



**CASE NO.: CR 13 /2011**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**GAVIN PETER NOBLE**

**DOMINIC DENNIS PHILLIPS**

**CORAM:** Muller, J and Smuts, J

**DELIVERED ON:** 16 /02/2011

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**SPECIAL REVIEW JUDGMENT**

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**SMUTS, J**

[1] This matter has been submitted by a magistrate in Walvis Bay for a Special Review.

[2] The two accused were arrested in January 2008, each charged with possession of cocaine – a contravention of section 2 (d) of Act 41 of 1971. The matter eventually proceeded for plea and trial on 2 February 2011. Each accused entered a plea (of not guilty) and the evidence of the first witness was led – a police officer who had acted upon a search warrant. It would appear that the arrest of the accused was a consequence of the search warrant.

[3] In the course of cross-examination, it became clear that the defence attorney for both accused, Mr. H Barnard, called into question the regularity of the warrant, putting it to the witness that it was based upon false information. Mr. Barnard further pointed out that the warrant had been issued by the presiding Magistrate who may need to give evidence concerning it.

[4] The prosecutor was inexplicably not in possession of the warrant. But, upon seeing the warrant, asked the Magistrate to recuse himself. This request was supported by Mr. Barnard on behalf of the accused.

[5] Although the warrant had not as yet been received in evidence, the presiding Magistrate has indicated that he has every reason to believe that he may have issued the warrant and does not doubt the prosecutor's belief that he had signed it. The Magistrate has further indicated that he would be prepared to recuse himself in the interests of justice and had requested that the matter be considered as a special review. He was supported in this by both the defence and the prosecution. The Magistrate then proceeded to remand the matter to 11 March 2011, pending the decision of a special review.

[6] Section 304 (4) of the Criminal Procedure Act, 51 of 1977 deals with special reviews. It provides:

*"If 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 section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local 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 section 303 or this section."*

[7] The section however contemplates a completed trial. These proceedings are untermiated. A special review under s 304 (4) would thus not be competent.<sup>1</sup>

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

[8] As was stressed in *S v. Immanuel*,<sup>2</sup> this Court has the inherent power to curb irregularities in proceedings in magistrate's courts. But it will only exercise that power where grave injustice might otherwise result or where justice might not be attained by other means.<sup>3</sup>

[9] Although this Court would thus be slow to intervene in untermiated proceedings, this would seem to me to be an instance where such intervention is required. It would plainly be untenable for the proceedings to carry on any further if the presiding Magistrate were to have issued the warrant and where its legality is placed in issue.

[10] It would follow that the proceedings should be set aside. What is however in explicable is why the accused's attorney did not raise this issue before the proceedings on 2 February 2011 commenced. That is clearly the proper course follow. Regrettably, this did not occur and the current referral and consequential order are the result, with the attendant yet further unnecessary delays in the criminal justice system which could have been avoided.

[12] The consequence of these events in the following order:

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<sup>2</sup> Supra at 328, par [5].

<sup>3</sup> See also *S v Burns and Another* 1988 [3] SA 366 (c) at 367 H and *Ismail and Others v. Additional Magistrate, Wynberg and Another* 1963 [1] SA 1 [A] at 5 G – 6 A.

1. The proceedings in the district Court where the charges were put and where they pleaded on 2 February 2011 and the ensuing evidence are set aside.
2. The matter is remitted to the Court for a referral for plea and trial before another magistrate.

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**SMUTS, J**

I agree.

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**MULLER, J**