

SUMMARY

CASE NO.: CR 1119/1996

THE STATE versus HALANGE HAUFIKU IMMANUEL

SILUNGWE, AJ

**CRIMINAL PROCEDURE - Review -
Unterminated proceedings - escape from
lawful custody - Original charge sheet could
not be traced - Unterminated proceedings
not reviewable in terms of section 304(4) of
the Criminal Procedure Act 51 of 1977 as
accused had not been convicted - Court will
only exercise its inherent power to interfere
with unterminated proceedings in rare
instances where grave injustice might
otherwise result or where justice cannot be
attained by other means - None of such rare
instances present in the instant case -
Prosecutor-General at liberty to proceed
against accused on basis of duplicate charge
sheet - Request for special review refused -
Case record remitted to the Court *a quo*.**

REVIEW CASE NO.: CR 1119/1996

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

VS

HALANGE HAUFIKU IMMANUEL

(HIGH COURT REVIEW CASE NO.: 852/2007)

CORAM: MAINGA, J *et* SILUNGWE, AJ

DELIVERED: 2007/06/27

JUDGMENT

SILUNGWE, AJ [1] The accused is standing trial before the Magistrate's Court in the District of Walvis Bay, on one count of escaping from lawful custody. It is, therefore, clear at the outset that we are here dealing with unterminated proceedings, and yet the presiding Magistrate has erroneously seen it fit to send the case to this Court "on a special review"!

[2] A sketch of the case is that on April 5, 1996, the accused was arrested for the crime of murder for which he was subsequently indicted before the Walvis Bay Magistrate's Court. Whilst he was a trial-awaiting prisoner, the accused allegedly escaped from lawful custody, and a warrant of arrest was issued against him.

[3] Following the accused's arrest for escaping from lawful custody, he was brought before the court *a quo* on March 19, 2007, charged with that offence. At the request of the State, the accused was remanded in custody to April 20 for the purpose of according an opportunity to the State to trace the original case record. The charge of murder is still pending.

[4] On resumption of the case on April 20, two further successive postponements, at the instance of the State, were granted for the same aforementioned reason.

The critical portion of what transpired when the proceedings resumed on June 15 was recorded as follows:

"PP: Says, the original charge sheet not yet found. The matter was for continuation of trial in 1996 and accused absconded when he was re-arrested, the original charge cannot be found up to now. The matter to be sent on special review for the case to start ***de novo***. *On the docket no indication as to who was the presiding officer.*

...

*COURT: Case to be sent on a special review for the matter to start **de novo**. Accused in custody."*

[5] This is a classic case of both the prosecutor and the presiding officer having laboured under the same misconception of the law. Firstly, the proceedings in this case are not reviewable in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 (the Act) on the ground that the accused has 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 section 304(4) of the Act are not available. Secondly, although this Court has inherent power to curb irregularities in Magistrate's 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* 1988 (3) SA (CPD) 366 at 367H; *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (AD) at 5G - 6A. Evidently, none of such rare instances is present in the instant case.

[6] In *casu*, the Prosecutor-General is at liberty to proceed against the accused on the basis of a duplicate charge sheet.

[7] The inevitable consequence of this matter is the following order:

1. the request for special review is refused;
2. the case record is remitted to the court *a quo*.

SILUNGWE, AJ

I agree

MAINGA, J