



CASE NO.: CR 55/2012

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION, HELD AT WINDHOEK

In the matter between:

THE STATE

and

JOEL NANGHAMA

HIGH COURT REVIEW CASE NO.: 438/2012

CORAM: HOFF, J *et* MILLER, AJ

Delivered on: 25 June 2012

SPECIAL REVIEW JUDGMENT

HOFF, J: [1] This matter is sent on special review by the presiding magistrate. The accused had pleaded to a charge of murder on 20 September 2011. The proceedings were stopped pending the decision of the Prosecutor-General and the matter was postponed to

18 November 2011. The bail of the accused was extended. On 18 November 2011 the decision of the Prosecutor-General was not available and the matter was postponed to 27 January 2012. It appears from the record that this was a final postponement. On 27 January 2012 the decision of the Prosecutor-General was still outstanding. The prosecutor applied for a postponement. This application was refused. The following then appears on the record:

“... matter deemed withdrawn pending PGD. Bail cancelled refund money to dep.”

[2] I interpreted this quotation that the magistrate meant the bail money should be refunded to the person who advanced the bail money on behalf of the accused person.

[3] In a cover letter attached to the court proceedings the presiding magistrate remarked as follows:

“1. The matter is send for special review, as a result of an oversight of the Magistrate in this matter, the matter was erroneously withdrawn however accused has already pleaded to the charge in terms of section 119 of the Criminal procedure 51 of 1977, therefore the matter cannot be withdrawn, but can only be struck from the roll pending the prosecutor-general decision..

2. May the order be set aside and or amended accordingly.”

[4] I directed a query to the magistrate requesting the magistrate firstly to provide me with his reasons why was the matter “deemed withdrawn” pending the decision of the Prosecutor-General, and secondly, on what basis the matter had been sent on special review.

[5] The magistrate in reply referred me to this afore-mentioned letter accompanying the case record. This was not very helpful. I also elicited the views of the Prosecutor-General on the issues raised in my query to the magistrate.

[6] The Prosecutor-General agreed that this is not a matter that could have been sent to this Court on special review in terms of the provisions of section 304(4) of Act 51 of 1977 since the proceedings have not been finalised in the Magistrate's Court.

[7] The circumstances when a matter may be sent on special review in terms of section 304(4) were set out by Silungwe AJ in *S v Immanuel* 2007 (1) NR 327 (HC). Firstly, where the proceedings had been concluded in the magistrate's court i.e. after an accused had been sentenced, and secondly although the High Court "has inherent power to curb irregularities in magistrate's courts by interfering (through review) with unterminated proceedings emanating therefrom, ... 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 also *S v Cornelius Isak Swartbooi* Case No. CR 09/2012 an unreported judgment, delivered on 15 February 2012).

[8] The Prosecutor-General opined that no grave injustice has occurred as a result of the ruling by the magistrate since the accused can always be brought back to court once she has decided to prosecute him. She however lamented the fact that the presiding magistrate did not act fairly since the State has not been forewarned that the magistrate considered releasing the accused person and her office was not given the opportunity to provide reasons why her decision was not available.

[9] I was unable to find any authority that a magistrate may strike a criminal case from the roll pending a decision of the Prosecutor-General, as requested by the presiding magistrate. The provisions of Criminal Procedure Act also do not make provision for the “deemed withdrawal” of a criminal case by a magistrate pending a decision of the Prosecutor-General. The magistrate in doing so, acted *ultra vires* and no legal consequence can flow from such an order.

[10] Nevertheless since this matter is not reviewable the case record is hereby returned to the clerk of the court. The Prosecutor-General may arraign the accused in whichever court she chooses for whichever crime (if any) committed by the accused person.

HOFF, J

I agree

MILLER, AJ