

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

versus

**SALOMON CHRISTIAAN**

**Accused**

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**HIGH COURT REVIEW CASE NO. 66/08**

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**CORAM: PARKER J. et ANGULA, A.J.**

Delivered on: 2008.05.27

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**REVIEW JUDGMENT**

**ANGULA, A.J.:**

[1] This matter has been placed before me for review in terms of section 116(3) of the Criminal Procedure Act. The accused was committed to the Regional Court for sentencing. The Regional Magistrate stated in his memorandum that having considered the record of proceedings in the Magistrates Court, he was of the opinion that the proceedings were not in accordance with justice, for the following reasons:

*"1. The evidence in the Magistrate's Court was led in such a way that it creates the impression that the State witnesses were being cross-examined. It was coached in a form of question and answer and was definitely not leading of evidence.*

*2. The previous convictions of the accused have not been properly proven before*

*the Magistrate that referred the accused for sentence in terms of Section 116(1) (b) of the Criminal Procedure Act 57/77 (S v Kgomo 1978 (2) SA 946 T). Vide Annexure "E" previous convictions of accused which were not put to the accused by the public prosecutor after the conviction of the accused.*

*3. The accused indicated on 20/6/06 that he would conduct his own defence relinquishing his right to be legally represented by a lawyer of his choice. However, when the charge was put to him he pleaded not guilty. It was then imperative upon the Magistrate to explain to the unrepresented accused the provisions of s. 115(1), Act 57/77, namely: to invite the accused to make a short statement indicating the basis of his defence that he was not obliged to make such a statement and to remain silent which is his constitutional right to do so.*

*4. Although the Magistrate stated on page 5 of the court record "Plea explanation (S115)" that was not sufficient. The Magistrate should have stated in express terms and on record that he explained to the accused."*

[2] I have read and considered the record of the proceedings in the Magistrates Court and respectfully agree with the observations and conclusions of the Regional Magistrate that for those reasons the proceedings were not in accordance with justice. This court has in a number of review judgments emphasised the importance of the strict and proper application of the provisions of section 115 of the Criminal Procedure Act:

*"(1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.*

*(2)(a) Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.*

*(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.*

*(3) Where the legal adviser of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, the accused shall be required by the court to declare whether he confirms such reply or not.*

See: S v Sanders 1990 NR 348 (HC) at 351 B - C

- [3] Similarly: *“On plea of not guilty s 115 of the Criminal Procedure Act requires the presiding officer to inform the accused that he can make a statement setting out his defence to the charge and that such officer can also ask questions in order to determine which*

*allegations, set out in the charge, are in issue. However, the presiding officer should also, at the same time, explain to the accused that he is not obliged to make any statement or to answer any questions. The accused is therefore given a choice either to remain silent or to explain. The choice is that of the accused and this must be fully explained to him. What is more, the presiding officer must then put it on record that the accused's rights, and in particular his right to remain silent, were explained to him. (See further S v M en Andere 1979 (4) SA 1044 (B); S v Evans 1981 (4) SA 52 (C); and S v Daniëls en 'n Ander 1983 (3) SA 275 (A).) In the present case no explanation as required by s 115 was given."*

See: S v Cachimbembo 1990 NR 290 at 292 C - E

[5] The fact that the provisions of section 115 have been complied with must clearly appear from the record. It cannot be assumed. I am of the view that the multiple irregularities which took place in the Magistrates Court and as outlined by the learned Magistrate of the Regional Court, vitiates the proceedings.

[6] In the result the conviction is set aside.

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**ANGULA, A.J.**

I concur.

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**PARKER, J.**