

**“Annexure 11”**

**IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI  
REVIEW JUDGMENT**

<b>Case Title:</b> <i>The State v Hilalius Amutenya</i>	<b>CR No.:</b> 26/2020 Case No.: OUTAPI 42/2020
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr Justice January J et Honourable Ms Justice Diergaardt AJ	<b>Delivered on:</b> 9 June 2020
<b>Neutral citation:</b> <i>S v Amutenya</i> (CR 26/2020) [2020] NAHCNLD 67 (9 June 2020)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The matter is remitted back to the Magistrate to comply with the provisions of section 77(1) (To do a proper inquiry and referral as provided by section 77(1));</li><li>2. The Magistrate is further directed to request the investigating officer not to remove the accused name from the list for observation to avoid further delay.</li></ol>	
<b>Reasons for the order</b>	
DIERGAARDT AJ (JANUARY J concurring):  [1] The matter came before me as a special review.  [2] The charge sheet reflects that the accused is faced with two counts, 1. Housebreaking	

with intent to steal and theft and 2. Malicious damage to property. The accused however never pleaded to these charges. The accused is not represented.

[3] On the first appearance of the accused in the district court the state applied for the accused to be “observed”.

[4] The prosecutor however laid no basis for such application, except to state that it seems from the accused conduct that he is unfit.

[5] Without any indication as to the objective for the referral being stated on the record the accused was referred for mental observation by the court on the application of the prosecutor.

[6] The accused was thereafter remanded in custody on several subsequent dates for “bed space” and up to date the accused has not been examined by a psychiatrist.

[7] The Magistrate’s attention is drawn to section 77(1) of Act 51 of 1977 ‘If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct the matter to be inquired into and be reported on in accordance with the provisions of section 79.’

[8] A referral in itself holds serious consequences for an accused and it follows in my view that it should be transparent that a proper and relevant reason exists to invoke the provisions of section 77(1) or section 78(2), or both, in the particular circumstances of the matter.

[9] The court must then make its direction, either in terms of section 77 (1) or 78 (2), or both, because this is the necessary jurisdictional basis for the relevant enquiry in terms of section 79 (1) to be conducted and reported on.

[10] Section 77 deals with the capacity of an accused person to understand court proceedings whereas section 78 deals with the ability of an accused person to appreciate the wrongfulness of his or her act (at the commission of the alleged offence) or his or her ability to act in accordance with an appreciation of the wrongfulness of his or her act.

[11] I further refer the learned magistrate to the case of *S v Mika* (CR 14/2010) [2010]

NAHC 57 (28 July 2010) in which the Court set out the provisions of section 78(2) to 78(6) as follows (at 613D-I):

[1] The criteria the court needs to follow when dealing with an accused who has committed an act which constitutes an offence and who allegedly suffers from mental illness or mental defect which makes him or her incapable of (i) appreciating the wrongfulness of his or her act; or (ii) acting in accordance with an appreciation of the wrongfulness of such act, are laid down in s 78(2) et seq in the following terms:

“(2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

(3) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the relevant mental condition of the accused, and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

(4) If the said finding is not unanimous or, if unanimous, is disputed by the prosecutor or the accused, the court shall determine the matter after hearing evidence, and the prosecutor and the accused may to that end present evidence to the court, including the evidence of any person who under s 79 enquired into the mental condition of the accused.

(5) Where the said finding is disputed, the party disputing the finding may subpoena and cross-examine any person who under s 79 enquired into the mental condition of the accused.

(6) If the court finds that the accused committed the act in question and that he at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act, the court shall find the accused not guilty by reason of mental illness or mental defect, as the case may be, and direct that the accused be detained in a mental hospital or a prison pending the signification of the decision of the State President.’

**Judge(s) signature**

**Comments:**

Diergaardt AJ:	
January J:	