REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 19/2017

In the matter between:

LOGAN PRETORIUS	**FRIST APPELLANT**
REGGENALD CARLO	**SECOND APPELLANT**
BEZUIDENHOUT SANDRA RIOBO	**THIRD APPELLANT**
GENIELLE PRETORIUS	**FOURTH APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Pretorius & 3 Others v State* (CA 19/2017) [2017] NAHCMD 266 (15 September 2017)

Coram: SHIVUTE J and USIKU J

Heard: **30 June 2017**

Delivered: **15 September 2017**

Flynote: Criminal procedure - Review- In what cases - Review proceedings only applicable where accused convicted and sentenced - Proceedings not finalised -

Review of unterminated proceedings - Court will only deal with unterminated cases on review under rare circumstances - Recusal application - Such be based on facts - Such facts must give rise to a reasonable apprehension of bias - Facts must appear from the record - No such facts that the magistrate was biased - Application for recusal dismissed - Court in present case referring the case back to the magistrate's court for the purposes of sentencing -Application for recusal dismissed.

Summary: The appellants pleaded guilty to charges of dealing in dependence producing substances and defeating or obstructing the course of justice in respect of appellant three and four respectively. They were represented by counsel who handed in statements in terms of section 112 (2) whereafter each appellant was convicted as charged.

The case was postponed to the 27 October 2015 upon request of the state in order to confirm whether each appellant had previous conviction or not. The matter was again postponed on various dates for different reasons.

ORDER

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(1) The application for recusal is dismissed.

(2) The matter is referred back to the learned magistrate for the purposes of sentencing and finalization.

APPEAL JUDGMENT

USIKU J, (SHUVITE J concurring)

INTRODUCTION

[1] On the 5th October 2015 the appellants appeared before the Walvis Bay magistrate court facing counts of dealing in dependence producing substances and defeating or obstructing the course of justice in respect of third and fourth appellant respectively. Each appellant pleaded guilty to the charges. They were represented by counsel who handed in statements in terms of section 112 (2) whereafter each appellant was convicted as charged.

[2] The case was postponed to the 27 October 2015 upon request of the state in order to confirm whether the appellants had a record of previous conviction or not.

[3] When the court reconvened on the 27 October 2015, the appellants informed the court that they had engaged the services of a new legal representative who was not present at court but had sent a letter requesting for a further remand. The matter was again postponed to 10 November 2015. On that date the appellant's legal representative was again not present at court and the matter was postponed to a further date. The reasons for his absence was that he was engaged in the Windhoek Regional Court. The matter was postponed for the third time to the 18[1] of February 2016.

[4] On 18 February 2016, the appellant's legal representative appeared before court on their behalf and made an application for a postponement in order to have the matter sent on review to this court. The reason advanced for review was that there had been a problem in the procedure followed by the court. The matter was again postponed to 1'2 May 2016 allegedly pending the review proceedings. On the 1'2 May 2016, the appellants' legal representative was absent again reason being that he was awaiting to obtain affidavits from an appellant who had travelled to South Africa, the matter was postponed to 14 June 2016. On the 14 June 2014, the appellants appeared before court, without their legal representative who was said to be in Botswana and the matter was again postponed to 17 October 2016.

[5] On 17 October, counsel for the appellant informed the court that he had received instructions to proceed in terms of section 113 and indicated that he will call

the appellants to testify. When questioned what had happened to the review application he responded that he had withdrawn that application. The state objected to the application stating that there is no such procedure in law.

[6] The court too refused to invoke the provisions of section 113 of the Criminal Procedure Act. Counsel for the appellant then again applied for the matter to be sent on review on the basis that the court had refused to allow the appellants to testify in order to retract their guilty pleas, which application was also refused. Counsel for the appellant then brought the application for recusal. The application for recusal was postponed to the 18 November 2016. On that date counsel for the appellants was again absent from the court, the reason being that he was out of the country. The matter was stood down and on resumption the court was informed that counsel for the appellants was away in Angola to consult with a client.

