

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<b>Case Title:</b> The State versus Julius Kadhikwa	<b>Case No:</b> CR 112/2024
<b>High Court MD Review No:</b> 1496/2024	<b>Division of Court:</b> Main Division
<b>Coram:</b> Shivute J <i>et</i> Christiaan J	<b>Delivered on:</b> 22 October 2024
<b>Neutral citation:</b> <i>S v Kadhikwa</i> (CR 112/2024) [2024] NAHCMD 620 (22 October 2024)	
<b>ORDER:</b> <ol style="list-style-type: none"><li>1. The conviction and sentence in respect of contravening section 55 of the Criminal Procedure Act 51 of 1977 is set aside. The fine if paid, should be returned to the accused.</li><li>2. The conviction and sentence in respect of housebreaking with intent to steal and theft are confirmed.</li></ol>	

**REASONS FOR ORDER:**

SHIVUTE J (CHRISTIAAN J concurring):

[1] The accused was charged with the offence of housebreaking with intent to steal and theft. He was admitted on bail and he absconded. His bail was forfeited to the State. However, a warrant of arrest was issued and he appeared on a warrant of arrest. The court a quo convicted the accused for failing to appear, contravening s 55 of the Criminal Procedure Act 51 of 1977 (the CPA). He was sentenced to N\$ 300 fine in default of payment 15 days imprisonment.

[2] Seeing that the accused was granted bail, a query was directed to the learned magistrate why the accused was convicted of contravening s 55 of the CPA. The court also inquired as to what happened to the accused's bail money.

[3] The learned magistrate responded that, although the accused did not appear on a summon as outlined in s 55 of the CPA the court questioned him in terms of that section for his failure to appear before court on 15 April 2024 and that he was supposed to be convicted of contempt of court. With regard to the bail money, it was finally forfeited to the State on 6 May 2024.

[4] Failure of accused on bail to appear is dealt with in terms of s 67 of the CPA as follows:

'(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 his trial; or

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 subsection (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 subsection (1) to appear or to remain in attendance was not due to fault on his part.

(b) If the accused satisfied 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 subsection (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.

(3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear to remain in attendance, and such evidence shall be recorded.'

[5] Section 67 of the CPA does not create criminal liability of a person who is on bail on the ground of failure to appear or to comply with a condition of bail.

[6] However, in the case of South Africa, there was an insertion of section 67A of the CPA that criminalizes a failure to appear or to comply with a bail condition. Such insertion does not apply to Namibia.

[7] Since non-appearance of a person who was on bail or non-compliance with bail condition is not punishable in Namibia, the conviction of contravening section 55 of the CPA cannot be allowed to stand.

[8] In respect of the housebreaking with intent to steal and theft, the conviction is in order. Therefore, the conviction and sentence are confirmed.

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

1. The conviction and sentence in respect of contravening section 55 of the Criminal Procedure Act 51 of 1977 is set aside. The fine if paid, should be returned to the accused.
2. The conviction and sentence in respect of housebreaking with intent to steal and theft are confirmed.

**N N SHIVUTE**  
**JUDGE**

**P CHRISTIAAN**  
**JUDGE**