

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT
PRACTICE DIRECTIVE 61

Case Title: The State v Bernold Dausab	Case No: CR 99/2023
High Court MD Special Review No: 1603/2023	Division of Court: High Court, Main Division
Coram: Liebenberg J <i>et</i> Shivute J	Delivered: 6 October 2023
Neutral citation: <i>S v Dausab</i> (CR 99/2023) [2023] NAHCMD 628 (6 October 2023)	
ORDER: The proceedings of 03 April 2023 regarding the accused's conviction and sentence, are set aside.	
REASONS:	
LIEBENBERG J (SHIVUTE J concurring): [1] This matter comes before this court on special review as transmitted by the regional court magistrate Windhoek to have the proceedings of the district court reviewed in terms of s 20(1)(c) of the High Court Act 16 of 1990 for reasons that will become	

apparent below.

[2] The accused was arraigned in the magistrate's court for the district of Windhoek on a charge of theft of a motor vehicle in contravention of the Theft of Motor Vehicle Act 12 of 1999. He pleaded guilty and was convicted on his guilty plea subsequent to questioning in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977(the CPA). The matter was then remitted to the Regional Court for sentencing.

[3] The record reflects that accused was granted bail at his first appearance in October 2021, but, owing to his inability to afford the amount set, the accused made several appearances from custody and subsequent reductions in the bail amounts were made. It is not apparent from the record when the accused eventually paid bail as all postponements indicate that he was in custody despite having been granted bail. For instance, the proceedings of 11 May 2022 indicate that the case was on even date postponed to 4 June 2022 and the status of the accused was 'in custody'. There is no record of the 4 June 2022 proceedings. What is however, evident from the record is that on 8 September 2022, the accused was not in attendance and it was on this date that a warrant of arrest was issued against him; his bail provisionally cancelled and provisionally forfeited to the state. After the expiration of 14 days, the accused's bail money was forfeited to the state.

[4] The accused then appeared in court again on 3 April 2023 on a warrant of arrest and the district magistrate conducted an inquiry as to his whereabouts on 8 September 2022. According to the accused, he was late and forgot about the court date. Not satisfied with the explanation, the magistrate found the accused guilty of contravening s 55(1) of the CPA and convicted him for contempt of court on account of his failure to appear in court on 8 September 2022. Following this conviction, he was then sentenced to a fine of N\$800 or 30 days' imprisonment. The aforementioned forms the basis of this special review on account of the irregular procedure followed by the district court.

[5] Section 67 of the CPA needs no rehashing and clearly provides the procedure to

be followed when dealing with an accused who is on bail and fails to appear. Worth highlighting in this instance, is the fact that the district court magistrate did not invoke the provisions of s 67 but rather, those under s 55(1) of the CPA which deals with the failure of an accused to appear on summons. Upon a scrutiny of the record, there is no indication that the accused appeared on a summons.

[6] The following, as far as the procedure to follow under s 67, has been laid down in *S v Paulus*¹: 'Section 67 makes clear the procedure to be adopted by the court when an accused on bail fails to appear. It makes no provision for the summary inquiry and punishment thereafter when convicted where adopted by the magistrate. It only makes provision for the estreatment of bail. It appears the legislature regarded the forfeiture of bail a sufficient punishment in the case where accused failed to appear. Therefore, the magistrate had no authority in terms of s 67 to act as he did.'

[7] It is thus trite that s 67 makes no provision for the summary inquiry as adopted by the magistrate and does not provide for punishment in that regard. Albeit not clear from the record, the legislature clearly regards the final cancellation of bail and forfeiture of the bail money as sufficient punishment.²

[8] The approach adopted by the district court in this instance, ie, to convict and sentence the accused – who was on bail – for failing to appear, amounts to a gross irregularity. It follows, therefore, that the conviction and sentence cannot be allowed to stand and must be set aside.

[9] In the result, it is ordered as follows:

The proceedings of 03 April 2023 regarding the accused's conviction and sentence, are set aside.

¹ *S v Paulus* 2007 (2) NR 622 (HC). See also *S v Ndakolute* 2005 NR 37 (HC); *Leonard v S* (HC-NLD-CRI-APP-CAL-2018/00045) [2018] NAHCNLD 106 (11 October 2018) and *S v Muronga* 2004 NR 134 (HC).

² *Benjamin v S* (HC-NLD-CRI-APP-CAL 14 of 2021) [2022] NAHCNLD 8 (11 February 2022).

J C LIEBENBERG JUDGE	NN SHIVUTE JUDGE