



CASE NO.: CR 69/2011

“Not Reportable”

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

VS

BENEDICTUS KANDJII

(HIGH COURT REVIEW CASE NO.: 919/2011)

CORAM: PARKER, J et, SIBOLEKA, J

Delivered on: 2011 September 21

REVIEW JUDGMENT

PARKER, J [1] This matter has been referred to me by way of special review in terms of s 304 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) ('CPA'). The accused was arraigned in the magistrates' court, Okakarara, on (1) attempted murder Act sec 80(1) of 22 of 1999 Reckless of Negligent Driving; (2) Sec 78(1)(a) of 22 of 1999 fail to stop the vehicle, after the accident; (3) Sec 78(1) (b) of 22 of 1999 fail to ascertain the nature and extent of any injury; (4) Sec 78(1)

(c) of 22 of 1999 fail to render such assistance to any injured; and (5) Sec 78(1)(d) of 22 of 1999 fail to ascertain the nature and extent of any damage sustained. The trial commenced and proceeded before Magistrate Ngwanga whose fixed-term contract of employment was not extended on its expiration, and so she returned to her home country, Zimbabwe.

[2] In such a situation, it has been said (see *S v Scheepers* 2009 (2) SACR 58 at 61g-h per Willis J) that the failure of a lower court to apply for the setting aside of proceedings and the commencement of a trial *de novo*, as a result of the unavailability of the magistrate who began hearing evidence in the matter, will not necessarily result in a finding that an accused was subsequently wrongly convicted, if a trial *de novo* does, in fact, take place without the prior sanction of the High Court. Nevertheless, it would certainly be desirable and good practice for an application to be made to the High Court, by way of special review, for the setting aside of previous proceedings and the commencement of a trial *de novo*. Rather than take the risk of injustice and unnecessary expense and inconvenience for the State and the accused, it is, by far, preferable to approach the High Court for a special review: the commencement of a trial *de novo* is not merely an administrative matter.

[3] I respectfully accept the point made by Willis J as a correct statement of law and so I adopt it. Having done so I make the following order:

- (1) The trial proceedings before the magistrate, Ms Ngwanga, in this matter are set aside.
- (2) The trial may commence *de novo* before another magistrate at the discretion of the Prosecutor General.

PARKER, J

I agree.

SIBOLEKA, J