

## REPUBLIC OF NAMIBIA



## HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

## SPECIAL REVIEW JUDGMENT

## PRACTICE DIRECTIVE 61

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| <b>Case Title:</b><br><i>The State v Festus Shimmy</i>  | <b>Case No:</b><br>CR 06 /2024             |
| <b>High Court Review No:</b><br>1977/2023   | <b>Division of Court:</b><br>Main Division |
| <b>Heard before:</b><br>Shivute J et January J  | <b>Delivered on:</b><br>5 February 2024    |
| <b>Neutral citation:</b> <i>S v Shimmy</i> (CR 06/2024) [2024] NAHCMD 34 (5 February 2024)  |  |
| <p><b>The order:</b></p> <ol style="list-style-type: none"> <li>1. The conviction and sentence are set aside.</li> <li>2. The fine, if paid must be refunded to the depositor.</li> </ol>                         |  |
| <b>Reasons for order:</b>   |  |
| <p>JANUARY J (Shivute J concurring )</p> <p>[1] This matter came on special review from the Divisional Magistrate Court, Keetmanshoop, under a cover letter dated 22 November 2023. The matter stems from the</p> |  |

Karasburg district court and was discovered by the Divisional Magistrate on 13 October 2023, long after the accused was convicted and sentenced on 14 June 2023. The typed record of proceedings wrongly reflect the date of sentences as 30/10/2021, resulting in a pure academic exercise to write this judgment.

[2] The accused was convicted and sentenced for contempt of court *in facie curiae* after he appeared in court in a yellow jersey and short pants. He was sentenced to a fine of N\$500 or 30 days imprisonment. The record of proceedings does not reflect in terms of what law the accused was convicted and sentenced but it is evident from a cover letter of the presiding magistrate and divisional magistrate that the proceedings were conducted in terms of s 108 of the Magistrate's Court Act 32 of 1944, as amended (the Act).

[3] Section 108 stipulates as follows:

**' 108 Custody and punishment for contempt of court**

(1) If any person, whether in custody or not, wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such court is held, he shall (in addition to his liability to being removed and detained as in subsection (3) of section five provided) be liable to be sentenced summarily or upon summons to a fine not exceeding one hundred rand or in default of payment to imprisonment for a period not exceeding three months or to such imprisonment without the option of a fine. In this subsection the word "court" includes a preparatory examination held under the law relating to criminal procedure.

[Subsec (1) amended by sec 23 of Act 19 of 1963.]

(2) In any case in which the court commits or fines any person under the provisions of this section, the judicial officer shall without delay transmit to the registrar of the court of appeal for the consideration and review of a judge in chambers, a statement, certified by such judicial officer to be true and correct, of the grounds and reasons of his proceedings, and shall also furnish to the party committed a copy of such statement.' (my emphasis)

[4] Both the divisional magistrate and presiding magistrate only raised concerns in the cover letters because the sentence was *ultra vires* the sentence as prescribed in the Act. That, however is not the only concern. Subsection two prescribes a procedure as

emphasized above which was not complied with either.

[5] It is firstly, alarming that the record and a warrant of detention reflects that the accused was 99 years old, whereas, the accused stated in mitigation that he was 26 years old. In addition the proceedings are not in accordance with justice. It is necessary to quote the proceedings in the court *a quo* to indicate why it was not in accordance with justice. It reflects as follows:

'PP: Accused is present and on bail, accused is conducting his own defense, the matter is on the roll for further investigation.

COURT OBSERVES THAT THE ACCUSED IS DRESSED INAPPROPRIATELY, ACCUSED IS WEARING A SHORT TROUSER AND JERSEY

Court: THE COURT WILL PROCEED WITH AN ENQUIRY SO AS TO DETERMINE WHETHER OR NOT YOU SHOULD BE FOUND GUILTY OF CONTEMPT OF COURT'

[6] The proceedings followed with an appropriate explanation of the right to legal representation at own cost, the right to apply for legal aid, such procedure through the clerk of court and the right to conduct his own defense. The accused opted to conduct his own defense.

[7] The record of proceedings continues:

'Court: Why should this court not hold you in contempt of court?

Accused: I did not do it on purpose the trouser I was supposed to wear is very dirty and I cannot come with that trouser because it is very dirty that is why I came with a short.

Court: Court is not satisfied with your explanation accused, you are found guilty for contempt of court.

PP: No previous convictions.

Mitigation:

I will testify under oath and I have no witnesses to call.

ACCUSED SWORN IN AND UNDER OATH

ACCUSED: I am 26 years old. I have 2 children, both under the age of 18. I am not married. I am unemployed. The mother of my child is unemployed and I am supporting my six (6) year old child. My sister in the north (sic). I am the one supporting her as my grandmother is unemployed. If I may be warned. I will not do it again.

PP: Nothing in cross-examination.

State in aggravation

PP: We recommend a fine of N\$100.00 or 20 days imprisonment.

Court: You are sentenced to a fine of N\$500 or 30 days imprisonment.'

[8] The public prosecutor, thereafter, withdrew the charge of housebreaking.

[9] It is evident that the enquiry in relation to contempt of court is inappropriately brief. The questioning did not cover the element of intent and unlawfulness. No question was directed if the accused willingly wanted to insult the judicial officer or any officer of court or be contemptuous and whether he knew that it was unlawful to appear in court in the manner that he did. In fact, the accused gave a reasonable explanation that his other clothing that he considered appropriate to wear to court was dirty. It was further the duty of the court orderly not to allow the accused into court if his appearance was inappropriate and offensive. In addition, there is no evidence or admission that the accused was previously warned of what an appropriate dressing to court is.

[10] The fine of N\$500 is *ultra vires* the maximum fine of N\$100 stipulated in the Act.

[11] It follows that the conviction and sentence are not in accordance with justice and fall to be set aside.

[12] In the result, the following order is made.

1. The conviction and sentence are set aside.
2. The fine, if paid, must be refunded to the depositor.

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| <b>H C JANUARY<br/>JUDGE</b> | <b>SHIVUTE J<br/>JUDGE</b> |