



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 39/2017

In the matter between:

**THE STATE**

And

**HENDRIK BAM**

**1<sup>ST</sup> ACCUSED**

**MATHEW MWANGA**

**2<sup>ND</sup> ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 969/2017)

**Neutral citation:** *S v Bam & Another* (WVB-CRM-1380/2016) (CR 39/2017)  
[2017] NAHCMD 170 (22 June 2017)

**Coram:** USIKU, J et UNENGU, AJ

**Delivered:** 22 June 2017

**Flynote:** **Criminal Law:** Special review – Accused one and two were charged with assault with intent to do grievous bodily harm – Accused two asking court to postpone matter for him to engage a private lawyer – Magistrate refused to postpone the matter – On review – Court held that refusal to postpone matter not gross

irregularity as provided for in s 20 of the High Court Act, 19 of 1990 – *Held* further that s 304(4) of the Criminal Procedure Act, 51 of 1977 does not apply. Consequently, record of proceedings returned and magistrate instructed to continue with the trial.

**Summary: Criminal Law:** Special review before sentence in a matter where two accused persons were charged with assault with intent to do grievous bodily harm. Accused two requested the court to postpone the matter for him to engage a private lawyer. The court refused to postpone the matter and ordered the trial to continue. However, after the state's case, the magistrate submitted the record of proceedings for special review. On review, the court held that s 304(4) of the Criminal Procedure Act, 51 of 1977 was not applicable but s 20 of the High Court 19 of 1990 is.

*Held* further, that by refusing to postpone, the magistrate did not commit an irregularity, therefore, the record of proceedings was sent back and instructed the magistrate to continue with trial.

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### ORDER

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The record of proceedings is returned and the magistrate instructed to continue with the trial of the case and hear the defence's (accused one and two) case.

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### SPECIAL REVIEW JUDGMENT

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**UNENGU, AJ (USUKU, J concurring):**

[1] This matter has been submitted for special review by the presiding magistrate under a covering letter where he set out the proceedings conducted in the matter and the grounds or reasons for the submission on special review.

[2] Section 304(4) of the Criminal Procedure Act (CPA<sup>1</sup>) provides for a procedure to be followed for the submission of special review proceedings and states that: “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 s 303 or in which a Regional Court has imposed any sentence; such sentence 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 s 303 or this section.”

[3] In this case, though, no sentence has been imposed yet. It is only the state’s case which has been conducted and closed when the learned magistrate decided to send the unterminated trial proceedings on special review for the high court to intervene at this stage already, for, he is of the view that special circumstances exist justifying the special review.

[4] What are these special circumstances the learned magistrate is talking about in the covering letter? On 23 March 2016, the two accused appeared unrepresented before the magistrate’s court on a charge of assault with intent to do grievous bodily harm. Their right to engage a lawyer of their choice at own costs as well as the advice to apply for a government appointed lawyer through the Directorate of Legal Aid were explained and indicated that they understood the explanation and elected to conduct own defence. The charge was then put to them and each pleaded not guilty where after the matter was postponed for further investigations. They were not asked by the court to explain their plea.

[5] On 30 May 2016, after various postponements, the record of proceedings indicates that they were asked again to plead to the same charge and each pleaded not guilty like before. When requested to disclose the basis of their defence, both opted to remain silent. Again the matter was postponed for the Prosecutor-General’s decision as accused are members of the Namibian Police Force.

[6] On 21 February 2017, the Prosecutor again put the charge to the accused and they pleaded not guilty. Accused one denied assaulting the complainant

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<sup>1</sup> Act 51 of 1977.

whereas accused two indicated that he wanted to apply for a private lawyer. This request prompted the magistrate to make the following order:

‘Ruling: the application is declined: the accused being a Police Officer had ample time to engage a lawyer.’

[7] The ruling of declining the application by accused two to look for a private lawyer is in the mind of the learned magistrate, the special circumstance justifying a submission of these pending and uncompleted trial proceedings on special review.

[8] In paragraph one of his covering letter, dated 5 June 2017, the learned magistrate has this to say:

‘At the outset, I should point out that review sought herein is premature as it pertains to pending and uncompleted trial proceedings. It is, however, submitted that special circumstances exist justifying the High Court to intervene. The trial proceedings are at the stage where the state has closed its, and the matter adjourned to 24 August 2017 for continuation of trial. Notably, at the end of the state’s case there is sufficient evidence upon which a reasonable court, acting carefully, may convict the accused. However, both accused are not represented by counsel and given the sheer magnitude and gravity of the offence. If convicted this matter will invariably be remitted to the High Court for Review purpose.’

