

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2018/00045

In the matter between:

KAKOLA HAITA LEONARD

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Leonard v S* (HC-NLD-CRI-APP-CAL-2018/00045) [2018]
NAHCNLD 106 (11 October 2018)

Coram: TOMMASI J

Heard: 11 October 2018

Delivered: 11 October 2018

Flynote: Criminal Procedure – Bail – Failure of accused on bail to appear in court on appointed day – Such accused cannot be convicted for failing to appear before court – Section 67 of the Criminal Procedure Act 51 of 1977 providing that accused under such circumstances to have bail cancelled and bail money forfeited to

the state — The magistrate erred when he convicted the appellant — Conviction and sentence are set aside.

Summary: The Appellant, who was on bail, failed to appear in court on the appointed day and was consequently convicted of contempt of court and sentenced to N\$ 1000 or six months imprisonment. His bail money was further finally forfeited to the state. His failure to appear was due to him being in custody, he requested the police officials to take him to court but was informed that there was no transport available.

ORDER

1. The conviction of contempt of court and the sentence of N\$ 1000 or 6 months imprisonment are set aside with immediate effect.
2. If the fine had been paid, same should be refunded to the appellant.
3. The matter is remitted to the district court for it to conduct a proper enquiry into the absence of the accused on 18 March 2016 and to make an appropriate order in accordance with the legal principles as set out herein.
4. The district court (clerk of the Magistrate Court) is directed to enroll the matter forthwith as soon as reasonably possible.

APPEAL JUDGMENT

TOMMASI J

[1] The appellant herein appeals against the conviction of contempt of court, having failed to appear at court on the date to which proceedings were adjourned. He was sentenced to N\$1000 or 6 months' imprisonment.

[2] The appellant complained of his conviction and the fact that his bail was forfeited to the State.

[3] The appellant was released on bail and his bail was finally forfeited to the State when he failed to appear before the court on 18 March 2016. After approximately two years, at the summary inquiry, the appellant explained that he was in Ohangwena Police cells. He explained that he tried to inform the police officers that he has to be in court but they did not take him as a result of the unavailability of transport to take him there. He informed the court that he has been in custody since 2014. The court rejected his explanation and convicted him of contempt of court, stating that, if he was serious about his case, he would have made sure that he was at court. The Appellant was further sentenced a fine of N\$ 1000 alternatively imprisonment for six months.

[4] In *S v Paulus* 2007 (2) NR 622 (HC) it was held that where an accused who is on bail fails to appear in court on the appointed day, he cannot be convicted of contempt of court. Section 67 of the Criminal Procedure Act 51 of 1977 provides that such an accused will forfeit bail. (See also *S v Ndakolote* 2005 NR 37 (HC) and *S v Muronga* 2004 NR 134 (HC)). This is an unnecessary mistake given the number of case law on this point. It is also one which is most prejudicial to an accused.

[5] The learned magistrate ought to have seriously considered the explanation given by the appellant and if satisfied that the appellant was indeed in custody, make an appropriate order regarding the bail monies which had been declared forfeited to the State and the release of the appellant.

[6] The magistrate therefore erred when he convicted the appellant in this matter and the conviction and sentence stand to be set aside.

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

1. The conviction of contempt of court and the sentence of N\$ 1000 or 6 months imprisonment are set aside with immediate effect.
2. If the fine had been paid, same should be refunded to the appellant.
3. The matter is remitted to the district court for it to conduct a proper enquiry into the absence of the accused on 18 March 2016 and to make an appropriate order in accordance with the legal principles as set out herein.

4. The district court (clerk of the Magistrate Court) is directed to enroll the matter as soon as reasonably possible.

M A TOMMASI
Judge

APPEARANCES:

FOR THE APPELLANT: Mr K H Leonard
In person
Oshakati police cells, Oshakati

FOR THE RESPONDENT: Mr L Matota
Office of the Prosecutor General, Oshakati