

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 81/2013

In the matter between:

THE STATE

and

BLOMDEN MERVIN OWASEB

1ST ACCUSED

GIDEON KAMEETA

2ND ACCUSED

Neutral citation: *S v Owaseb* (CR81/2013)[2013]NAHCMD351(22 November 2013)

Coram: GEIER J et PARKER AJ

Delivered: 22 November 2013

Flynote: It was noted during the consideration of the proceedings which had been submitted for automatic review that the accused persons had been sentenced in respect of count 2, the alternative charge, in respect of which they were never convicted – it was held that a valid sentence could in such circumstances not be imposed - sentence on alternative charge accordingly set aside

Summary: See judgment

ORDER

The sentence imposed in respect of count 2 on the accused persons is set aside

JUDGMENT

GEIER J (PARKER AJ concurring):

- [1] This matter came before the court by way of automatic review.
- [2] After consideration of the record it was noted:
- a) that the accused persons had been charged with “House breaking with intent to steal and theft” (count 1) and in the alternative with “possession of suspected stolen property” (count 2);
 - b) that, after questioning, the court was satisfied that the accused persons had admitted all the elements of the main count (count 1) and where convicted as charged on count 1;
 - c) that the accused persons thus were never convicted of the alternative charge – (count 2);
 - d) that the accused persons were, nevertheless, sentenced in respect of both charges, (counts 1 and 2).
- [3] A request for an explanation was forwarded to the magistrate’ court Windhoek, on 14 October 2013 in terms of section 304(2)(a) of the Criminal Procedure Act 1977.

[4] The magistrate responded as follows:

‘The above subject matter and your letter dated 23/09/13 refers.

Kindly be informed that the presiding magistrate in this matter is no longer attached to the magistracy and that she is abroad for further studies.

Indeed, having perused the record on page 10, 17 and 18 of the typed record, I am entirely in agreement with the sentiments of the Honourable the Reviewing Judge that the accused persons were not convicted of the alternative charge and they cannot be legally sentenced on that charge.

I am of the view therefore that the sentence on the alternative charge be set aside accordingly as the accused would not suffer any prejudice at all in the absence of presiding officer’s reply to the query.

As pleases the Honourable the Reviewing Judge.’

[5] We agree – the error is obvious and the correction of that error through the setting aside of the sentence imposed in respect of count 2 will not cause any prejudice to the accused persons.

[6] The sentence imposed in respect of count 2 on the accused persons is accordingly set aside.

H GEIER
Judge

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C Parker
Judge (Acting)