

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 08/2014

In the matter between:

THE STATE

and

LIBOLIUS KONDJENI

ACCUSED

Neutral citation: *S v Kondjeni* (CR 08/2014) [2014] NAHCMD 71 (05 March 2014)

Coram: HOFF J et GEIER J

Delivered: 05 March 2014

Flynote: Bail - Failure of accused on bail to appear at any subsequent date set by the court - Procedure to be followed dictated by s 67 of Criminal Procedure Act 51 of 1977 – in such circumstances the bail of an accused person has to be provisionally cancelled and the bail money provisionally forfeited to the State and a warrant for the arrest of the accused has to be issued in terms of Section 67(1) - should the accused subsequently appear before the court within fourteen days - the failure to afford an accused the opportunity to provide an explanation for his non-appearance and to satisfy the court that the failure to appear on the previous date was not due to any fault on his part – in breach of the requirements set by section 67(2)(a) of the Criminal Procedure Act 1977 - constitutes a material irregularity in

the proceedings which will prejudice an accused – proceedings accordingly set aside

Summary: The facts appear from the judgment.

ORDER

- a) The proceedings conducted on- as well as the orders made on 4 August 2011 and 5 December 2013 are set aside.
- b) The conviction and sentence imposed on the accused on 5 December 2013 is set aside.
- c) The matter is referred back to the lower court were the failure, of the accused, to appear on 21 July 2011, is to be dealt with afresh in terms of the provisions of section 67 of the Criminal Procedure Act 1977.

JUDGMENT

GEIER J (Hoff J concurring):

[1] The matter came before the court by way of review. The circumstances pertaining thereto were as follows:

[2] The accused had been charged with robbery with aggravating circumstances.

[3] When questioned in regard to the right to legal representation at his first appearance he indicated that he wanted to conduct his own defence. This was on 10 November 2009.

[4] The matter was postponed to 24 March 2010 for further investigation.

[5] Although bail was almost immediately granted to him, the accused remained in custody - He was accordingly warned of the consequences should he not appear at the next hearing should he be released on bail in the interim.

[6] From 24 March 2010 onwards the matter was again postponed on a number of further occasions for various reasons.

[7] The accused paid bail on 7 December 2010.

[8] On 21 July 2011 the accused failed to be in court.

[9] After his name was called out three times. His bail was cancelled – the matter was remanded to 04 August 2011.

[10] On that date the accused appeared and it seems that the cancellation of bail and the forfeiture of his bail money was confirmed. It was also ordered that his warrant of arrest remain in force.

[11] On 05 December 2013 he was again brought to court and the following transpired:

'Public Prosecutor: Accused appear on a warrant of arrest on 21/07/11 and 4/05/11

COURT: Accused why did you fail to appear on 21/07/11 and 4/08/11?

Accused: On 21/07/11 I was at court, my name was not called was advised by a police officer to go to room 30 where they advised me to come to court the next day which I did and yet nothing happened.

COURT: Do you have anything to shoe court that you were indeed at court

Accused – No nothing

COURT: Court is not satisfied with accused explanation in the absence of any proof to substantiate his explanation to court

Accused found guilty of failure to appear. Sentenced to a fine of N\$300-00 OR 1 Month imprisonment. Warrant of Arrest cancelled.

Public Prosecutor: Request remanded 31/01/14 F O T.D

Accused remain in custody'.¹

[12] The matter was then referred for review.

[13] The learned magistrate included a letter in the review record in which he requested the setting aside of the conviction and sentence which he had imposed on the accused on 05 December 2013 for the following reasons:

'TO: THE HONOURABLE REVIEWING JUDGE

1. The accused appeared in court on 05-12-13 for a warrant of arrest enquiry I.T.O Section 67 of the Act. As a result the accused was summarily convicted of failure to appear and sentenced accordingly.
2. It later transpired to the court that accused was already dealt with I.T.O Section 67 of the Act on 04-08-11 and his bail money was finally cancelled and finally forfeited to the state.
3. In the result the procedure adopted by the court on 05/12/013 is illegal and ultra vires i.t.o S170 of the Criminal Procedure Act. 51 of 1977 and s106 of the Magistrate Court Act 32 of 1944 as no charge of contempt of court was preferred against the accused.
4. May the conviction and sentence of failure to appear against accused made on 05/12/13 be set aside.

As it pleases the you my Lord.'

