

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

REVIEW JUDGMENT

Case No.: CR 17/2020

In the matters between:

THE STATE

v

NOA VALOMBOLA

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (61/2020)

Neutral citation: *S v Valombola* (CR 17/2020) [2020] NAHCNLD 43 (19 March 2020)

Coram: JANUARY J and SALIONGA J

Delivered: 19 March 2020

ORDER

- (a) The proceedings in case no. OPU-CRM 104/2011 are hereby set aside.
- (b) The matter is remitted to the magistrate's court Opuwo for the matter to start de novo before another magistrate.

JUDGMENT

SALIONGA J (JANUARY J concurring):

Introduction

[1] The matter was submitted on special review seemingly in terms of s 304 (4) of the Criminal Procedure Act 51 of 1977 by the magistrate's court for the district of Opuwo under cover letter here under:

'Re: recusal (myself)

The above matter refers.

It has come to my attention that the accused person in this case OPU-CRM-204/2011-CR NO: 17/03/2010 for State v Valombola Noa is coming up for continuation of trial on 12 November 2019 and he is represented by Jan Greyling Jr.

I have just realised that I cannot proceed to hear his case as I have already find accused Johannes Uupindi guilty and convicted him in a case where the present accused, Valombola Noa was a witness. And the allegations are that this accused Valombola Noa fired a shot which injure Johannes Uupindi, the complaint in the current case.

It is a pity that I only come to notice that when I continued with Uupindi's case. Therefore it is my request that I should recuse myself form the case, although the State have lead one witness already it will not be fair to me to proceed with this case.

I know that accused will incur expenses, however, it is in his best interest, as I already hear the evidence involved.

I hope and trust that my request is in order.

Yours faithfully,

LT Iiyambo

MAGISTRATE (CONTRACT)'

[2] The accused in this matter was charged with attempted murder (assault) and negligent discharge of a fire arm. The matter has been dragging on since it was last postponed on 30 May 2016 for continuation of trial until the 31 October 2019 when a recusal letter was written to this court.

[3] Although the magistrate did not make reference to the specific case she tried, from the recusal letter submitted for special review and when regard is had to the evidence led in case OPU-CRM 104/2011 it is obvious that the said magistrate had already found Johannes Uupindi now a witness guilty and convicted him accordingly in a case where the present accused, Valombola Noa was a witness.

[4] Section 304(4) of the Criminal Procedure Act, 51 of 1977 provides for review of termination proceedings from lower court but does not provide for the High Court to review irregularities committed in unterminated proceedings.

[5] However s 20 (1) of the High Court Act, 16 of 1990 provides for grounds of review of proceedings of lower court and states that;

- '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.'

[6] In this matter, I do agree with the magistrate that bias on the part of the presiding judicial officer may occur in the proceedings before her because she had already heard the evidence of a witness who stands being accused in the present matter. In my view there is merit in the magistrate's recusal application and could be granted for that reason.

[7] In the result, I make the following order.

- (a) The proceedings in case no OPU-CRM 104/2011 are hereby set aside.
- (b) The matter is remitted to the magistrate's court Opuwo to start de novo before another magistrate.

J T SALIONGA
JUDGE

I agree

H C JANUARY
JUDGE