



CASE NO.: CR 09/2012

NOT REPORTABLE

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**CORNELIUS ISAK SWARTBOOI**

**HIGH COURT REVIEW CASE NO.: 184/2012**

**CORAM:** HOFF, J *et* MILLER, AJ

Delivered on: 15 February 2012

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**SPECIAL REVIEW JUDGMENT**

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**HOFF, J:** [1] The accused person was charged with and convicted of the crime of attempted murder in the magistrate's court. The presiding magistrate after conviction but before sentence forwarded the record of the proceedings on special review with the following motivation which I quote verbatim:

“There was evidence beyond reasonable doubt that the accused assaulted the complainant however, the intention by the accused to murder the complainant was not proven by the evidence adduced by State that it constituted an attempt to murder. The accused stabbed complainant once, and ran, there is no evidence proving accused intention was to murder complainant. Even if he stabbed complainant on part of body regarded as sensitive, used a knife regarded as a dangerous weapon, this merely proves he intent to assault grievously and not attempted murder, as the evidence adduced does not prove that accused was persistent in his attack on the complainant.”

[2] The evidence of the complainant was that he was stabbed once in his throat in an unprovoked attack. He was admitted to the Mariental State Hospital and thereafter transferred to Windhoek State Hospital where he regained consciousness after three days. He was in the intensive care unit for one week. He regarded it as a miracle that he survived the attack on him.

[3] It is clear from what was quoted that the presiding magistrate is eliciting the reviewing judge’s view whether or not she is correct in her evaluation of the evidence presented by the State.

[4] I must say at this stage that it is not necessary for this Court to express any view on the correctness or otherwise of the view expressed by the learned magistrate in her cover letter.

[5] This matter is at this stage not reviewable in terms of the provisions of section 304(4) of Act 51 of 1977.

[6] Section 304(4) of Act 51 of 1977 provides as follows:

“If in any criminal case in which a magistrate has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.”  
(Underlining mine).

[7] I am aware of the fact that section 304(4) had been amended in the Republic of South Africa by the insertion of section 304 A to make provision for the review of proceedings before sentence. This amendment is however not applicable to this jurisdiction even though, in my view, it will certainly serve the administration of justice here should the legislature similarly amend section 304.

[8] In *S v Mametja* 1979 (1) SA 767 (TPD) an accused was convicted of a statutory offence. The matter was postponed for sentence. On the date of sentence the magistrate who had convicted the accused was not available and in terms of section 275 of Act 51 of 1977 another magistrate presided for the purpose of sentencing. The second magistrate was of the opinion that the conviction was not supported by the evidence, refused to pass sentence and referred the matter to the provincial division for review:

Van Dijkhorst AJ (as he then was) at 768 B – C responded as follows:

“This case is not reviewable in terms of s. 302 and s. 304(4) of Act 51 of 1977. These sections only deal with review *after* sentence.”

[9] In *S v Immanuel* 2007 (1) NR 327 HC Silungwe AJ said the following on this point:

“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 had 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 367 H; *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A) at 5G – 6A. Evidently, none of such rare instances is present in the instant case.”

(See also *S v Handuke* 2007 (2) NR 606 (HC) at 607 H).

[10] I agree with this exposition of the present legal position in this jurisdiction relating to review proceedings in terms of section 304(4) prior to sentence and in which circumstances this Court will exercise its inherent powers of review to curb irregularities in lower courts.

[11] In the result the record of the proceedings is returned and the magistrate is instructed to sentence the accused person on the charge of attempted murder.

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**HOFF, J**

I agree

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**MILLER, AJ**