

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CR 08/2013

In the matter between:

THE STATE

and

WILHELM NDAHANGE TATE

High Court NLD Review Case Ref No.: 02/2013

Neutral citation: *The State v Tate* (CR 08/2013) [2013] NAHCNLD 18 (15 April 2013)

Coram: LIEBENBERG J and TOMMASI J

Delivered: 15 April 2012

Flynote: **Criminal procedure** – Trial - The prosecution - Stopping of prosecution - Unauthorised stopping of prosecution by prosecutor amounts to nullity - It doesn't follow from fact that unauthorised stopping of prosecution and subsequent acquittal amount to nullities that entire proceedings thereby vitiated - If accused has pleaded, she or he is entitled to verdict on plea – Closing of the State case on one count and subsequent acquittal set aside and matter remitted to magistrate to continue with trial if the required consent not obtained.

Summary: After the accused pleaded guilty on both counts the court entered a plea of not guilty in respect of count 1. He was correctly convicted on count 2. During subsequent proceedings the complainant on count 1 was absent and the prosecutor asked the court to deem the State case closed. The court acquitted the accused on that count in terms of s 174. On review found that the closing of the State case amounted to a stopping of prosecution and whereas the consent of the Prosecutor-General had not been obtained beforehand, the stopping was void. The accused's subsequent acquittal thus amounted to a nullity. The closing of the State case and the acquittal on count 1 set aside.

ORDER

1. The closing of the State case and the accused's subsequent acquittal in terms of s 174 of Act 51 of 1977 on count 1 is set aside.
2. The matter is remitted to the trial court with the direction to proceed to trial on count 1 when the prosecutor is unable to obtain the Prosecutor-General's consent to stop prosecution.
3. The conviction and sentence on count 2 are confirmed.

JUDGMENT

LIEBENBERG J (TOMMASI J concurring):

[1] In this matter the accused appeared in the magistrate's court for the district of Eenhana on two counts of housebreaking with intent to steal and theft. He pleaded guilty on both counts but in respect of count 1 a plea of not guilty was entered after the accused raised a defence. He was correctly convicted and sentenced on count two.

[2] The matter was thereafter remanded and during a subsequent appearance 6 months later, the prosecutor informed the court that despite the complainant in count 1 having been subpoenaed to attend proceedings on that day, she was absent. He then invited the court to 'deem the State's case closed'. The record reflects that the court thereafter deemed the State case to be closed and discharged the accused on count 1 in terms of s 174 of the Criminal Procedure Act, 1977 (Act 51 of 1977) and proceeded to sentence on count 2.

[3] On review a query was directed to the presiding magistrate enquiring from him whether, in the light of the provisions of s 6 of the said Act, this did not amount to a stopping of charges which, at that stage of the proceedings, required the consent of the Prosecutor-General.

[4] The learned magistrate in his response conceded that the decision not to lead evidence on count 1 did not carry the consent of the Prosecutor-General as required by s 6 and thus the result of the prosecutor's actions was void. The concession is properly made.

[5] In a similar matter this court in *The State v Samuel Ekandjo*¹ said that where the prosecutor decides not to proceed with a charge against the accused (after the accused has pleaded to the charge) it is incumbent upon

¹ Unreported Case No CR 04/2010 delivered on 23.04.2010.

the presiding officer to enquire from the prosecutor whether the consent of the Prosecutor-General in that respect has been obtained because without such consent the stopping is void. See *S v Van Niekerk*²; *S v Hlokulu*³; Du Toit *Commentary on the Criminal Procedure Act* (Service 47) at 1-4Z. The following was said in the *Ekandjo* matter (*supra*) at 3:

[6] In the present case after the accused pleaded not guilty on count 1, the State closed its case without leading evidence whereafter the court acquitted him in terms of s.174 of the Act. The acceptance of the accused's plea of not guilty by the prosecutor, in effect, amounted to a stopping of prosecution on count 1, requiring the consent of the Prosecutor-General; which was not obtained. This was followed by the accused's acquittal. The unauthorised stopping of prosecution would amount to a nullity (*S v Van Niekerk (supra)*) and I respectfully agree with the remarks of Pickering J in *S v Tengo* 2003 (1) SACR 162 (ECD) at 163e-h that, so would be the court's subsequent acquittal of the accused as a result thereof.'

[6] In the instant matter the prosecutor has to either obtain the consent of the Prosecutor-General to stop the prosecution, or proceed to lead evidence on count 1.

[7] In the result, the following order is made:

1. The closing of the State case and the accused's subsequent acquittal in terms of s 174 of Act 51 of 1977 on count 1 is set aside.
2. The matter is remitted to the trial court with the direction to proceed to trial on count 1 when the prosecutor is unable to obtain the Prosecutor-General's consent to stop prosecution.
3. The conviction and sentence on count 2 are confirmed.

² 1985 (4) SA 550 (B).

³ 1988 (1) SA 174 (C).

JC LIEBENBERG
JUDGE

MA TOMMASI
JUDGE