(7) Counsel for the state then argued that the matter had been postponed on too many occasions and that the postponements were only delaying tactics from the defence counsel as the case was merely for sentencing which could have been done already. He requested the matter to proceed despite the absence of the appellants' legal representative. The appellants then indicated that they were going to speak to their counsel and if he was not available they would engage the services of another legal representative. The matter was then postponed to 22 November2016.

[8] On the 22 November 2016, the application for recusal was heard and the matter was postponed to the 12 December 2016 for the court's ruling. On the 12 December 2016 the application for recusal was dismissed. Aggrieved by the dismissal of the application for recusal, the appellants' now appeal against such refusal.

(9] I will first deal with the issue of review raised by counsel for the appellants. Section 304 (4) of the Criminal Procedure Act 51 of 1977 provides for a procedure to be followed for the submission of special review proceedings and states:

'If in any criminal case in which a magistrates court 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.'

[10] In this case a plea of guilty was entered in terms of section 112 (2) after the court had satisfied itself, no sentence has been imposed as yet. The learned magistrate could not forward or sent the unterminated proceedings on special review for this court to intervene at that stage.

(11] Counsel for the appellants did not set out the irregularities committed either, and in view of that, the magistrate was correct in declining to send the matter for special review as that would be premature because the matter had not yet come to an end through a conviction and sentence. In that respect section 304 (4) of the Criminal Procedure Act was not applicable.

[12] In the matter of the *State v Corneluis Isaacks Swartbooi*[1], Hoff J (as he then was) with Miller AJ, concurring after referring to cases of *S v Mametja*[2], the record of proceedings submitted for special review before sentence was returned and the magistrate instructed to sentence the accused on the charge of attempted murder.

[13] In another case of *S v Immanuel*[3], Silungwe AJ, when dealing with the same issue of a matter sent for special review before a sentence being imposed on the accused person, had the following to say, "Firstly, the proceedings in this case are not reviewable in terms of section 304 (4) of the Criminal Procedure 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 a sentence," provisions of section 304 (4) are not applicable.

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1 State vs Cornelius Isaaks Swartbooi (HC) 2007 1 NR 327 at page 328.
2 State vs Mametja 1979, 1787 (TPD).
3 State vs Immanuel (HC) 2007 (1) NR 327 at 328

[14] The appellants herein had only been convicted but no sentences had been imposed. Section 20 of the High Court Act, 16 of 1990 provides grounds upon which review of proceedings of lower courts may be brought:

'(a) absence of jurisdiction on the part of the court.

(b) interest in the case, bias malice or corruption on the part of the presiding officer.

(c) gross irregularity in the proceedings.

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

I agree with the sentiments expressed in the above authorities that is, that unterminated criminal proceedings where a sentence has not been imposed on the accused person like in this present case, cannot be reviewed in terms of *section 304 (4)* but in terms of section 20 of the High Court Act on the grounds set out in *section 20 (1) (a-d)* alone.

[15] Coming to the application for the learned magistrate to invoke the provision of section 113 which the learned magistrate had refused, the section provides

> 'If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.'

[16] The wording of the section in my view does not make provision for the defence to bring an application to the court to invoke the provision of section 113, it is for the court to invoke that section on its own when not satisfied or is in doubt whether an

accused is in law not guilty. In this case the court was satisfied that each appellant had admitted to all elements of the offence charged and it proceeded to find each appellant guilty as per their own admission.

[17] The appellants were legally represented by counsel of their own choice and pleaded guilty to the offence based on advice of their legal practitioner, who confirmed the pleas to be in accordance with his instructions and as such there was nothing
wrong with the pleas and accordingly, the conviction.

(18] The learned magistrate having satisfied himself had no reason to invoke the provisions of section 113 of the Criminal Procedure Act. The question that now arises is whether the learned magistrate had erred by declining to recuse himself in this matter.

