

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CR NO: 83/2018

In the matter between:

THE STATE

v

RUPOSA ELIZABETH

(HIGH COURT MD REVIEW CASE NO.1505/2018)

Neutral citation: *S v Elizabeth* (CR 83/2018) [2018] NAHCMD 341 (29 October 2018)

Coram: ANGULA DJP *et* LIEBENBERG, J

Delivered: 29 October 2018

Flynote: Criminal Procedure – Review – Accused’s minor child released in her custody in terms of s 72 – Failed to bring child to court – Convicted of defeating or obstructing course of justice – No evidence on record indicating that accused committed offence – Court *a quo* ought to invoke s 72 of the Criminal Procedure Act 51 of 1977 – Section allows court to carry out an enquiry as to failure of accused person to bring person released in her custody to court.

ORDER

- (a) The conviction and sentence are set aside.
 - (b) The accused person to be brought before court and informed of the outcome of these proceedings.
 - (c) In the event of the accused having paid the fine or any part thereof, she is entitled to be refunded in full.
-

JUDGMENT

LIEBENBERG J (concurring ANGULA DJP)

[1] This is a review submitted in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 (the Act). The matter emanated from the magistrate’s court for the district of Rundu.

[2] The background of the case is that the accused’s minor son was charged with two counts of rape. The child was placed in the care of the accused in terms of s 72 the Act.¹ [3] A warrant of arrest was issued for the arrest of the minor child because he failed to appear in court. The warrant was issued two years ago. On the night of the

¹ 72 Accused may be released on warning in lieu of bail

incident, police officers came looking for the accused's son in order to execute the warrant of arrest. The accused was then asked by the police officers as to the whereabouts of her son and she replied that she didn't know where he was. The accused's son was later found in the room of her eldest daughter. From the record it would appear that the daughter's room was a separate structure in the homestead. She was then charged with defeating or obstructing the course of justice for having failed to bring her child to court and for concealing her child's presence at the time the police came to her home that night.

[4] The accused pleaded not guilty to the charge and a trial ensued. The court in the end found the accused guilty and she was sentenced to a fine of N\$ 4000.00 or 12 months' imprisonment, in default of payment.

[5] After perusing the review record, a query was directed to the magistrate enquiring as to the following: under what duty in law the accused was to disclose the whereabouts of her son; in what way was the course of justice defeated or obstructed and, whether the trial court should followed the procedure provided for in s 72 of the Act? The magistrate replied to the query and the gist of her reply was that the accused at all times attempted to defeat or obstruct the course of justice by misleading the police officers as to her son's whereabouts.

(1) If an accused is in custody in respect of any offence and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or such court, as the case may be, may, in lieu of bail and if the offence is not, in the case of such police official, an offence referred to in Part II, Part III or Part IV of Schedule 2-

(a)

(b) in the case of an accused under the age of eighteen years who is released under paragraph (a), place the accused in the care of the person in whose custody he or she is, and warn such person to bring the accused or cause the accused to be brought before a specified court at a specified time on a specified date and to have the accused remain in attendance at the proceedings relating to the offence in question and, if a condition has been imposed in terms of paragraph (a) to ensure that the accused complies with that condition.

[6] The crux of the issue is whether the accused, in failing to bring her child to court, defeated or obstructed the course of justice.

[7] From the perusal of the record, it is evident that the State failed to adduce evidence indicating that the accused was given a written notice in terms of s 72(3)(a)² or a copy of the record of proceedings indicating that the accused had been warned by the court in terms of s 72(3)(b) of the Act.³ The other reason being that there was no evidence contradicting the accused's testimony on the point that she could not read, and that her son would normally inform her as to his next appearance in court. She was further unaware that a warrant of arrest had been issued for her son.

[8] As regards her alleged concealment of her son on the night in question, there was evidence that he used to sleep in her room but because he was not in the room when the police arrived, it was assumed that she hid him. Based on the accused's daughter's explanation as to why her brother slept in a different room that night, and the accused's uncontroverted evidence that she was unaware of her son's whereabouts that evening, there is no basis for coming to the conclusion that the accused's actions or failure to assist the police constituted an obstruction of the course of justice. He was after all found fast asleep and not hiding.

² S 72(3)(a) A police official who releases an accused under subsection (1)(a) shall, at the time of releasing the accused, complete and hand to the accused and, in the case of subsection (1)(b), to the person in whose custody the accused is, a written notice on which shall be entered the offence in respect of which the accused is being released and the court before which and the time at which and the date on which the accused shall appear.

³ 72(3)(b) A court which releases an accused under subsection (1) shall, at the time of releasing the accused, record or cause the relevant proceedings to be recorded in full, and where such court is a magistrate's court or a regional court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court and which sets out the warning relating to the court before which, the time at which and the date on which the accused is to appear or the conditions on which the accused was released, shall, on its mere production in any court in which the relevant charge is pending, be prima facie proof of such warning.

[9] The correct approach the police ought to have followed was to bring the accused before court in terms of s 72 (4) of the Act. This procedure allows the court to enquire from a person in whose custody a minor was placed, to give reasons as to why he or she did not bring such person to the court in compliance with the court order. The section succinctly provides as follows:

'(4) 'The court may, if satisfied that an accused referred to in subsection (2)(a) or a person referred to in subsection (2)(b) was duly warned in terms of paragraph (a) or, as the case may be, paragraph (b) of subsection (1), and that such accused or such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for the arrest of such accused or such person, and may, when he or she is brought before the court, in a summary manner enquire into his or her failure to comply with the warning or condition and, unless such accused or such person satisfies the court that there is a reasonable possibility that his or her failure was not due to fault on his or her part, sentence him or her to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding 12 months.'

If the court was not satisfied with the explanation advanced by the accused, it could have convicted and sentenced the accused accordingly.

[10] For the reasons set out above, the accused was wrongly convicted and the conviction and sentence fall to be set aside.

[11] In the result, it is ordered that:

- (a) The conviction and sentence are set aside.
- (b) The accused person to be brought before court and informed of the outcome of these proceedings.
- (c) In the event of the accused having paid the fine or any part thereof she is entitled to be refunded in full.

J C LIEBENBERG

JUDGE

H ANGULA

JUDGE