹ The Criminal Procedure Act 51 of 1977.

'An accused who is under the age of eighteen years may be assisted by his parent or guardian at criminal proceedings, and any accused who, in the opinion of the court, requires the assistance of another person at criminal proceedings, may, with the permission of the court, be so assisted at such proceedings.' (My emphasis) This section thus creates a right of a minor to have his parent present to assist him if the person so wish.

[7] Section 74 of the CPA, in more strict terms, puts a duty to attend court proceedings on the parent or guardian of a minor and the relevant parts reads as follows:

'74 (1) Where an accused is under the age of eighteen years, a parent or, as the case may be, the guardian of the accused shall be warned, in accordance with the provisions of subsection (2), to attend the relevant criminal proceedings.

74 (2) The parent or the guardian of the accused, if such parent or guardian is known to be within the magisterial district in question and can be traced without undue delay, shall, for the purposes of subsection (1), be warned to attend the proceedings in question -

(a) in any case in which the accused is arrested, by the peace officer effecting the arrest or, where the arrest is effected by a person other than a peace officer, the police official to whom the accused is handed over, and such peace officer or police official, as the case may be, shall inform the parent or guardian, as the case may be, of the place and date and time at which the accused is to appear;' (my emphasis).

[8] The duty lies with the arresting officer to warn the parent/guardian to be present upon arresting the accused. Such parent may request exemption from attending² court for whichever reason, which exemption must be given in writing by the Magistrate. The parent/guardian must remain in attendance at the relevant court proceedings until excused.³ The court has the right at any stage of the proceedings to direct that the parent or guardian of an accused be warned to be present at court.⁴ The court furthermore has the right to issue a warrant of arrest for a parent or guardian warned to be present under this section and apply the penalty clause⁵ if such parent/guardian does not comply.

² Section 74(3) of Act 51 of 1977.

³ Section 74(4) of Act 51 of 1977.

⁴ Section 74(5) of Act 51 of 1977.

⁵ Section 74 (6) and 74 (7) of Act 51 of 1977; See also *S v Shivute* and several other 1991 NR 433.

[9] On the first appearance the record of proceedings reflects as follows:

'Crt: Accused, where is your guardian?

Acc: At home.'

The Magistrate then explained the rights to legal representation to the accused who elected to conduct his own defense. The accused was hereafter remanded in custody 'to be detained in a place of safety', which normally refers to a separate police holding cell for minors. The accused was unaware that he may have his guardian present as it was not explained to him in court. There was no attempt from the court to obtain the details of a possible guardian from the accused or any directions to the State to ensure the presence of a guardian.

[10] After conviction, the accused's rights to mitigation were explained, upon which he indicated he wish to call his mother:

'Crt: Where is your mother?

Accd: She is in Soweto. The police can assist me and she can come here'

This was a direct request from the accused to the court for assistance in securing the attendance of his witness.⁶ Instead the matter was remanded, without any assistance to the accused, for a pre-sentence report and his witness. Two remands later, with the witness for the accused still not present, the record reflects the following:

'Crt: Is your witness available?

Accd: No, she is not. My mother is pregnant

Crt: How do you want to proceed? Do you want time until this witness is available.....'

The accused, still in custody, unsurprisingly decided to proceed. The Magistrate at this stage had another tool at hand *to wit* Section 186⁷ of the CPA to subpoena the mother/family member as essential witness. The fact that the mother was pregnant did

⁶ See Section 179 of the Criminal Procedure Act 51 of 1977.

⁷ Section 186: 'The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.'

not mean that she was necessarily unable to attend court. The pre-sentence report is not mentioned again and the matter was finalized.

[11] The absence of a guardian, which in turn is a violation of the accused's right to a fair trial, does not *per se* vitiate the entire proceedings. This court is guided in this regard by the reasoning of Maritz J, in the matter of *S v M* 2006 (1) NR 156⁸, who stated that: 'It is only where the nature of the irregularity is such that a failure of justice has resulted that a court will set aside the conviction. The position is no different even if it is to be accepted that the irregularity has some bearing on the appellant's constitutional right to a fair trial'. In the matter of *S v M* (*supra*) the Judge relied on *S v Shikunga*⁹ where it was argued that in these circumstances the court is required to do a balancing act between the claims of society that a guilty person should be convicted against the claim that the integrity of the judicial process should be upheld.

[12] Applying the above principles to this case it is noted that the accused was properly informed by the magistrate before his plea of guilty that he is facing a serious charge for which direct imprisonment is the norm. The accused was also hereafter asked twice by the magistrate if he is certain to proceed without legal representation. The accused chose to proceed. The questioning and subsequent conviction appears to be in accordance with justice and will be confirmed. This should however not be regarded as a general approval for finalising matters without following proper procedure.

[13] The same cannot be said regarding the sentencing of the accused. The court, as the guardian of the values enshrined in our Constitution, failed the accused in this regard. There is an enormous pressure on Magistrates to finalize matters however this should not be done at the cost of a fair trial. The best interest of a minor should play a role even more so considering the fact that Namibia is a signatory to the UN Convention on the Rights of the Child.¹⁰ The court had various tools at its disposal to ensure a fair outcome however chose not to use any. There was a duty on the Magistrate to attempt

⁸ See *S v M* 2006 (1) NR 156 at page 159 Par B-D.

⁹ See *S v Shikunga and Another* 1997 NR 156 (SC).

¹⁰ See Articles 3, 5, 37 and 40 of the UN Convention on the Rights of the Child.

to secure the attendance of a parent/guardian.¹¹ If that was not possible, the assistance of a Social worker or at least a pre-sentence report could have guided the court in the sentencing of this minor.¹²

[14] Evidence on the personal circumstances of the accused by a parent/guardian during mitigation could have possibly influenced the court to impose a more lenient sentence.¹³ The accused was prejudiced by the court not assisting him with his witness in mitigation before sentence.¹⁴ The State before sentence, suggested 12 months imprisonment with the Magistrate imposing 24 months (with 12 suspended). There is no specific indication on the record why the Magistrate decided that the sentence suggested by the prosecutor was insufficient. Without the evidence or input of a parent or guardian and a social worker's pre-sentence report, it is difficult for this court to accept that the magistrate's sentence was well informed.¹⁵

[15] In the result the following order is made:

1. The conviction is confirmed.
2. The sentence is set aside and the matter remitted back to the court a quo to request and consider a pre-sentence report and sentence the accused accordingly.
3. The time spent in custody should be deducted when sentencing the accused afresh.

E. E. KESSLAU
ACTING JUDGE

¹¹ See *S v M (supra)*.

¹² See *S v Van der Bergh* 2003 NR 69 (HC).

¹³ See *S v Lambert* 1993 NR 303 (HC).

¹⁴ See *S v Lukas* 1999 NR 394 (HC).

¹⁵ See *S v Erickson* 2007 (1) NR 164 (HC).

I agree

J. T. SALIONGA

JUDGE