

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

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| Case Title: The State v Rodney Wittenbach | Case No: CR 87/2023 |
| High Court MD Review No: 1098/2023 | Division of Court: High Court, Main Division |
| Coram: Liebenberg J <i>et</i> Shivute J | Delivered: 4 August 2023 |
| Neutral citation: <i>S v Wittenbach</i> (CR 87/2023) [2023] NAHCMD 473 (4 August 2023) | |
| ORDER: The conviction and sentence are set aside. | |
| REASONS: | |
| LIEBENBERG J (SHIVUTE J concurring): | |

[1] The accused in this review matter was arraigned before the Magistrate Court for the district of Mariental on a charge of 'a contravention of s 75(e) read with the provisions of s 75(h),77,78 and 79 of Act 17 of 1998, as amended. In that upon or about the 11th day of August 2020 and at or near Hardap Prison in the district of Mariental, accused attempted to escape from lawful custody.' The accused pleaded not guilty to the charge and after evidence was led, was convicted and sentenced to eighteen (18) months' imprisonment of which six (6) months were suspended for five (5) years on the condition that accused is not convicted of the offence of contravening s 75(e) read with 75(h) of Act 17 of 1998 committed during the period of suspension.

[2] On review, a query was directed in which it was pointed out that the state prosecuted the accused under the Prisons Act 17 of 1998 which was repealed by the Correctional Service Act 9 of 2012 and whether the conviction, was thus in accordance with justice.

[3] The magistrate concedes, and rightly so, that the accused was indeed prosecuted under Act 17 of 1998 as opposed to the Correctional Service Act which repealed the former Act. She further concedes that accused was convicted on contraventions that are defective and no longer binding in law.

[4] This court, on numerous occasions in previous judgments cautioned prosecutors and magistrates alike about ensuring that proceedings are conducted in accordance with justice as a failure to examine charges could, as in the present case result in incurable and defective charges.¹

[5] The authorities in this regard are trite and postulate that not only is repealed legislation invalid, but, that it is incurably invalid so much so that a charge preferred under such legislation cannot be resuscitated.² Accused in this matter was charged and convicted under a repealed Act. It is thus undeniable that the charge is defective and the conviction and sentence stand to be set aside as they fall short of being in accordance with justice.

¹ *S v Mafudza* (CR 63/2019) [2019] NAHCMD 323 (05 September 2019).

² *S v Poppas* (CR 48/2020) [2020] NAHCMD 287 (16 July 2020).

[6] In the result, the following order is made:

The conviction and sentence are set aside.

J C LIEBENBERG
JUDGE

NN SHIVUTE
JUDGE