



CASE NO.: CR 53/2011

“Not Reportable”

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

vs

JULIUS MBANGULA

HAFENI MATHEUS

(HIGH COURT REVIEW CASE NO.: 924/2011)

CORAM: PARKER, J et, SIBOLEKA, J

Delivered on: 2011 July 12

REVIEW JUDGMENT

PARKER, J [1] The learned magistrate has submitted this matter for, in his words, ‘special review, not in terms of section 304, but for the High court to exercise its inherent jurisdiction and rectify the gross irregularity committed by the learned magistrate I J Gawanab’. The learned magistrate explained as follow verbatim:

1. Both accused persons pleaded not guilty to the charge of attempted murder on 20th August 2010, before Magistrate C Olivier, whereupon a trial ensued. However, due to time constraint the case was adjourned for cross-examination of the state witness by both accused persons. On the remand date, accused 2 was absent; and a warrant for his arrest was issued!
2. On 25th February 2011, the state was not able to proceed due to a docket that was not in court nor accused 2 was arrested which prompted the state to apply for a further remand. This request was turned down by the Magistrate I J Gawanab, and proceeded to withdraw the matter against accused 1, whilst it was a part heard case before Magistrate C Olivier.
3. Accused 2 has since been re-arrested on a J50 and brought before court. He was remanded in custody and is to appear on 6 May 2011, for case to proceed. Because of Magistrate Gawanab's ruling which withdrew the case against accused 1, Magistrate Olivier cannot proceed with the trial in respect of both accused and, hence, the following request:- That the ruling made by Magistrate I J Gawanab on 25th day of February 2011, be set aside to allow Magistrate C Olivier to proceed with her part heard trial and bring it to finality (restore case of accused 1 to the status quo ante).

[2] The handwritten record of the proceedings appears to indicate that on 25 February 2011 the public prosecutor sought an adjournment of proceeding on the basis that accused 2 was 'still at large'. The learned magistrate (Gawanab) refused to grant the public prosecutor's request to adjourn proceedings and to remand accused 1. Whereupon the following exchange ensued:

PP: Withdrawn
Court: Withdrawn

[3] It appears the public prosecutor submitted that he (or she) was withdrawing the charge against accused and the learned magistrate accepted the public prosecutor's submission. The exchanges between the learned magistrate and the public prosecutor completed the proceedings for the day. It is not clear as to what order the learned magistrate granted. Such confused state of affairs should not be allowed to occur in judicial proceedings. The power to withdraw a charge or stop prosecution lies with only the prosecuting authority as provided for s. 6 of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the CPA'). Since accused 1 was in court the learned magistrate ought to have made an order that dealt with the situation of accused 1 in terms of s. 6 of CPA.

[4] It would seem the public prosecutor withdrew the charge against accused 1. In that event para (b) applies. The learned magistrate ought to have acquitted accused 1 in terms of para (b) of s. 6. The court has become *functus officio* as far as accused 1 is concerned. The charge cannot be restored against accused 1 by the same court. The trial can only proceed in respect of accused 2, because the charge against him has not been withdrawn.

[5] This Court cannot set aside the decision of the learned magistrate because it does not appear on the record that there has been a failure of justice. In the result, it is ordered –

- (1) That accused 1 is acquitted in respect of the charge.
- (2) That the trial of accused 2 should proceed.

PARKER, J

I agree.

SIBOLEKA, J