

CASE NO.: CR 18/2010

**IN THE HIGH COURT OF NAMIBIA  
HELD AT OSHAKATI**

In the matter between:

**THE STATE**

**and**

**WILLEM HANYANGO**

*(HIGH COURT REVIEW CASE NO.: 240/2010)*

**CORAM:** LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: September 23, 2010.

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**REVIEW JUDGMENT**

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**LIEBENBERG, J.:** [1] The accused was arraigned in the magistrate's court Ohangwena in the district of Eenhana on a charge of housebreaking with intent to steal and theft and was subsequently convicted and sentenced. The conviction and sentence are in order and will be confirmed. Another matter has to be addressed.

[2] During the proceedings of May 19, 2009 the case was postponed for plea and trial until July 28, 2009 and the accused was remanded in custody with bail set at N\$600-00. According to a copy of a bail receipt attached to the case record the accused paid bail at Ohangwena police station on May 28, 2009 in the amount mentioned whereafter he was released on bail.

[3] From the hand written record of the proceedings it appears that the accused failed to appear in court on July 28, 2009 whereafter the court ordered a warrant of arrest to be issued against the accused and provisionally cancelled his bail and

forfeited the bail money to the State with the return date being August 12, 2009. The matter was called on the return date and due to the continued absence of the accused his bail money was finally forfeited to the State.

[4] When the accused was brought before court on a warrant of arrest on October 26, 2009 a summary enquiry into his absence from court on July 28, 2009 was held (apparently in terms of s 170 of the Criminal Procedure Act No. 51 of 1977 ('the Act')) whereupon he was convicted of contempt of court and sentenced to N\$100-00 or 30 days imprisonment. The legality of this procedure adopted by the court is in issue.

[5] Although s 67 of the Act deals with the failure of an accused on bail to appear in court and the section containing provisions for the forfeiture of the bail money, it does not criminalise such conduct as in ss 55, 56 (5), 72 (4) and 170 of the Act. In the latter instances a summary enquiry and punishment upon an accused person's arrest, are specifically provided for. The relevant part of s 67 is subsection (2) (c) and states:

“(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.”

[6] The failure of an accused to appear after adjournment of the case or to remain in attendance is governed by s 170 of the Act and specifically *excludes* the case where an accused is on bail and fails to appear after an adjournment. It would therefore appear that the Legislature regarded the forfeiture of the accused's bail sufficient punishment where he or she fails to attend the proceedings as ordered. In the present instance the record of proceedings does not reflect on what authority the magistrate acted when conducting the enquiry as he did, but as the enquiry was done summarily, it could only have been in terms of s 170 of the Act; which he was not entitled to do as the accused was already dealt with under s 67 of the Act. If the magistrate was of the view that the circumstances justified additional punishment – in my view it does not – then the correct approach would have been to have the accused properly notified of the charge of contempt of court *ex facie curiae* (under common law) and to afford him adequate time to obtain legal representation and prepare himself, if that was required. In that instance the court would act in terms of s 106 of the Magistrates' Court Act No. 32 of 1944. It is trite law that a magistrate's court may not punish summarily anyone who is guilty of contempt of court *ex facie curiae* (*Attorney-General v Crockett* 1911 TPD 893 at 900, 905, 912).

[7] In the instant case the conviction of the accused of contempt of court was the result of a summary enquiry into the accused's absence from court (*ex facie curiae*) and the procedure applied by the magistrate was therefore *ultra vires* and should be set aside (See *S v Paulus* 2007 (2) NR 622 (HC)).

[8] In the result, it is ordered:

1. The conviction and sentence are confirmed.

The conviction for failure to attend court on July 28, 2009 and the sentence of N\$100 or 30 days imprisonment are set aside.

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**LIEBENBERG, J**

I concur.

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**TOMMASI, J**