[9] The magistrate is correct, the review sought in the matter is premature in view of the fact that the trial of the matter has not come to an end through a conviction and sentence. In that respect, s 304(4) of the CPA will not apply.<sup>2</sup>

[10] In the matter of *The State v Cornelius Isak Swartboo*<sup>3</sup>, Hoff, J (as he then was) with Miller, AJ concurring, after referring to cases of *S v Mametja*<sup>4</sup> and *S v Immanuel* above, returned the record of proceedings submitted for special review before sentence and instructed the magistrate to sentence the accused person on the charge of attempted murder.

[11] In the matter of *S v Immanuel* above, Silungwe, AJ when dealing with the same issue of a matter sent for special review before sentence being imposed on the accused person, said the following:

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<sup>2</sup> *S v Immanuel* (HC) 2007 (1) NR 327 at p328.

<sup>3</sup> High Court Review Case No. 184/2012 delivered on 15/02/2012 (unreported).

<sup>4</sup> 1979(1) 767 (TPD).

'Firstly, the proceedings in this case are not reviewable in terms of s 304(4) of the Criminal procedure Act 51 of 1977 (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 sentence), the provisions of s 304(4) are not available.

Secondly, although this court has inherent power to curb irregularities in magistrates' 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.<sup>5</sup>

[12] However, in the matter of *S v Mazita*<sup>6</sup>, Ueitele, J who wrote the judgment for the court held the view that s 20 of the High Court Act<sup>7</sup> is applicable to reviews of unterminated criminal proceedings emanating from magistrate's courts. Section 20 provides as follows:

**'20 Grounds of review of proceedings of lower court**

- (1) The grounds upon which the proceedings of any lower court may be brought under review before the High Court 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.
- (2) Nothing in this section contained shall effect the provisions of any other law relating to the review of proceedings in lower courts'. (my own Emphasis)

[13] I agree with sentiments expressed in the authorities quoted above, that is 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

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<sup>5</sup>See *S v Burns and another* 1988(3) SA 366 © at 367 H; *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A) at 5G – 6A. Evidently, none of such rare instances is present in the instant case.

(See also *S v Handuke* 2007 (2) NR 606 (HC) at 607 H)

<sup>6</sup> (CR 59/2014) [2014] NAHCMD 301 (10 October 2014)

<sup>7</sup> Act 16 of 1990

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.

[14] In the review matter before me, the reason for the special review requested, according to the learned magistrate, is to review the refusal to grant a postponement applied for by accused two to obtain a private lawyer.

[15] The magistrate, in paragraph two of the covering letter states that the matter was postponed several times; had ample time (approximately six months) to make the necessary arrangement to engage a lawyer and the fact that his rights to legal representation was explained to him at his first appearance before court. Also on 10 August 2016, when the case was postponed to 24 November 2016, they were informed and put on notice that the matter was ripe for trial. With all these facts in mind, the magistrate declined the postponement applied for by accused two.

[16] The question which arises now is whether by declining to postpone the matter, the learned magistrate acted grossly irregular for this court to intervene and set aside the proceedings? In my view, not. To grant or not to grant a request for a postponement by an accused or the prosecutor, is something for the discretion of the court before which such a request is filed. The court of appeal will only interfere with the ruling of the presiding officer when the discretion has been wrongly exercised, which is not the case in *casu*.

[17] I am therefore, in agreement, with what was said by Claasen, J in *Director of Public Prosecutions v Regional Magistrate and Another*<sup>8</sup> that:

*'To interrupt trials in the Magistrate's Court by applications to this court to rule on the correctness of interlocutory orders, cannot be countenanced by this court. If this court were to set a precedent of allowing the State to come to this court to attack the correctness of a refusal to grant a postponement, this court will be inundated with a flow of review which can never have been intended by either the long line of cases referred to above, or the Constitution, which expressly states in section 35, that an accused is entitled to a speedy trial.*

*Many applications for postponements in the courts a quo by either the accused or the State are refused by such courts. If all of them were to be the subject of review applications to this*

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<sup>8</sup> Case No 2254/2012 dated 28/02/2012 paragraph 12 and 13 Johannesburg.

*court, not only will the administration of justice come into disrepute but the entire wheels of justice will come to a grinding halt. This court would not be able to handle the inordinate flow of review applications from lower courts.'* Section 35 of the South African Constitution is equivalent to our Article 12.

[18] In the result, I come to the conclusion that no irregularity was committed by the learned magistrate in the matter. The record of proceedings is returned and the magistrate is instructed to continue with the trial of the case and hear the defence's (accused one and two) case.

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P E UNENGU  
Acting Judge

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D USIKU  
Judge