



IN THE HIGH COURT OF NAMIBIA

CASE NO.: CR 02/2011

In the matter between:

THE STATE

PLAINTIFF

and

MAGDALENA NAMISES

DEFENDANT

HIGH COURT REVIEW CASE NO 511/2010

CORAM: DAMASEB JP *et* UEITELE, AJ

Delivered on: 14th February 2011

REVIEW JUDGMENT

UEITELE, A J: [1] This is a review judgement.

[2] The accused in this case was charged and convicted of the offence of arson in that on 20 September 2010 and at or near Tsintsabis in the District of Tsumeb the accused wrongfully and intentionally set on fire 1x bed and various items and clothing the property of Edward Amutenya valued at N\$5 000-000. She was sentenced to a fine of N\$2000-00 or seven months imprisonment.

[3] Upon receiving the matter for review on 07 October 2010 I sent the following query to the presiding officer.

"On what basis is the accused guilty as charged if arson is defined as follows:

'Arson is committed if a person unlawfully and intentionally

(a) sets fire to immovable property belonging to another; or

(b) sets fire to his own immovable insured property with the intention of claiming its value from the insurer. V.

See Snyman **C.R Criminal Law** 2nd ed p.523 " Also

see: **S v Dawid** 1993 Nr 316.

[4] The learned magistrate replied as follows: "*The Courts a agreed (sic) with the definition by Snyman. The conviction and sentence can be quashed and the accused's liberty to restored (sic).*"

[5] The concession by the learned magistrate is correctly made because the crime of arson can only be committed in regard to immovable property. A bed and various clothing items are not immovable property.

[6] I take cognisance of the fact that malicious damage to property is a competent verdict to the charge of arson **S v C Motau en n Ander** 1963 (2) SA 521 (T)). Apart from the fact that the crime of arson can only be committed in regard to immovable property, the record does not disclose the circumstance under which the bed and the clothing were set on fire. The intention of the accused person cannot be assumed. It must be established and proven; nor can it be assumed that the accused person acted negligently.

[7] In the circumstances, neither can the matter be remitted to the magistrate to consider a conviction on the basis of malicious damage to property nor can this Court substitute such a verdict. In the result the conviction and sentence are set aside.

[8] It may be appropriate to, in passing, advise magistrates that although the Criminal Procedure Act, 1977 has been amended so as to increase the maximum fines that may be imposed by magistrates, the provisions of section 112(a) of that Act (as amended by Act 10 of 2010) must only be resorted to where the offence or crime involved does not contain technical elements which require questioning of the accused in order to establish the accused's guilt.

UEITELE, AJ

I agree.

DAMASEB, JP