

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Kandapo Immanuel Tileni</i>	Case No.: CR 04/2023 Outapi: 5/2021
	Division of Court: Northern Local Division
Heard before: Honourable Mr Justice Munsu AJ <i>et</i> Honourable Mr Justice Kessler AJ	Delivered on: 10 February 2023
Neutral citation: <i>S v Tileni</i> (CR 04/2023) [2023] NAHCNLD 09 (10 February 2023)	
It is hereby ordered that: 1. The conviction and sentence are set aside.	
Reasons for the order: KESSLAU AJ (MUNSU AJ concurring)	
[1] The matter comes before this court in terms of section 304(2) of the Criminal Procedure Act 51 of 1977 as amended, (the CPA).	
[2] The accused was charged, convicted and sentenced in the Magistrate's Court of Outapi on a charge of assault, read with the provisions of the Combating of Domestic Violence Act 4 of 2003.	

[3] I directed a multitude of queries to the magistrate which read as follows:

1. On 29 July 2021 the accused plead guilty according to the record however the Magistrate proceeded in terms of section 115 of the Criminal Procedure Act 51 of 1977 as amended (CPA)?
2. What was the purpose of explaining the rights to disclosure to the accused after the complainant had already testified?
3. Proceedings attached to the original record appears to be from a different case of stock theft with three accused (dated 16 November 2021: S v Simon Natangwe and others). Why does it form part of this record?
4. The learned Magistrate on 12 August 2021 discharged the accused in terms of section 174 of the CPA however the case proceeded thereafter, ending in the conviction of the accused. In terms of which provision did the learned Magistrate act after the verdict was pronounced, whilst the court was for all intents and purposes *functus officio*?
5. From 12 August 2021 the matter was remanded to the 9th of September 2021 according to the first record (typed) however the next page (handwritten) is the same date and same case name with completely different proceedings displayed where the matter is remanded to the 2nd of September 2021?
6. From 12 August 2021 it took thirteen remands up to the 18th of July 2022 for the State to make submissions after the section 174 discharge was already granted. Why the delay?
7. The accused was kept in custody for the most part from his acquittal on 12 August 2021 to 18 July 2022 when the order was changed. On which basis was the accused kept in custody?
8. The learned Magistrate during judgment noted again that the 'accused pleaded guilty and denied all the charges ...'
9. The learned Magistrate noted during judgement that: 'The evidence before court is that the accused does not dispute the assault was perpetrated on the complainant by him...', however the accused throughout proceedings denied any assault?
10. The accused was sentenced on 19 July 2022 whilst the review was only forwarded more than three months later on 25 October 2022. Why the delay?

[4] The magistrate's explanation, for the most part, is that 'typing errors, oversight and misfiling' are to blame. In respect of the fourth query, the explanation reads that:

'Point 4 of the query the learned magistrate replies that there is a typing error in the same sentence the court made a section 174 application on behalf of the accused. The word 'is discharged' is a typing error that is why the state responded to have a response to the state application. The magistrate cannot be *functus officio* by then since that section 174 was wrongly pronounced as a typing error.' (sic)

[5] The relevant proceedings on 12 August 2021 are quoted verbatim as follows:

'Pp; The case is for Continuation of Trial; we will not call any other witness.

Crt: In that case Witness evidence is uncorroborated by the Witness Otilie mentioned in state evidence. Accused is discharged in terms of Section 174 of Act 51 of 1977.

Pp: We did not get time to respond to the accused application for Section 174, we wish to be given an opportunity. And we wish to have the court recuse itself because it has pronounced itself without giving the state an opportunity.

Crt: The Court is aware of the state response to Section 174, the state is hereby given time to reply on the next court date. Case remanded to 09/09/21 for Section 174 response and Recusal application by the state.' (Emphasis added)

[6] It is clear from the above that there is no typing error as stated by the magistrate as the magistrate even gave a reason before *mero motu* acquitting the accused prompting the State to request for her recusal. Rightly or wrongly so, when the discharge order was given, it was a final order.

[7] A judgment may be corrected in terms of s 176 of the CPA which states that: 'When by mistake a wrong judgment is delivered, the court may, before or immediately after it is recorded, amend the judgment.' (Emphasis added).

[8] The accused, for most part of the proceedings, was nothing more than a spectator at his own trial as he was not given any opportunity to address the court. Eleven months later, on 18 July 2022, the magistrate recorded that the s 174 application is dismissed and thereby changed her initial order. That amendment certainly does not qualify as 'before or immediately after'. Furthermore in *S v Brand*¹ it was held that s 176 does not entitle a magistrate to amend a judgment or verdict which had been arrived at as a result of a misdirection or as a result of following an incorrect procedure. Once such judgment has been pronounced the magistrate is *functus officio* and cannot review his/her own ruling.

[9] From what was recorded in court, it is clear that the magistrate consciously discharged the accused after reasoning that the evidence was not corroborated. The court was thus *functus officio*, having fully and finally exercised its jurisdiction in the

¹ *S v Brand* 1992(1) SACR 525 (Nm).

matter. The magistrate could not, even if she, with the benefit of hindsight, found that she erred, alter or correct the order.² I find that any proceedings that followed were grossly irregular and cannot be allowed to stand.

[10] Having reached the above conclusion, there is no need to discuss the remaining queries apart from mentioning that proper record keeping is of utmost importance and one of the inherent duties of a magistrate. The many 'typing errors', of which the wrongly recorded plea of the accused is but one, furthermore cast doubt on the accuracy of the record.

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

1. The conviction and sentence are set aside.

Judge(s) signature	Comments:
KESSLAU AJ:	None
MUNSU AJ:	None

² *S v Swartz* 1991 (2) SACR 502 (NC).