CASE NO.: CR 34/2011

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

(1) AGILES EFRAIM ASINO
(2) SHILONGO MAGHADHI

(HIGH COURT REVIEW CASE NO.: 281/2011)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 18 November 2011

REVIEW JUDGMENT

LIEBENBERG, J.: [1] This review came before me in terms of s 304 (4) of the Criminal Procedure Act, 1977[1] and was sent by the magistrate of Outapi on review when realising after the trial had commenced and the evidence of

[1] Act 51 of 1977

the first witness was already led by the State, that accused no 2 never pleaded to the charge.

[2] Proceedings were stopped and, despite the magistrate's direction already given on 19 May 2010 that the matter had to be sent on review, the magistrate, in a letter dated 30 August 2011 (more than a year later!), explains that the Clerk of the Court failed to forward the record to this Court. The magistrate explains that she was under the impression that the case had been sent as directed; but, had that been the case, then she must have realised that her reasons had to accompany the record and that it could not have been sent without reasons explaining the need to have the proceedings reviewed – more so, when the matter again came before the same magistrate four months later.

[3] I pause here to observe that accused no 1 already pleaded to a charge of housebreaking with intent to steal and theft on 20 April 2007, whereafter the case was postponed at the instance of the prosecution twenty times over a period of more than three years before the first witness testified! I have no doubt that the irregularity which arose in this case came as a direct consequence of numerous postponements over a long period of time and that both the public prosecutor and the magistrate, in the process simply lost track of the proceedings as a result thereof. This underscores the need and importance for magistrates to see to it that cases are not unnecessarily and without good reason postponed – particularly not over such a long period of time. Under the Namibian Constitution an accused is guaranteed a fair trial

and which must take place within a reasonable time; failing which the accused must be released.[2] The courts are obliged to uphold the Constitution and when dealing with unrepresented and apparently unsophisticated accused, the duty to protect such accused becomes even more compelling. It seems to me that, irrespective of the outcome of subsequent proceedings, and whether or not the accused persons were released on warning, that it cannot be said that they up to now were given a fair trial as envisaged in the Constitution. In the light thereof, the prosecuting authority should give serious consideration in bringing an end to the case against the accused persons, without pursuing a trial.

[4] From the record of the last proceedings held on 13 September 2010, it would appear that the accused persons were released on their own cognisance, pending the outcome of the review. Whether that is still their position, is unknown.

[5] Section 304 (4) of the Criminal Procedure Act provides for review proceedings in circumstances where it has come to the attention of the Court or a judge thereof, that the proceedings in which *sentence was imposed,* were not in accordance with justice; in which instance the Court or judge shall have the same powers in respect thereof as if the record had been laid before such Court or judge in terms of s. 303 of the Act. Because sections 302, 303 and 304 (4) only provide for cases to be sent on review *after* sentence has been imposed, this created a problem in cases where a magistrate, who was of the view that the proceedings or a conviction was not in accordance with justice

[2] Article 12 (1)(b)

or not justified, was nevertheless obliged to impose sentence before the case could be sent on review in terms of the sections referred to above. The present review is a case on point. Unlike South Africa, the Criminal Procedure Act has not been amended in this jurisdiction by the insertion of s. 304A[3], which provides for the review of proceedings *before* sentence.

[6] This Court in *S v Immanuel*[4] on the reviewing powers of the Court in terms of s. 304 (4) said the following at 328B-D:

> *"Firstly, the proceedings in this case are not reviewable in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 (the Act) on the ground that the accused has not been convicted. In other words, where a conviction has not been entered (or where a conviction had been entered but is not followed by sentence), the provisions of s 304(4) of the Act are not available. Secondly, although this court has inherent power to curb irregularities in magistrates' courts by interfering (through review) with unterminated proceedings emanating therefrom, such as the present proceedings, it will only exercise that power in rare instances of material irregularities where grave injustice might otherwise result, or where justice might not be attained by other means. See S v Burns and Another 1988 (3) SA 366 (C) at 367H; Ismail and Others v Additional Magistrate, Wynberg and Another 1963 (1) SA 1 (A) at 5G - 6A."*
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> (emphasis provided)

