

REPUBLIC OF NAMIBIA

IN THE HIGH
DIVISION



COURT OF NAMIBIA, MAIN

JUDGMENT

Case no: CR 38/2013

In the matter between:

THE STATE

and

CREDULA KATAMELO
GOTTHARD KATAMELO

ACCUSED 1
ACCUSED 2

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 832/2013)

Neutral citation: The State v Katamelo & Another (CR 38/2013) [2013]
NAHCMD 188 (5 July 2013)

CORAM: **SMUTS, J** et **UNENGU, AJ**

Delivered on: 5 July 2013

Flynote: Referral to the High Court by district court magistrate under s 304(4) of Act 51 of 1977 prior to conviction and sentence. Not competent referral. Matter remitted for finalisation of trial.

ORDER

The matter is remitted to the presiding Magistrate for finalisation of the trial.

JUDGMENT

SMUTS, J: [1] This matter has been referred to this court by a district magistrate for a special review under s 304(4) of the Criminal Procedure Act, 51 of 1977 (the Act).

[2] The two accused were both charged with assault with the intent to do grievous bodily harm. They both pleaded not guilty. After the State and both accused had closed their respective cases, the presiding Magistrate heard argument and adjourned to give judgment. Upon resumption, the presiding Magistrate recorded that in preparing her judgment, she had noted that she had not afforded accused no. 2 the opportunity to cross-examine a witness called by accused no. 1. This despite a request by accused no. 2 to ask questions of that witness.

[3] The presiding Magistrate then stated that she could not proceed to finalise her judgment as the refusal to permit accused no. 2 the opportunity to ask questions of the witness would constitute an irregularity in the proceedings and referred the proceedings to this court under s 304(4) for special review. The

Magistrate then postponed the matter to 29 July 2013 pending the decision of this court upon review.

[4] Section 304(4) provides:

'If in any criminal case in which a magistrate's 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 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.'

[5] This provision clearly contemplates that a sentence is first to be passed – and thus the finalisation of proceedings – prior to referral under s 304(4). In this matter the accused have neither been convicted nor sentenced. It is accordingly not competent for the matter to be referred under s 304(4). The proceedings need to be finalised before that can occur.

[6] The Magistrate may wish to consider recalling the witness in question for the purpose of cross-examination by accused no. 2 upon the resumption of the trial. But this court is not in position to consider the matter under s 304(4) in the absence of sentence being passed.

[7] The matter is accordingly remitted to the presiding Magistrate for finalisation of the trial.

DF Smuts

Judge

I agree
