



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 11/2016

In the matter between:

THE STATE

And

TASSEN FALALI MABUNA

(HIGH COURT MAIN DIVISION REVIEW REF NO. 305/2016)

Neutral citation: State v Mabuna (CR 11/2016) [2016] NAHCMD 61 (8 March 2016)

Coram: SIBOLEKA J and USIKU J

Delivered: 8 March 2016

Flynote: Criminal procedure –Trial- Addressing court before sentencing by the state and accused in terms of s 274 (2) of the Criminal Procedure Act 51 of 1977 – Depriving accused of the opportunity to address court before sentence amounting to gross irregularity – accused severely prejudiced because he was denied the opportunity to put his mitigation before sentence – consequently, sentence set aside.

Summary: Criminal Procedure – Trial – addressing court before sentencing by the state and accused in terms of s 274 (2) of the Criminal Procedure Act 51 of 1977 – the opportunity to address the court in mitigation of sentence as contemplated in s 274(2) of the Criminal Procedure Act 51 of 1977.

ORDER

- (a) The conviction is confirmed.
- (b) The sentence is set aside.
- (c) The matter is returned to the learned magistrate for him to comply with s 274 (2) of the Criminal Procedure Act 51 of 1977 and sentence the accused afresh.

REVIEW JUDGMENT

USIKU J, (SIBOLEKA J CONCURRING)

[1] The accused was charged with the crime of escaping from lawful custody in the magistrate court Katima Mulilo. He pleaded guilty and was questioned in terms of s. 112(1) (b) of Act 51 of 1977 where after the magistrate convicted and proceeded to sentence the accused to twelve (12) months imprisonment without affording the state and the accused an opportunity to address the court.

[2] Having realised his oversight the matter was sent on review with a covering letter from the learned magistrate indicating the following “Kindly place the attached record before the judge of the High Court with the following comments as it more fully appears on record the accused person pleaded guilty to a charge of escaping from lawful custody the court proceeded in terms of section 112(1) (b) of the Criminal

Procedure Act 51 of 1977. After conviction the court proceeded to pronounce sentence without affording the parties any opportunity to address the court in mitigation and aggravation. This was due to a bona fide oversight on the part of the undersigned and will be guided against in future. May it please the judge to set aside the proceedings after conviction if the judge is satisfied that the proceedings up to that stage were proper and remit the matter back to the trial court for the parties to be afforded the opportunity to address in mitigation and aggravation of the sentence and the court then proceed to sentence the accused afresh”

[3] I am of the view that the concession is correctly made in view of the provision of section 274 (1) and (2) reads as follows:- “ The accused may address the court on any evidence received under subsection (1) as well as on the matter of sentence, and there after the prosecution may likewise address the court”

[4] Where s 175 of the Criminal Procedure Act 51 of 1977 (CPA), which concerns prosecution and defence address to court at the conclusion of evidence, has been breached the authorities are one on principle that such violation is a gross irregularity which may result in the setting aside of the proceedings unless it is clear that the accused was not prejudiced thereby. (See eg *S v Paulus* 2010 (2) NR at 534) In the present case it is not s 175 of the CPA which was breached, but s 274 (2), which concerns address before sentence. In that event I do not think it is in the interests of the administration of justice that the conviction, too, should be set aside because the irregularity committed is in respect of sentence not conviction. I am of the view that it is in the interest of justice that the conviction is confirmed but the sentence be set aside, because the accused was severely prejudiced as he was denied the opportunity to address the court before sentence.

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

- (a) The conviction is confirmed.
- (b) The sentence is set aside.
- (c) The matter is returned to the learned magistrate for him to comply with s 274 (2) of the Criminal Procedure Act 51 of 1977 and sentence the accused afresh.

DN USIKU

Judge

A SIBOLEKA

Judge