¹ It is to be noted that the transcript is copied as supplied

[14] The learned magistrate has indeed picked up what must be an irregularity and his early intervention is therefore appreciated by the court.

THE SECTION 67 PROCEEDINGS

[15] If one then considers more closely what has transpired in this instance it appears firstly that the accused was initially dealt with on 21 July 2011 and on 04 August 2011 in terms of Section 67 of the Criminal Procedure Act 51 of 1977.

[16] Section 67 sets the following requirements:

'67 Failure of accused on bail to appear

(1) If an accused who is released on bail-

- (a) fails to appear the place and on the date and at the time-
 - (i) appointed for his trial; or
 - (ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or
- (b) fails to remain in attendance at such trial or at such proceedings;

the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.

(2)(a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.

(b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.

(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.

(3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.'

[17] The learned author of '*Hiemstra's Criminal Procedure*', Judge Albert Kruger comments on this section as follows:

'If the accused fails to appear or to remain present during the trial, the court before which the case is pending has to withdraw the bail and declare the bail money forfeit. The court also has to issue a warrant for arrest of the accused. Then there are two possibilities:

1. If the accused appears before court within 14 days of the issuing of the warrant, he or she must be given an opportunity to prove that the default was not due to any fault on his or her part. If the court is so convinced, the provisional cancellation and forfeiture of the bail, lapse. According to the wording of subsection (2) this is a proper evidentiary burden which has to be proved on a balance of probabilities (*S v Cronje* 1983 (3) SA 739 (W)). It is arguable that the burden now, in the light of constitutional norms, has to be interpreted restrictively as merely a duty of rebuttal, by analogy with the view of the majority in *S v Manamela* 2000 (5) BCLR 491 (CC); 2000 (3) SA 1 (CC).

On the other hand it can be argued with more conviction that one is here not concerned with the presumption of innocence and the risk of a guilty finding despite the existence of reasonable doubt; one is concerned with an interim arrangement. All the information about non-appearance falls within the accused's knowledge. The accused can personally or through a legal representative satisfy the court that the failure under section 67(1) was not the fault of the accused (*Terry v Botes and Another* [2002] 3 All SA 798 (C) at 802g-h).

2. If the accused does not appear within 14 days, the provisional cancellation and forfeiture become final. Although according to paragraph (2)(c) cancellation and forfeiture in these circumstances happen automatically, it is general and healthy practice for the court nevertheless to make a formal finding and order and to announce and record them. The court can hear evidence to prove that the accused is in default. The harshness of this provision can be alleviated by extending the period of 14 days and a court ought to do so in order to avoid an injustice. Here *S v Mudau* 1999 (1) SACR 636 (W) provides striking example of circumstances in which extension should have been granted: the court knew that the accused was in custody but ordered forfeiture nevertheless. If the accused does not appear within 14 days or absence, the cancellation and forfeiture remain in place. This

is a situation in which strict liability is authorised by the Act. Even if the police fail to execute the warrant for arrest, the accused will after 14 days have no redress.²

[18] It also emerges from the record that the accused, in this instance, appeared before the court within 14 days of the warrant which was issued for his arrest on 21 July 2011. Accordingly he had to be dealt with in terms of section 67(2)(a).

[19] The record of the proceedings of 04 August 2011 however only reflects the following:

‘Public Prosecutor: May bail be F/C and money forfeited
Court: Bail F/C and money forfeited. Warrant of arrest to remain in force.’

[20] It so appears that the accused was not given any opportunity to provide an explanation for his non-appearance on 21 July 2011 and to satisfy the court that the failure to appear on that date was not due to any fault on his part.

[21] The requirements set by Section 67(2)(a) were thus not complied with.

[22] This non-compliance constitutes a material irregularity in the proceedings which prejudiced the accused and the court’s order of 4 August 2011, that bail be cancelled and the accused’s bail money be forfeited and that his warrant should remain in force, must therefore be set aside.

THE SUBSEQUENT PROCEEDINGS – SECTION 106 OF THE MAGISTRATES COURTS ACT 1944

[23] Subsequent to the aforementioned proceedings the court conducted a further inquiry into the matter. This occurred on 05 December 2013.

[24] The following emerges from the record:

‘Public Prosecutor: Accused appear on a warrant of arrest on 21/07/11 and 4/05/11

² See commentary at p 9-28 (Issue2)

COURT: Accused why did you fail to appear on 21/07/11 and 4/08/11?

