

**“ANNEXURE 11”**

**IN THE HIGH COURT OF NAMIBIA**

<b>Case Title:</b> <i>The State v Daniel Nghiningwalayi Fillemon</i>	CR 17/2019 Case No: OSH-CRM-1066/2019
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honorable Mr. Justice January J <i>et</i> Honorable Ms. Justice Salionga J	<b>Delivered on:</b> 5 April 2019
<b>Neutral citation:</b> <i>S v Fillemon</i> (CR17/2019) [2019] NAHCNLD 39 ( 5 April 2019)	
<b>The order.</b> <ol style="list-style-type: none"><li>1. In the result the record of proceedings is returned to the magistrate for purposes of mitigation and sentencing of the accused.</li><li>2. Magistrate is directed to request for a pre-sentence report on the background and domestic circumstances of the accused before sentencing.</li></ol>	
<b>Reasons for the order:</b>	
<p>SALIONGA J ( JANUARY J concurring):</p> <p>[1] The accused, a 16 years old minor had pleaded guilty to a charge of theft. The magistrate questioned him in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977 the magistrate satisfied herself on the plea of guilty correctly in my view convicted the accused as charged.</p>	

[2] After a verdict of guilty was noted, it turned out that the accused had no previous convictions and before hearing his address in mitigation, the magistrate realized that accused is 16 years old.

[3] The magistrate remanded the case to 28 May 2019 for special review. The record was submitted to this court under the cover letter saying “due to an error by the magistrate in not checking the age of the accused on the charge sheet, the accused was convicted.”

[4] It is common cause that the accused in the instant case had only been convicted but no sentence had been imposed as yet. The magistrate could not have forwarded the untermiated proceedings on special review at that stage as section 304(4) of the Act was not applicable. Silungwe AJ in the matter of *S v Immanuel* (HC) 2007 (1) NR 327 at 328 when dealing with an untermiated matter sent for special review before sentence is imposed on the accused person had said ‘Firstly the proceedings in this case are not reviewable in terms of s 304(4) of 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 a sentence’ provisions of s 304 (4) are not applicable.

[5] Conversely, Ueitele J in *S v Mazita* (CR 59/2014) [2014] NAHCMD 301(10 October 2014) held a different view that, section 20 of the High Court Act<sup>1</sup> is applicable to reviews of untermiated criminal proceedings emanating from magistrate’s courts. Section 20 provides grounds upon which the proceedings of any lower court may be brought under review before the High Court –These are;

- (a) Absence of jurisdiction on the part of the court;
- (b) Interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) *Gross irregularity in the proceedings*;
- (d) The admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

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<sup>1</sup> Act 16 of 1990

[6] I do agree that unterminated criminal proceedings where a sentence has not been imposed on the accused person like the present case, cannot be reviewed in terms of s 304(4), but s 20 of the High Court Act can be utilized to review such proceedings, on the grounds set out in ss (1)(a) – (d) alone.

[7] Coming to the magistrate's reason for submitting the record on special review, the question is whether a complete failure to comply with the provisions of s74 as amended would constitute a fatal irregularity which would vitiate the whole proceedings.

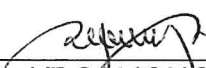
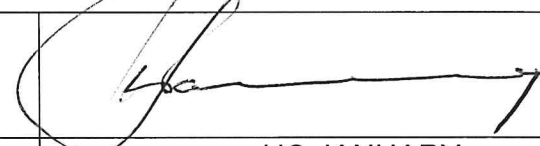
[8] Section 74 of Act 51 of 1977 contains express provisions, couched in peremptory terms, which are designed to procure the attendance of the parent or guardian of a juvenile accused under the age of 18 years throughout his trial.

[9] In *S v Ramadzanga* 1988 (2) SA 816 (v), the court made reference to these two cases (see *R v Daweti* 1941 EDL 135 and *R v Mdutyana* 1942 EDL 272) where the question of the attendance of a parent or guardian was considered against the background of prejudice to the accused. The views expressed were that where there was no question of prejudice or a miscarriage of justice, the Court refused to set aside a conviction on this ground alone. The same view was applied in *R v Salomon; R v Stone; R v Manewil* 1962 (3) SA 528 (C). The court went on to say that it seems that the Legislature could not have intended despite, the use of peremptory language and the creation of an offence or failure to comply with the notice, to override the proviso to s 309(3) that no conviction should be set aside unless it appears that a failure of justice has in fact resulted. I respectfully endorse the aforesaid views expressed forthwith.

[10] I have carefully considered the proceedings in the instant case and I cannot find that any prejudice or irregularities to the accused resulted from failure to comply with

the provision of section 74 of the Act. The proceedings were not irregular though undesirable.

[11] In the result the record of proceedings is returned to the magistrate for purposes of mitigation and sentencing the accused. It is desirable in this matter to obtain a pre-sentence report on the background and domestic circumstances of the accused before sentencing.

	
J.T. SALIONGA JUDGE	HC JANUARY JUDGE

CR 17/2019

**IN THE HIGH COURT OF NAMIBIA: NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI: 5 APRIL 2019  
BEFORE THE HONOURABLE MR JUSTICE JANUARY J  
MS JUSTICE SALIONGA J**

In the matter between:

**STATE**

v

**DANIEL NGHININGWALAYI FILLEMON**

**ACCUSED**

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Having considered the matter in chambers and having read the documents filed of record:

**IT IS ORDERED THAT:**

1. In the result the record of proceedings is returned to the magistrate for purposes of mitigation and sentencing of the accused.
2. Magistrate is directed to request for a pre-sentence report on the background and domestic circumstances of the accused before sentencing.

**BY ORDER OF COURT**



**REGISTRAR**

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