

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 39/2016

In the matter between

**THE STATE**

And

**ZOLA ANTON BABINU**

**HIGH COURT MD REVIEW CASE NO 572/2016**

*Neutral citation: State v Babino (CR 39/2016) [2016] NAHCMD 140 (12 May 2016)*

**CORAM: LIEBENBERG J et SHIVUTE J**

**DELIVERED: 12 May 2016**

**Flynote:** Criminal procedure – Trial – Contempt of court in c/s 170 (1) of Act 51 of 1977 – Accused released on own cognizance – Accused failed to appear on date case adjourned to – Enquiry held – Accused’s explanation that he was in detention serving a sentence accepted – Court convicted on basis of accused’s failure to report himself after discharge – Section 170 (1) making no provision for instance where accused must

report himself subsequent to failing to appear on date proceedings adjourned to –  
Finding of court not in accordance with the law – Conviction and sentence set aside.

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**ORDER**

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The conviction and sentence are set aside.

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**JUDGMENT**

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LIEBENBERG J: (Concurring SHIVUTE J)

[1] This review concerns a contravention of s 170 (1) of the Criminal Procedure Act, 51 of 1977 (the Act) for which the accused was convicted after having failed to appear at court on the date to which proceedings were adjourned. He was sentenced to a fine of N\$2 000 or 10 months' imprisonment.

[2] During a summary inquiry held in terms of s 170 (2) of the Act on 15 January 2016, the court enquired into the accused's failure to appear at court on the 20<sup>th</sup> of August 2013. At the time of the adjournment the accused had been released in the custody of his guardian and both warned to appear in court on the said date. The accused explained that he subsequent thereto had been sentenced to imprisonment on another case and was therefore unable to attend court proceedings on the relevant date, despite him having informed officers of the correctional facility that he had to attend court. They

undertook to inform the court of his status. The accused was only discharged in August 2014.

[3] The court in its ruling accepted the accused's explanation that he had been in detention on the day he had to appear in court, but found that, once released, he should have come to report himself and, having failed to do so, convicted him in contravention of s 170 (1) of the Act.

[4] Section 170 (1) reads as follows:

'An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to punishment prescribed under subsection (2).'

(Emphasis provided)

[5] The section clearly provided for an instance where the accused person is not in custody and is either released on his own cognizance, or had been admitted to bail. In such case the accused is obliged to appear in court on the date to which the case is adjourned. An accused in custody is specifically excluded and the reason for this is clearly because he has no control over his movement; hence, the duty to secure the accused's attendance at court would be on the institution in whose custody he is, in this instance the correctional facility where he was serving his sentence.

[6] What is evident from the accused's explanation is that he intended appearing in court on the date his case was adjourned to, and asked officers at the correctional

facility to take him, but was told that there was no transport and alternative arrangements would be made. However, he was not taken to court subsequent thereto or, alternatively, informed as to what he was required to do. The trial court reasoned that he had to report himself after his release from prison and his failure to do so constituted contempt of court.

[7] Though it could be argued that the accused had a moral duty to report himself to court once released, there was no legal duty on him to do so. Section 170 (1) makes no provision for the accused having to report himself to court once he has failed to appear, though that mostly happens before the arrest is effected, and is taken into consideration during the enquiry. The magistrate's finding to the contrary was therefore not in accordance with the law and cannot be supported.

[8] In the result, the conviction and sentence are set aside.

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**J C LIEBENBERG**

**JUDGE**

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**N N SHIVUTE  
JUDGE**