THE GROUNDS

[19] That the magistrate erred in law and or fact in finding that there existed no substantial grounds for recusing himself. The test for recusal is actual bias or a reasonable apprehension of bias. The appellants' case was allegedly based on bias. It must be stressed that whereas a judicial officer should recuse himself when it is warranted, it is also his/her duty not to do so when the facts do not warrant a recusal. Having said that it is now necessary to establish what facts were placed before the magistrate to establish the basis of the recusal application.

[20] On 17 October 2016 counsel for the appellant informed the court that he had received instructions to proceed in terms of section 113 of the Criminal Procedure Act, 51 of 1977. The court then inquired what had happened to an earlier application for review that counsel had sought. Counsel for the appellant indicated that he had withdrawn that application. He also indicated to the court that he wished to lead evidence in support of such application. The state opposed the application based on the argument that it is only the court that may invoke section 113 after satisfying itself that an accused has not admitted to the elements of an offence charged or when a defence has been raised. He then applied to withdraw the guilty plea tendered on the 5th October 2015. That application was also refused.

[21) After the court refused the application for withdrawal of the guilty plea, counsel for the appellant requested the court once more to have the matter sent on review which was again declined. He proceeded to apply for the magistrates' recusal and that he would bring a substantive application in that regard. Counsel for the appellant asked for more time to prepare and requested for a further postponement.

[22] When the matter reconvened on 8 November 2016 counsel for the appellants was not present at court. No explanation was given about his absence. The appellants confirmed that counsel still had their mandate, after which the matter was stood down in order to inquire about the whereabouts' of counsel. The court warned the appellants that the matter would proceed with or without their counsel at 14h00. The appellants were remanded in custody as they had since been convicted, on the 5th October 2015. When the court resumed at 14h00, a letter was handed up indicating that counsel was in Angola and that the matter must be postponed to 22 November 2016 at 14h00.

[23] As the letter was found to be unsatisfactory and inadequate the state applied that the matter should proceed in the absence of counsel for the appellants. The appellants were given an opportunity to decide on the way forward and all indicated that they still wish to be represented by their absent counsel. The matter was postponed against the wishes of the state that wanted the matter to proceed in the absence of counsel for the appellants, as he had been well aware of the court date. In my view to grant or not to grant a request for a postponement by an accused or the prosecutor, is something for the discretion of the court before which such a request is made.

UNDUE DELAY

[24] It is evident from the record of the proceedings that the case was postponed on many occasions for various reasons but mostly due to the absence of the defence counsel. Courts have a duty to ensure that cases are finalised within reasonable time

Article 12 (b) Namibian Constitution[4]. It is not only the interest of the appellants that must be considered alone but also that of the state and it is against this background that the learned magistrate had expressed his opinion about possible delaying tactics on the part of the defence. Such expression of opinion could not be said to constitute bias and therefore a reason for the magistrate's recusal. The expression has to be looked at in the context of how the case had been delayed unnecessarily due to the ill-informed applications by the defence.

[25] Furthermore, it is a well-established principle of our law that there is a presumption of impartiality when it comes to judicial officers. Such a presumption can only be rebutted by cogent and convincing evidence to the contrary. The onus therefore is on the applicant in a recusal application to rebut the perception of impartiality. In my view the applicants herein did not discharge its burden to prove conspicuous impartiality on the part of the magistrate.

CONCLUSION

[26] The learned magistrate thus was correct to refuse the review application as well as to decline invoking the provision of section 113 of the Criminal Procedure Act requested by the defence, and furthermore to refuse the application for his recusal.

[27] In the result the following orders are made:

(1) The application for recusal is dismissed.

(2) The matter is referred back to the learned magistrate for the purposes of sentencing and finalization.

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4 Article 12 (b) Namibian Constitution

D N USIKU
Judge

NN SHIVUTE
Judge

APPEARANCES

APPELLANT: Mr. Isaacks

Isaacks & Associates, Windhoek

RESPONDENT: Mr. Kanyemba

Of the Office of the Prosecutor-General, Windhoek