



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 51/2013

In the matter between:

**THE STATE**

**APPLICANT**

and

**TUVONE MURANDA**

**RESPONDENT**

*(SPECIAL REVIEW)*

**Neutral citation:** *State v Muranda* (CR 51/2013) [2013] NAHCMD 237 (7 August 2013)

**Coram:** SHIVUTE J *et* PARKER AJ

**Delivered:** 7 August 2013

**Flynote:** Special review – Accused pleaded guilty to one count of assault with intent to do grievous bodily harm and was convicted accordingly – Before sentencing, the trial magistrate ordered the accused to undergo psychiatric evaluation – Upon the psychiatric report the trial magistrate applied s 9 of the Mental Health Act 18 of 1973 and declared the accused to be a civil patient – The court found that the trial magistrate applied the wrong law and so the court set aside the order or sentence.

**Summary:** Review – Special review – Accused pleaded guilty to one count of assault with intent to do grievous bodily harm and was convicted accordingly – Before sentence the learned magistrate court ordered the accused to undergo

psychiatric evaluation – The psychiatric report indicates that at the time of the commission of the offence the accused was suffering from a mental illness and as a result was unable to appreciate the wrongfulness of his action and to act in accordance with such appreciation – Acting upon the report the trial court applied s 9 of the Mental Health Act 18 of 1973 and declared accused to be a civil patient – Court found that the trial court applied the wrong law – The court held that the trial court should have applied s 78(6) of the Criminal Procedure Act 51 of 1977 – Accordingly, the court remitted the case to the learned magistrate for her to apply s 78(6) of Act 51 of 1977.

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### ORDER

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- (a) The sentence or order of the trial magistrate is set aside.
- (b) The matter is remitted to the trial magistrate for her to apply s 78(6) of Act 51 of 1977 in respect of the accused person.

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### JUDGMENT

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PARKER AJ (SHIVUTE J concurring):

[1] This matter comes to the court for special review. The accused appeared before the magistrate's court, Rundu, charged with one count of assault with intent to do grievous bodily harm. He pleaded guilty to the charge, and was convicted upon his plea of guilty. Thereafter, the accused made statements on mitigation of sentence; whereupon the learned magistrate stated:

'It seems that he is mental retardant (retarded). The best is for him to be referred to the immigration board for him to be deported. Referring him to the mental observation is not a solution at all. Sentencing him will be a serious rush.'

[2] Following upon that statement, the learned magistrate halted the proceedings and remanded the accused in custody. Upon resumption of proceedings the public prosecutor made an application for the matter to be 'remanded to 14/06/2012 for mental observation'. The learned magistrate ordered: 'Adjourned 14/06/2012 for mental observation. Accused remanded in custody'. Proceedings were adjourned on several occasions and on each occasion the learned magistrate with unbroken regularity ruled: 'Adjourned to (date) for mental observation. Accused remanded in custody'. Then on 17 May 2013 the learned magistrate made the following order: 'Remanded to 20/05/2013 for accused (to) be brought. Warrant of removal issued'.

[3] On resumption of proceedings on 20 May 2013 the public prosecutor stated: 'The accused has been observed and (I) hand in the psychiatrist report. May it be handed in (admitted) and marked as exhibit 'A.' The learned magistrate then ruled: 'Psychiatrist report is admitted as exhibit 'A.' The findings of the psychiatrist are as follows:

'At the time of writing the report, the accused was unfit to plead and stand trial. At the commission of the crime he was suffering from mental illness and as a result was not able to appreciate the wrongfulness of the alleged offence and act according (in accordance) with such appreciation.'

[4] After admitting the psychiatrist report the learned magistrate made the following order:

'In terms of section 9 of Act 18/73 accused is declared a civil patient.'

The learned magistrate further 'recommends that the accused be referred to the immigration board for him to be deported to his country of origin Botswana'.

[5] The submission for special review was made by the Control Magistrate, Rundu Division; and he encloses his comments, which in relevant parts, read:

- '5. It is my humble view that the accused should not have been declared a civil patient. The accused was appearing before the court because he was alleged to have committed a criminal offence. He was not appearing before court following any civil application made by someone for him to be detained in a mental institution in terms of chapter 3 of the Mental Health Act.
  
6. In my opinion the accused ought to have been declared a state president's patient once the court had made a finding in terms of Section 78(6) of the Criminal Procedure Act.'

[6] I accept the comments by the learned Control Magistrate. The trial magistrate should have applied s 78(6) of the Criminal Procedure Act 51 of 1977 which provides:

'If the court finds that the accused committed the act in question and that he at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act, the court shall find the accused not guilty by reason of mental illness or mental defect, as the case may be, and direct that the accused be detained in a mental hospital or a prison pending the signification of the decision of the State President.'

[7] In the result, I make the following order:

- (a) The sentence or order of the trial magistrate is set aside.
  
- (b) The matter is remitted to the trial magistrate for her to apply s 78(6) of Act 51 of 1977 in respect of the accused person.

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C Parker  
Acting Judge

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N N Shivute  
Judge