



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 83/2013

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

FRANSLEY NOWASEB

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 1563/2013)

Neutral citation: S v Fransley (CR 83/2013) [2013] NAHCMD 364 (29 November 2013)

CORAM: SMUTS, J et MILLER, AJ

Delivered on: 29 November 2013

ORDER

The conviction and the sentence of a caution and discharge are hereby set aside.

JUDGMENT

SMUTS, J.: [1] This matter has come before me by way of a special review, forwarded by the magistrate for Usakos for that purpose (in terms of s302 (2) of the Criminal Procedure Act, 51 of 1977).

[2] The accused appeared before a different magistrate in that court, Magistrate Kaviua, in 2011 on a charge of failure to pay maintenance read with s11 (1) of the Maintenance Act, 23 of 1963. But at the time the accused was charged, Act 23 of 1963 had long since been repealed by s50 (1)(a) of maintenance Act, 9 of 2003, as is correctly pointed out by Magistrate R.H. Mutuku who referred this matter for a special review.

[3] In the charge, the State alleged that the accused was in arrears in the sum of N\$12 600. The court disposed of the matter in terms of s112 (1)(a) of Act 51 of 1977 on 12 October 2011. Magistrate Mutuku also correctly points out that, given the seriousness of the offence, the court should have proceeded under s112 (1) (b).

[4] After conviction, the then magistrate postponed the matter for a pre-sentence report. On resumption on 28 October 2011, the accused said he was unemployed. The prosecutor recommended that the criminal proceedings be converted into a maintenance enquiry in terms of s34 (b) of the Maintenance Act of 2003 and that the maintenance order and arrears be frozen until the accused had obtained employment whereafter the order would operate and the arrears be paid off. The matter was then postponed for sentencing on 7 November 2011. On that date, the accused was sentenced to a caution and discharge and the court

confirmed that a consent form was signed encapsulating the prosecutor's recommendation.

[5] There was however no enquiry as to when the arrears had accumulated and whether the accused was employed at that time. This omission is of importance, as Magistrate Mutuku rightly points out, because a lack of means may be a defence under the Maintenance Act, 2003.

[6] Apart from these defects in procedure adopted by the then presiding magistrate, the more fundamental issue is that the accused was charged and convicted for a statutory offence which did not exist at the time he was charged and convicted. The 1963 Maintenance Act had been repealed some eight years beforehand. The section in terms of which the accused was charged had long since been repealed. It could no longer be relied upon as a basis for the statutory offence contained in it. That section thus no longer embodied an offence at the time when the accused was charged and convicted. For this reason alone, the conviction and the sentence of a caution and discharge are hereby set aside.

DF Smuts
Judge

I agree