Accused: On 21/07/11 I was at court, my name was not called was advised by a police officer to go to room 30 where they advised me to come to court the next day which I did and yet nothing happened.

COURT: Do you have anything to shoe court that you were indeed at court

Accused – No nothing

COURT: Court is not satisfied with accused explanation in the absence of any proof to substantiate his explanation to court

Accused found guilty of failure to appear. Sentenced to a fine of N\$300-00 OR 1 Month imprisonment. Warrant of Arrest cancelled.

Public Prosecutor: Request remanded 31/01/14 F O T.D

Accused remain in custody.'

[25] If one then has regard to the aforementioned letter of the magistrate, quoted above, it would seem that the learned magistrate conducted these proceedings in terms of Section 170 of the Criminal Procedure Act 1977 and Section 106 of the Magistrates Courts Act of 1944.

[26] The record shows that the accused was requested to explain his non-appearance and that he was not questioned about his failure to comply with any court order. He was also not told that he was facing any new charge for contempt of court, now preferred against him, in terms of section 106 of the Magistrates Courts Act 1944.³ The charge sheet was also not amended to this effect.

[27] Instead of finding the accused guilty 'of wilfully disobeying or neglected to comply with an order of court' the magistrate imposed a fine on the accused and found him guilty 'of failure to appear'.

³ 106 **Penalty for disobedience of order of court**

Any person wilfully disobeying or neglecting to comply with any order or judgment of a court or with a notice lawfully endorsed on a summons for rent prohibiting the removal of any furniture or effects, shall be guilty of contempt of court and shall, upon conviction, be liable to a fine not exceeding N\$1 000 or, in default of payment, to imprisonment for a period not exceeding three months or to such imprisonment without the option of a fine:

[28] In the absence of any charge formulated on the basis of the provisions of section 106 - to which the accused person could have responded properly – and - were also the resultant order - (a finding of ‘guilty ‘of failure to appear’) - is not in line with the type of order contemplated and sustained by section 106 - (namely a finding of guilty for ‘contempt of court’) - it must be concluded that the sentence imposed on the accused on 5 December 2103 was procedurally irregular and also substantively incorrect. It is accordingly liable to be set aside on that basis alone.

THE SUBSEQUENT PROCEEDINGS – SECTION 170 OF THE CRIMINAL PROCEDURE ACT 1977

[29] In so far as the learned magistrate did also purport to deal with the accused in terms of the provisions of Section 170 of the Criminal Procedure Act 1977, it appears that this section is concerned with accused persons who are not in custody and have not been released on bail and who do not appear on the date to which the case has been postponed.⁴ – See also *S v Swartbooi* where Muller AJ (as he then was) stated :

‘The magistrate refers to s 170 of Act 51 of 1977 in respect of his sentence. Section 170 is only applicable to persons who are not in custody and have not been released on bail or on warning and who do not appear on the date to which the matter had been postponed. In this case the accused was out on bail. The correct and appropriate procedure was one in terms of s 67 referred to supra . The proceedings of 23 November before the magistrate, Mr Hausiku, were therefore irregular and the conviction and sentence imposed by him are set aside.’⁵

[30] Also in this instance the section could thus never have been of application because the accused, was a person, to whom bail had already been granted by the time that he failed to appear on 21 July 2011 - and as - on the occasion of his subsequent appearance - on 04 August 2011 - a warrant for his arrest had already

⁴170 **Failure by accused to appear after adjournment**

(1) An accused at criminal proceedings who is not in custody and who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned, or who fails to remain in attendance at such proceedings as so adjourned shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

⁵1991 (2) SACR 54 (NM) at p55 i – 56 a

been issued. The accused was accordingly in custody at the time of the next appearance. Also for this reason the subsequent proceedings of 05 December 2013 were irregular and have to be set aside.

[31] In the result – and in circumstances where the main criminal proceedings instituted against the accused, where he is facing a charge of robbery with aggravating circumstances have not yet been concluded - the following orders are made

- a) The proceedings conducted on- as well as the orders made on 4 August 2011 and 5 December 2013 are set aside.
- b) The conviction and sentence imposed on the accused on 5 December 2013 is set aside.
- c) The matter is referred back to the lower court where the failure, of the accused, to appear on 21 July 2011, is to be dealt with afresh in terms of the provisions of section 67 of the Criminal Procedure Act 1977.

H GEIER
Judge

EPB HOFF
Judge

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