

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI  
REVIEW JUDGMENT

Case no: CR 1/2018

THE STATE

v

KOLINGI SHILONGO

ACCUSED

**Neutral citation:** *S v Shilongo* (CR 1/2018) [2018] NAHCNLD 5 (24 January 2018)

**Coram:** TOMMASI J *et* JANUARY J

**Delivered:** 24 January 2018

**Flynote:** Trial — Mental state of accused — Trial court receiving psychiatric report — Accused fit to plead and stand trial but at the time of the commission of the offence he was not able to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation – Court under these circumstances had to act in terms of s 77(5) of the Criminal Procedure Act, 1977 (Act 51 of 1977) which provides that the proceedings shall be continued in the ordinary way – magistrate however directed that the accused be kept in the mental hospital or institution pending the signification of the decision of the State President.

Trial — Irregularity — Section 118 of Criminal Procedure Act, 1977 (Act 51 of 1977) — In casu after evidence was adduced case was heard by different magistrate — Case should have been heard by original magistrate — Irregularities in proceedings justifying review.

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## ORDER

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1. The direction under s 78(6) of The Criminal Procedure Act, 1977 (Act 51 of 1977) that the accused be detained in a mental hospital or a correctional facility pending the signification of the decision of the State President, is set aside;
2. The matter is remitted to the trial court with the direction that the accused must be brought before learned magistrate Ms Haihambo, who is to continue with the trial according to the provisions of section 77(5) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

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## JUDGMENT

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TOMMASI J (JANUARY J concurring):

[1] This matter was referred to me by the Divisional Magistrate for a special review.

[2] The accused was charged with having assaulted the complainant, his mother, with the intent to do her grievous bodily harm read with the provisions of the Domestic Violence Act, 4 of 2003 by beating her with a stick. The accused pleaded not guilty. In his plea explanation in terms of s 115 he stated that he was not himself and that his relatives are aware of his condition.

[3] On the trial date the prosecutor informed the learned magistrate, Ms Haihambo, that it is alleged that the accused is mentally ill. The matter was postponed for the court to hear evidence regarding the mental condition of the accused. The learned magistrate heard the testimony of the complainant and on the strength of his testimony, referred the accused for mental observation.

[4] The report of the Psychiatrist was availed to the district court after two years. The matter was enrolled before another magistrate. The clinical diagnoses was that: the accused was in remission; the accused was fit to plead and stand trial; at the time of the commission of the alleged crime, he was mentally ill; and that, as a result

of mental illness, he was not able to appreciate the wrongfulness of the alleged offence and act in accordance with such appreciation. The State prosecutor had no objection to the findings of the psychiatrist and indicated to the court that the accused may be declared a State patient. The accused in response stated that he has no objection to be declared a State Patient. He did not dispute the mental observation report.

[5] The learned magistrate gave the following order: 'The Accused declared state patient as per the state's application in terms of section 78(b) of Act 51 of 1977. He shall be kept in the mental Hospital or Institution pending the signification of the decision of the State President.'

[6] The Divisional Magistrate forwarded the matter to this court for a special review and relied on the views expressed in *S v Tashiya* 2013 (3) NR 637 (HC) where Liebenberg J (Miller A J concurring) at page 640, paragraph 12 stated as follow:

'Although the legislature has not by statutory enactment conferred upon the high court any review powers in criminal cases except where provided for by s 304 of Act 51 of 1977, the court, in appropriate cases, does have the power at common law to exercise review powers over the decisions of the lower courts. See *R v Marais* 1959 (1) SA 98 (T); *Wahlhaus and Others v Additional Magistrate, Johannesburg, and Another* 1959 (3) SA 113 (A) at 120A.'

The Divisional Magistrate held the view that the order made by the magistrate was incompetent in the circumstances if regard is had to the psychiatric report and the provisions of section 77(5) of Act 51 of 1977.

[7] Section 77(5) reads as follow:

'If the court finds that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way.'

[8] It is clear that the procedure adopted by the court was indeed incompetent and bad in law. The accused was fit to plead and stand trial. The court therefore ought to have adopted the procedure prescribed by section 77(5) stated above. The order made by the learned Magistrate to declare the accused a State President's Patient stands to be set aside.

[9] Furthermore, the magistrate who heard evidence in respect of the mental illness of the accused is not the magistrate who declared the accused a State President's Patient. This is contrary to the provisions of section 118 of the Criminal Procedure Act and it renders the proceedings before the magistrate who gave such an order, a nullity. This irregularity further justifies a review of the matter. (See *S v Tashiya, supra*)

[10] In the result the following order is made;

1. The direction under s 78(6) of The Criminal Procedure Act, 1977 (Act 51 of 1977) that the accused be detained in a mental hospital or a correctional facility pending the signification of the decision of the State President, is set aside;
2. The matter is remitted to the trial court with the direction that the accused must be brought before learned magistrate Ms Haihambo, who is to continue with the trial according to the provisions of section 77 (5) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

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MA TOMMASI J

Judge

I agree,

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HC JANUARY

Judge