

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: The State v Michael Howoseb	Case No: CR 98/2023
High Court MD Review No: 858/2023	Division of Court: Main Division
Heard before: Liebenberg J <i>et</i> Christiaan AJ	Delivered on: 6 October 2023
Neutral citation: <i>S v Howoseb</i> (CR 98/2023) [2023] NAHCMD 627 (6 October 2023)	
The order: The conviction and sentence are set aside.	
Reasons for order:	
LIEBENBERG J (CHRISTIAAN AJ concurring)	
[1] This is a review matter in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 (CPA).	

[2] The accused person appeared in the Magistrate's Court for the district of Khorixas on a charge of contravening section 2(b), read with sections 1, 2(i) and/or 2(iv) 7, 8, 10, 14 and Part I of the schedule of the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971 as amended, namely possession of dependence producing substance, to wit, 27 grams of Cannabis valued at N\$270.

[3] The accused pleaded guilty to the charge, and when questioned in terms of section 112(1)(b) of the CPA, he did not admit to the elements of the offence and a plea of not guilty was instead recorded in accordance with section 113 of the CPA.

[4] The State called four witnesses, three of whom are police officers who were involved in the arrest of the accused person and the fourth one, who is also a police officer, is the one who took the alleged drugs for weighing at Otjiwarongo.

[5] The accused testified in his own defence and called one witness.

[6] Not convinced that the accused's version is reasonably possibly true, the learned magistrate convicted the accused and sentenced him to pay a fine of N\$4000 (four thousand Namibian dollars) or 24 (twenty four) months' imprisonment.

[7] In a query directed to the presiding magistrate, it was pointed out that the record of the proceedings of 21 October 2022 and beyond have not been typed. The missing portion of the record includes the evidence of the accused and his witness, pre-sentence proceedings, and the court's reasons for sentence.

[8] In his reply, the Divisional Magistrate of Otjiwarongo, Mr P. Shipo, indicated that the presiding magistrate on the matter has since left the service of the magistracy by the time the query was sent. Although he (Mr Shipo) indicated that he has addressed the concerns raised, no explanation has been provided on the missing record of the proceedings.

[9] In *S v Lukas* it was held as follows:

‘The effect of an incomplete record is that the reviewing court has no basis to determine whether the convictions were in accordance with justice. However incomplete the record may be, a reviewing court may also determine whether, despite the incomplete record, all the evidence is before the Court for the Court to make a decision on review and whether the accused person was prejudiced because of the incomplete record of the proceedings.’

[10] The record of the current proceedings is incomplete to the extent that the record does not include the typed version of the evidence of the accused and his witness, the proceedings pertaining to sentence regarding mitigation and aggravating circumstances (if they were submitted), and the reasoning behind the sentence. The state closed its case on 23 September 2022, and the matter was postponed to 21 October 2022. When the case was called on 21 October 2022, the record reflects that the proceedings were recorded in A court. Nothing is typed from this recording and no explanation is provided as to why the record was not typed to form part of the review record. The matter was then postponed to 4 November 2022 for continuation of trial.

[11] On the 4 November 2022, there is no indication in the court order whether any mechanical recordings were made. However, the accused was convicted and sentenced on this date (4 November 2022). It is not known if the trial proceeded on this date, as the matter was postponed for continuation of trial from the 21 October 2022. There is simply no indication what actually transpired prior to the conviction and sentence.

[12] Although there is some cryptic notes of the presiding magistrate in respect of the evidence of the accused and his witness bound into the record, presumably to substitute the missing part of the transcribed record, they are insufficient. Furthermore, the record does not have a clear version of the judgment in respect of conviction, except for some notes with several written insertions ‘see print’ while such prints are not clearly identifiable. Therefore, apart from the incompleteness of the record, it is clear that the learned magistrate did not proof-read the record before leaving office.

[13] No record of mitigating circumstances or aggravating circumstances appear in the entire record. The record contains an annexure that explains the accused's rights to mitigation, which is not borne out by the record of proceedings. It is recorded on the annexure that the accused will mitigate from where he stands and that he will call a witness. No such evidence is recorded anywhere. In light of the authority cited above, the incompleteness of the record leaves the reviewing court with no basis upon which it can determine whether the conviction of the accused is in accordance with justice. For that reason alone, the conviction and the sentence imposed fall to be set aside.

[14] In the result, I make the following order:

The conviction and sentence are set aside.

J C LIEBENBERG JUDGE	P. CHRISTIAAN ACTING JUDGE