



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 78/2013

In the matter between:

THE STATE

and

GREGORIUS SYLVESTER GORASEB**ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 1283/2013)

Neutral citation: *State v Goraseb* (CR 78-2013) [2013] NAHCMD 336 (15 November 2013)

Coram: HOFF J and UNENGU AJ

Delivered: 15 November 2013

Flynote: Criminal Procedure – Review – Sentence – Magistrate extending bail and bail money after sentencing pending the outcome of review in terms of section 302 of the Criminal Procedure Act, 51 of 1977 – Magistrate wrong to extend such bail and bail money of the accused person.

Summary: In this matter, after the magistrate had convicted and sentenced the accused to eighteen (18) months imprisonment, he extended accused's bail money pending the outcome of the review in terms of section 302 of the Criminal Procedure Act, 51 of 1977. Section 302 does not provide for such procedure – magistrate was wrong to extend the accused's bail and bail money pending the outcome of the

review – The order of the magistrate to extend the bail and bail money inappropriate and an illegality and set aside.

ORDER

In the result, I make the following order:

1. The conviction and sentence are confirmed.
 2. The order by the magistrate extending bail and bail money pending the outcome of review is inappropriate and an illegality and is set aside.
-

JUDGMENT

UNENGU AJ (HOFF J concurring):

[1] The accused in the matter was charged with an offence of corruptly accepting gratification by or giving gratification to agent under the provisions of the Anti-Corruption Act¹, as the main count with two alternative counts of extortion and bribery.

[2] He pleaded not guilty to the main and to both the alternative counts, after a trial, he was found not guilty of the main count but found guilty of extortion, the first alternative count and sentenced to eighteen (18) months imprisonment. However, the execution of the sentence was suspended by the learned magistrate pending the outcome of the review – his bail was extended.

[3] I queried the learned magistrate to indicate on what authority, if any, he had extended the bail and bail money after sentencing the accused person to eighteen (18) months imprisonment.

[4] The learned magistrate responded as follows:

¹ S 35(3)(a) of Act 8 of 2003

'I extended accused bail after sentencing in terms of section 307 (1) of the CPA, (the Act, Act 51 of 1977).

The section reads: "Subject to the provisions of section 308, the execution of any sentence shall not be suspended by the transmission of or the obligation to transmit the record for review unless the court which imposed the sentence releases the person convicted on bail"

See typed record at page 8 authority is indicated there.

As it pleases the Honourable Review Judge'.

[5] There are no qualms with regard the conviction and sentence. Both are in accordance with justice and will be confirmed. The problem lies with the suspension of the execution of the sentence pending the outcome of the review².

[6] Section 302 of the CPA makes provision for and spells out sentences subject to review in the ordinary course. It also provides for circumstances when the court shall suspend the execution of a sentence subject to review in terms of section 302.

[7] Subsection 1(b) of Section 302 of the CPA provides for grounds under which a sentence subject to review in the ordinary course shall be suspended. It states as follows:

'The provisions of paragraph (a) shall be suspended in respect of an accused who has appealed against a conviction or sentence and has not abandoned the appeal, and shall cease to apply with reference to such an accused when judgment is given'.

Paragraph (a) above deals with sentences subject to review in the ordinary course. In the present review matter the accused has not appealed against his conviction or sentence. Therefore, section 302(1)(b) of the CPA does not apply.

² S 302 of the Criminal Procedure Act, 51 of 1977 (the CPA)

[8] The learned magistrate has attempted to justify his order through section 307(1) of the CPA. Section 307(1) does not cater for sentences subject to automatic review in terms of section 302. In fact, section 307 refers to section 308 which provides for a whipping other than a whipping imposed in section 294, which could not be inflicted upon the accused person until the proceedings in the matter have been confirmed on review. Whipping in terms of section 308 is no longer a competent sentence in Namibia. It has been abolished³.

(9) Subsection 4(b) of section 309 of the CPA makes it clear that section 307 and 308 shall *mutatis mutandis* apply with reference to the sentence appealed against, including a sentence of a whipping imposed under section 294. The section does not refer to sentences referred to in section 302.

[10] Having said that, I am of the view that the learned magistrate misdirected himself extending the bail and bail money of the accused person after he had convicted and sentenced him to a period of imprisonment pending the outcome of the review in the ordinary course⁴, in the absence of an appeal against the conviction or sentence.

[11] In the result, I make the following order:

1. The conviction and sentence are confirmed.
2. The order by the magistrate extending bail and bail money pending the outcome of review is inappropriate and an illegality and is set aside.

PE Unengu
Acting

³ Ex parte Attorney-General: In Re Corporal Punishment by Organs of State 1991 NR 178

⁴ Section 302 of the CPA *supra*

5
5
5
5
5

E Hoff
Judge