



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT**

CR No. 68/2017

In the matter between:

THE STATE

vs

EVA DAALA

(HIGH COURT MAIN DIVISION REVIEW CASE NO. 186/2017)

Neutral citation: *S v Daala* (CR 68/2017) [2017] NAHCMD 333 (23 November 2017)

Coram: SHIVUTE, J et USIKU, J

Delivered: 23 November 2017

Flynote: Criminal Procedure – Bail – Failure of accused on bail to appear in court on appointed day – Such accused cannot be convicted for failing to appear before court – Section 67 of the Criminal Procedure Act 51 of 1977 providing that accused under such circumstances to have bail cancelled and bail money forfeited to the state.

Summary: The accused who was released on bail, failed to appear in court on the appointed day – When the accused next appeared, the magistrate conducted enquiry about accused's failure to appear in court, found her guilty of failing to appear contrary to section 55 of the Criminal Procedure Act and sentenced her to N\$ 500.00 or 60 days imprisonment – Court holding that such accused cannot be convicted for “failing to appear” – Such accused should be dealt with in terms of section 67 of the Criminal Procedure Act which provides that under such circumstances accused forfeits her bail.

ORDER

- a) The conviction and sentence of N\$ 500.00 or 60 days imprisonment imposed by the magistrate on the 08th December 2016 when the accused, while on bail, failed to appear in court on the 19th November 2015, are set aside.
- b) The conviction and sentence of N\$ 2000.00 or 6 months imprisonment on the charge of theft by false pretences, are hereby confirmed.

REVIEW JUDGMENT

USIKU, J (SHIVUTE, J concurring)

[1] This matter was submitted to this court for special review by the magistrate of Walvis Bay.

[2] In the accompanying note the learned magistrate provided reasons why the matter should be specially reviewed, as follows:

‘The above-mentioned matter appeared before me in November 2015 and the trial commenced with evidence being led. When the accused person was to appear on 19 November 2015 she failed to do so and warrant for her arrest was subsequently issued. She was on bail. On 03 December 2015 her bail was finally cancelled and her bail money finally forfeited to the State.

She was then arrested on 07 December 2016 and appeared before another presiding officer on 08 December. The Magistrate conducted an enquiry in terms of section 67 of the Criminal Procedure Act into her failure to attend court on 19 November 2015.

The accused person was sentenced to a fine, alternatively imprisonment. She did not pay the fine and is currently serving sixty days term of imprisonment.

The matter was then remanded to 25 January 2017 for the trial to be finalized before me. It was when the matter came before me that I realised that the afore-mentioned presiding officer erred in the proceedings conducted on 08 December in that section 67 of the Criminal Procedure Act does not allow for a summary enquiry and punishment of accused persons for failure to appear in court. The magistrate therefore, in my opinion had no authority to act as he did.

Herewith, I therefore submit the matter to your office on special review for those proceedings to be set aside.'

[3] Considering the time that has lapsed since this matter was referred to me for review, I do not deem it appropriate to first request reasons from the magistrate who attended to the proceedings in question. For that reason, I will confine myself to what appears from the record, on what transpired in respect to this matter.

[4] The background of this case is that, the accused was charged in the magistrates' court for the crime of theft by false pretences. The accused was released on bail of N\$ 800.00 pending finalization of her trial. On the 18 November 2015, the State closed its case, and the accused commenced giving evidence under oath, in her defence. After she gave her evidence, but before cross-examination, the matter was postponed to the 19 November 2015 for continuation of trial and her bail was extended. On the 19 November 2015 she was absent. Her bail was provisionally cancelled and the bail money provisionally forfeited to the State. A warrant was issued for her arrest and the bail return date was set for the 3rd December 2015. From the record, it appears, the matter did not come before court on the 3rd December 2015. The record does not reflect the matter as having come before court on the 3rd December 2015.

[5] Almost a year later, the accused was arrested and appeared in court from custody on the 08th December 2016, before a different magistrate. The magistrate enquired as to the reasons for accused's failure to appear on the 19 November 2016. The accused explained that she "was in the north". Then the record reflects the following:

'Court: VERDICT: GUILTY OF C/S 55(1). "Failing to appear" '

[6] The accused was invited to present mitigating circumstances before sentence was imposed, and was subsequently sentenced to N\$ 500.00 or 60 days imprisonment.

[7] The matter was thereafter referred to the magistrate who had partly-heard the matter, and was duly finalised. The accused was found guilty of theft by false pretences, convicted and sentenced to a fine of N\$ 2000.00 or 6 months imprisonment.

Analysis

[8] An accused who is released on bail and fails to appear in court is dealt with under the provisions of section 67 of the Criminal Procedure Act 51 of 1977("the Act"), and not under section 55(1) of the Act. The relevant parts of section 67 provides as follows:

'67. Failure of accused on bail to appear

- (1) If an accused who is released on bail
 - (a) fails to appear at the place and on the date and at the time
 - (i) appointed for this trial; or
 - (ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or
 - (b) fails to remain in attendance at such trial or at such proceedings, the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.
- (2)(a) If the accused appears before court within fourteen days of the issue under ss (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under ss (1) to appear or to remain in attendance was not due to fault on his part.
- (b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.
- (c) If the accused does not appear before court within fourteen days of the issue under ss (1) of the warrant of arrest or within such extended period as the court may on

good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.’

[9] The relevant parts of section 55 of the Act provides as follows:

‘55. **Failure of accused to appear on summons:** -(1) An accused who is summoned under section 54 to appear at criminal proceedings and who fails to appear at the place and on the date and at the time specified in the summons or who fails to remain in attendance at such proceedings, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).’

[10] It is apparent from the record that the accused was released on bail, and was not summoned to appear before court in respect of the offence for which she was being prosecuted. Therefore the provisions of section 55 are not applicable to her.

[11] When accused on bail fails to appear, the provisions of section 67 apply. Section 67 makes no provision for summary enquiry for the purposes of punishment for “failing to appear”¹. Where an accused appears before court within 14 days of the issue of the warrant of arrest, the court is required to enquire into whether the failure to appear or remain in attendance, was due to the fault on the part of the accused. If the court does so find then the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money. If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.

[12] On the other hand, if the accused does not appear before court within 14 days of the issue of the warrant of arrest, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.

[13] In light of the foregoing, it is apparent that the magistrate had no authority to deal with the issue of accused’s failure to appear, under the provisions of section 55, as he did. This is so because the accused in the present matter was on bail and had

¹ S v Paulus 2007 (2) NR 622 at p. 623H.

not been summoned or released on warning, as contemplated under various provisions of the Act.²

[14] For the reasons foregoing the purported criminal proceedings of “failure to appear” conducted by the magistrate on the 08 December 2016 are invalid and both the conviction and sentence should be set aside.

[15] As regard the conviction and sentence in respect of the charge of theft by false pretences, the accused was properly convicted and sentenced, and the conviction and sentence thereon are hereby confirmed.

[16] In the result the following order is made:

(a) The conviction and sentence of N\$ 500.00 or 60 days imprisonment imposed by magistrate on the 8 December 2016, when the accused, while on bail, failed to appear in court on the 19 November 2015, are set aside.

(b) The conviction and sentence on the charge of theft by false pretences are hereby confirmed.

B Usiku
Judge

N.N Shivute
Judge

² See : - S.55(2): failing to appear on summons.
S.56(5): filing to appear on written notice to appear.
S.72(4): failing to comply with warning to appear.
S. 170 (2) failing to appear after adjournment.