See also *S v Handukene*[5] where the accused was tried and convicted on a charge of rape in the Magistrate's Court without that court having the required

[3] Inserted by s. 22 of Act No. 33 of 1986
[4] 2007 (1) NR 327 (HC)
[5] 2007 (2) NR 606 (HC)

jurisdiction under the Magistrates' Courts Act 32 of 1944, to hear the case. When the matter was remitted for sentence to the Regional Court for sentence, the magistrate noticed the irregularity and without sentencing, sent the matter on special review. On review it was found that the proceedings were conducted without any jurisdictional basis and that the entire proceedings were irregular and null and void. Appreciative that the proceedings could not be reviewed in terms of s. 304 (4) of the Act, as sentence was not passed, the Court said the following at p. 607I-608A:

> *"[5] This cannot be done by review in terms of s 304(4) of the Act, as this section requires that there must have been a sentence imposed in the magistrate's court. However, it would be untenable to refer the matter back to the regional magistrate to first sentence the accused while knowing that the original proceedings upon which the sentence is based, are a nullity. In terms of s 20(1)(a) of the High Court Act 16 of 1990, this court may review the proceedings of a lower court on the grounds that that court had no jurisdiction to conduct those proceedings, as is the case here. Although the correct procedure has not been followed in terms of the Rules of the High Court, this court may regulate its own procedure. There can be no good purpose served by referring the matter back merely for the rules to be followed. This will only prejudice the accused in whose interests it is that this matter be dealt with as expeditiously as possible."*

[7] Although the trial court in the present instance has the required jurisdiction to try the matter, it committed an irregularity by commencing with trial proceedings against accused no 2 without him having pleaded to the

charge. Section 105 of the Act[6] in peremptory terms states that the charge *shall* be put to the accused by the prosecutor *before* the trial is commenced, which was not done in respect of the second accused. A gross irregularity was committed by the trial court in this regard, which, undoubtedly, vitiates the entire proceedings – even if the case were run its full course up to the stage of sentence. This Court in terms of s. 20 (1)(c) of the High Court Act 16 of 1990 may review the proceedings on the grounds that a gross irregularity was committed in the proceedings held in the Magistrate's Court and, in my view, this case falls in the category of cases where grave injustice would result if the trial were to proceed; and where justice cannot be attained by any other means. Even though the requirements of s. 304 (4) have not been satisfied in that the proceedings are not terminated, it would be in the interest of justice to have this matter be dealt with as expeditiously as possible.

[8] The non-availability of magistrate Iyambo, who originally presided over the case and who, in the mean time, has been appointed as the magistrate of Opuwo, would adversely impact on the continued proceedings hereafter. In the light thereof, proceedings should continue before the magistrate(s) sitting at Outapi in terms of s. 118 of the Act. Admissions made by accused no 1 during the s. 112 (1)(b) questioning does not constitute "evidence"[7]; accordingly, it is not improper for one magistrate to take down the plea and conduct questioning in terms of s. 112 and record a plea of not guilty in terms of s. 113, and thereafter, due to the unavailability of that magistrate, for a second magistrate to oversee the trial. What is required in such instance is

[6] Act 51 of 1977
[7] *S v Hendriks,* 1995 (2) SACR 177 (A)

for the record to reflect that the magistrate, originally seized with the matter, is not available.

[9] In the result, it is ordered:

1. The proceedings of 19 May 2010, held in the Magistrate's Court Outapi, are hereby set aside.
2. The plea of accused no 1 remains standing and the matter is remitted to the Magistrate's Court Outapi for continuation.
3. In the absence of the magistrate originally seized with the matter, the provisions of s. 118 of Act 51 of 1977 must be invoked.

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LIEBENBERG, J

I concur.

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TOMMASI, J