



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 92/2018

In the matter between:

THE STATE

v

IMENTIA UIRAS

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1785/2018)

Neutral citation: *S v Uiras* (CR 92/2018) [2018] NAHCMD 386 (29 November 2018)

Coram: USIKU, J and UNENGU, AJ

Delivered: 29 November 2018

Flynote: Criminal Procedure – Special review in terms of s 304(4) of the Criminal Procedure Act, 51 of 1977 – Accused charged with contravening s 18(1) of the Children’s Act, Act 33 of 1960 – Duplication of convictions – Sentences of fines

ordered to run concurrently – Inappropriate and not permissible in law – Convictions and sentences set aside – Matter remitted to the magistrate with directions.

Summary: The accused, a mother of three minor children was charged with and convicted of three counts of contravening s 18(1) of the Children’s Act, Act 33 of 1960, i.e. abandoning her three minor children. She was sentenced to pay a fine of N\$1500.on each count. The penalty for the offence in the Act, is a fine not exceeding 200 pounds. For this and other reasons, the divisional magistrate for the Otjiwarongo division submitted the record of proceedings of the matter with comments for special review following the provisions of s 304(4) of the Criminal Procedure Act, 51 of 1977. On review, the court *held* – that the convictions amounted to a duplication of convictions because the accused performed one action and had one intention when she abandoned the minor children. *Held* further that it is inappropriate and not permissible to order sentences of fines to run concurrently. Therefore, the court set aside the convictions and sentences imposed and remitted the matter to the magistrate with directions.

ORDER

- (i) The convictions and sentences on all three counts are hereby set aside.
 - (ii) The matter is remitted to the magistrate’s court of Otjiwarongo and the learned magistrate directed to deal with the matter in terms of s 112(1) (b) of the Act.
 - (iii) Part of the sentence served by the accused must be taken into consideration when sentencing her afresh if convicted.
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REVIEW JUDGMENT

UNENGU, AJ (USIKU, J concurring):

[1] This matter has been sent by the divisional magistrate for the division of Otjiwarongo on special review following the provisions of s 304(4) of the Criminal

Procedure Act¹ (the CPA), under cover of a letter 1/4/13 dated 1 November 2018 with the following comments:

1. The accused pleaded guilty and was convicted of 3 (three) counts of contravening Section 18(1) of the Children's Act 33 of 1960. She was sentenced to pay a fine of N\$1500.00 (one thousand five hundred Namibian Dollars) or in default of payment 7 (seven) months imprisonment on each count which were all ordered to run concurrently.
2. The maximum fine under the Act is 200 (two hundred Dollars) pounds. That figure was converted to N\$3012.00 (three thousand and twelve Namibian Dollars) by the prosecution using the current exchange rate between the pound and the Namibian Dollar.
3. In terms of Section 2 of the Decimal Coinage Act of 1959 the ratio set between the 2 (two) currencies is 1 to 2. The maximum fine that can therefore be imposed in terms of Section 18(5) of the Act is N\$400.00 (four hundred Namibia Dollars). The fines that were thus imposed are accordingly incompetent on account of exceeding the permissible penalty. See S v Tjangano Igrid Nangali CR 60/2017 delivered 10 October 2017.
4. To my mind it was imprudent for the court to deal with the matter under Section 112(1)(a) instead of 112(1)(b). The nature of the sentences imposed suggests that the court viewed the offences in a serious light. From the record it is clear that there was no enquiry "...if as a result of the ... abandonment the child is likely to suffer unnecessarily, or any part or function of its mind or body is likely to be injured or detrimentally effected, even though no such suffering, injury or detriment has in fact been caused or even though the likelihood of such suffering, injury or detriment has been averted by the action of another person...". In fact not even the ages of the children are disclosed in the proceedings. In short no proper enquiry was done to understand what happened in order to inform the court of an appropriate sentence.
5. Having imposed fines it was not proper for the court to order that the fines should run concurrently as that is only permissible with respect to prison terms.
6. It also appears to me that there was a duplication of convictions in that the 3 (three) minor children appearing separately on the three charges were in fact abandoned at once during the same period by their mother. There is nothing to suggest that what the mother did amounted to three separate acts but clearly demonstrate that the mother had a single intent to abandon her children simultaneously.'

¹ Act 51 of 1977

[2] The accused involved was convicted of three counts of contravening s 18(1) of the Children's Act, Act 33 of 1960, and is the mother of the three minor children whom she left at the house of a certain Roderick Oxurub for three days. However, from the record of the proceedings, it is not clear under what circumstances she left the children with Roderick Oxurub and how Oxurub is related to her, because no evidence was led to that effect. The matter was disposed of in terms of s 112(1)(a) of the Criminal Procedure Act.

[3] I agree with the divisional magistrate that the learned magistrate when dealing with the matter in terms of s 112(1)(a) instead of s 112(1)(b) of the Criminal Procedure Act, failed to do a proper enquiry to understand the circumstances why the children were left and how they were left with Mr Roderick Oxurub. This is a sign of laziness on the part of both the magistrate and the prosecutor. The importance of the case did not matter to the magistrate and prosecutor, what mattered to them was to finalise the case as quickly as possible.

[4] The divisional magistrate is further correct that there is nothing on record of the proceedings suggesting that the conduct of the accused (mother) amounted to three separate acts to justify the three convictions. Even if it is argued that she had an intention to abandon each minor child separately – the fact of the matter is that it was done in one action simultaneously. In my view, the convictions amount to a duplication of convictions.

[5] Another correct observation made by the divisional magistrate is the order made to order the sentences of fines to run concurrently. Such order is inappropriate and not permissible were fines have been imposed.

[6] That being the case and for reasons stated above, the convictions and the sentences imposed by the learned magistrate cannot be allowed to stand. In the result, therefore, the following order is made:

- (i) The convictions and sentences on all three counts are hereby set aside.

- (ii) The matter is remitted to the magistrate's court of Otjiwarongo and the learned magistrate directed to deal with the matter in terms of s 112(1) (b) of the Act.
- (iii) Part of the sentence served by the accused must be taken into consideration when sentencing her afresh if convicted.

E P UNENGU
Acting Judge

D N USIKU
Judge