

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

Case Title: THE STATE // JOHANN WICKUS MAREE	Case No: CR 10/2022 WHK-CRM-13078/2020
	Division of Court: HIGH COURT (MAIN DIVISION)
Heard before: HONOURABLE MR JUSTICE ANGULA, DEPUTY JUDGE-PRESIDENT	Date of hearing: 10 FEBRUARY 2022
	Delivered on: 10 FEBRUARY 2022
Neutral citation: <i>S v Maree</i> (CR 10/2022) [2022] NAHCMD 44 (10 February 2022)	
The order: Having read the documents filed of record in chambers and in absentia of the parties and having due regard to section 304(4) of the Criminal Procedure Act, Act 51 of 1977: IT IS ORDERED THAT: 1. The order of the magistrate dated 17 January 2022 transferring the case in the Magistrate Court under case number WHK-CRM-13078/2020 to the High Court is hereby reviewed and set aside. 2. The matter is remitted to the Magistrate Court with the direction to the magistrate to act in terms of the provisions of section 122(3) of the Criminal Procedure Act, Act 51 of 1977.	

3. The accused person is to remain in custody at the Seeis Police Station until this order is complied with.

Following below are the reasons for the above order:

Brief background

[1] This matter was sent by the learned Magistrate of Windhoek for special review in terms of section 304(4) of the Criminal Procedure Act, No. 51 of 1977 (the 'CPA'). In the accompanying letter the learned magistrate explained why the magistrate order made on 17 January 2022 transferring the matter to the High Court after the accused had pleaded not guilty in terms of section 119 CPA, should not be allowed to stand and should be reviewed and set aside.

[2] According to the learned Magistrate, on 17 January 2022 the matter was on the roll for the Prosecutor-General's (PG) decision whether the accused should be transferred to the High Court. When the matter was called, the prosecutor informed the court that the PG's decision was at hand and that the State moves for an order that the court should transfer the matter to the High Court for a pre-trial conference.

[3] Furthermore the prosecutor indicated to the court that he had provided a copy of the PG's decision to counsel for the defence and proceeded to read the content of the decision into the record. The prosecutor indicated to the court that the PG's decision in his possession was not signed by the PG. On the other hand the legal representative for the accused confirmed that he was in possession of the unsigned copy of the PG's decision and that he had no objection that the matter be transferred to the High Court.

[4] According to the learned magistrate she did not want to attach the unsigned PG's decision to the record for fear that it might create confusion to the next person who would be handling the matter. In this connection, the magistrate points out that the prosecutor who appeared before her on that day was not the one assigned to her court, but was only assisting that day.

[5] According to the magistrate she impressed upon the prosecutor to make sure that the signed PG's decision is attached to the record of the case that would be forwarded to the High Court. Accordingly, the magistrate made an order transferring the matter to the

High Court for first appearance on 10 February 2022.

[6] Subsequent thereto, with the benefit of hindsight, it occurred to the learned magistrate that she might have erred in transferring the matter to the High Court without an unsigned PG's decision.

Relevant statutory provision

[7] Section 144 of the CPA states that the charge in the superior court must be set out in the indictment. Subsection (4)(a)(ii) provides as follows:

‘An indictment, together with a notice of trial referred to in the rules of court, shall, unless an accused agrees to a shorter period, be served on an accused at least ten days (Sundays and public holidays excluded) before the date appointed for the trial –

(i)

(ii) by the magistrate or regional magistrate committing him to the superior court, by handing it to him.’

Determination

[8] In my view, an indictment which has not been signed by the PG is not an indictment within the means of the CPA. It amounts to a nullity. In the present matter even though a copy of the unsigned indictment was handed over to the legal representative for the accused it remains a nullity and does not cure the fatal defect in the proceedings. The learned magistrate, as she correctly conceded, committed an error by not demanding a signed indictment from the prosecutor before she made the order transferring the matter to the High Court. That constituted a vitiating irregularity.

[9] Quite apart from the unsigned indictment, I am of the further view that the learned magistrate abdicated her duty and left it to the prosecutor to ensure that a signed indictment was attached to the record that will be forwarded to the High Court.

[10] In the light of what transpired with regard to the transferring of this matter to the High Court, the order made by the learned magistrate transferring the matter to the High Court is

liable to be reviewed and set aside.

Judge's signature:

Counsel:

Directorate of Legal Aid,
Windhoek

Office of the Prosecutor General,
Windhoek