

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case No.: CR 29/2018

In the matter between:

THE STATE

v

ASSER HAMEVA

1ST ACCUSED

GOTFRIED KATJINAMUNENE

2ND ACCUSED

(HIGH COURT MAIN DIVISION REVIEW CASE NO. 550/2017)

Neutral citation: *S v Hameva* (CR 29/2018) [2018] NAHCMD 119 (08 May 2018)

Coram: SHIVUTE J *et* USIKU J

Delivered: 08 May 2018

Flynote: Criminal Procedure – Magistrate’s Court commencing trial without accused person having pleaded to the charge – Gross irregularity – Magistrate referring matter for special review before sentencing of the accused takes place – Court having jurisdiction in terms of s 20(1)(c) of the High Court Act 16 of 1990 to review proceedings of a Magistrates’ Court.

Summary: Magistrate Court commenced trial without the accused persons having pleaded to the charges – Magistrate referring matter for special review before

sentencing of the accused persons – Court finds that it has jurisdiction in terms of section 20(1)(c) of the High Court Act 16 of 1990 to review the proceedings of a Magistrate's Court – Proceedings set aside and matter remitted to the magistrates' court to be dealt with in terms of the relevant provisions of the Criminal Procedure Act 51 of 1977.

ORDER

The proceedings are set aside and the matter is remitted to the Magistrates' Court of Otjiwarongo, to start de novo and to be dealt with in terms of s 105 of the Criminal Procedure Act and for the matter to proceed in terms of the relevant provisions of the Act.

REVIEW JUDGMENT

USIKU J (SHIVUTE J concurring):

[1] This review matter came before me in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977 and was sent by the Principal Magistrate of Otjiwarongo with the following remarks:

'Upon perusing the record to draft a judgment, I notice that not anywhere in the charge sheet indicated or recorded when the charges were put to the two accused persons apart from the top cover of the charge sheet. A plea of not guilty entered on 14/03/2013. The trial started on 22/04/2015 by myself because a colleague allegedly entered a plea of not guilty wasn't available then Section 118 applied.

I sincerely request the Honourable reviewing Judge to make an appropriate order to solve the situation due to the fact that the two accused persons never answered to the charge and eventually the trial proceeded.'

[2] From the record, the two accused persons first appeared before the Magistrates' Court on the 14 March 2013, on three charges, each, of contravening certain provisions of the Nature Conservation Ordinance 4 of 1975. Both accused persons were in custody, however they were both released on bail later. The matter

was postponed numerous times between 14 March 2013 and 22 April 2015. On the 22 April 2015, the State proceeded to call its first witness, without any charge having been put to the accused persons. Thereafter, the State called its second witness and closed its case. At the end of its case, the State submitted that it has established a prima facie case against the first accused person and that the first accused should be put on his defence. The State further submitted that it has not placed evidence before court implicating the second accused, therefore, he should be discharged. The court ruled that the second accused will not be discharged and both accused persons were put on their defence.

[3] The matter was postponed to the next day, the 23 April 2015, whereafter the first accused indicated that he will testify under oath and would call one witness. Nothing appears on the record as to how the second accused wished to proceed. The matter was then postponed to 23 June 2015 for the defence's case.

[4] The matter was postponed numerous times between the 23 June 2015 and 31 March 2016. The record for the 31 March 2016 suddenly shows that the matter should be postponed to a future date for judgment. There is no record showing whether the defence had put forth its case. Then the matter was subsequently postponed to the 24 June 2016, and the record of that day reflects as follows:

'p/p matter for judgement state ready to proceed.

Crt: the judgment will not be delivered today as the court picked up some illegality as the court was about to draft the judgment that the accused were arrested on 27.02.13 but only appeared in court on 14.03.13. It appeared that on the charge sheet it indicates that the accused(s) pleaded not guilty to the charges both not guilty but there is nowhere indicated the charges put to the two accused persons. The case to be transcribed and be sent for special review.

p/p: may it come 10.11.16 for record to be typed.

The following has been made an order of the abovementioned Honourable Court on this 24 June 2016:

Bail is extended to 10 Nov 2016 and the accused person is warned to appear at Otjiwarongo Magistrates' Office, A Court, on the 10 Nov 2016 at 09:00. In case of failure to appear in court a warrant for the arrest may be issued against you and your bail will be provisionally cancelled and the bail money will be provisionally forfeited to the State'.

[5] The matter was ultimately referred by the Principal Magistrate, on the 17 March 2017, to this court for special review, as aforesaid.

[6] From the record, it appears that the irregularity referred to above, arose as a consequence of numerous postponements over a long period of time and that both the public prosecutor and the magistrate, in the process, lost track of the proceedings. The prosecuting authority must ensure that it brings finality to the cases that it decides to prosecute within a reasonable time.

[7] The present review matter comes before me in terms of s 304(4) of the Act. However, that section provides for review proceedings in circumstances where a Magistrate's Court has imposed a sentence which is not subject to review in the ordinary course, and it appears that the proceedings in which the sentence was imposed were not in accordance with justice. It is apparent from the foregoing that, the Act does not provide for the review of proceedings, before a sentence is imposed.

[8] In the review case of *S v Asino and Another*¹ this court, dealing with a similar matter, held that this court may review the proceedings of the Magistrates' Court in terms of section 20(1)(c) of the High Court Act 16 of 1990, on the ground of gross irregularity committed in the proceedings held in the Magistrates' Court. In the *Asino* matter, Liebenberg, J, remarked as follows:

'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 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 state 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,

¹ *S v Asino and Another* Case No. 281/2011, (Unreported) delivered on 18 November 2011.

it would be in the interest of justice to have this matter be dealt with as expeditiously as possible.²

[9] The above remarks apply with equal force to the present matter. And for the same reasons the proceedings cannot be allowed to stand due to the irregularity referred to.

[10] In the result, we make the following order:

The proceedings are set aside and the matter is remitted to the Magistrates' Court of Otjiwarongo, to start de novo and to be dealt with in terms of s 105 of the Criminal Procedure Act and for the matter to proceed in terms of the relevant provisions of the Act.

B Usiku
Judge

I concur

N.N Shivute
Judge

² *S v Asino and Another* (supra) para [7].