



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**REVIEW JUDGMENT**

Case no: CR 13/2019

In the matter between:

**THE STATE**

v

**JAN JOSEPH MCKAY**

**ACCUSED**

**(HIGH COURT MAIN DIVISION REVIEW REF NO. 101/2018)  
(MAGISTRATE SERIAL NO.: 138/2017)**

**Neutral citation:** *S v McKay* (CR 13/2019) [2019] NAHCMD 34 (22 February 2019)

**Coram:** NDAUENDAPO J et SHIVUTE J

**Delivered:** 22 February 2019

**Flynote:** Accused charged under wrong Act – Maintenance Act 23 of 1963 – Act repealed by Maintenance Act 9 of 2003 – Court held no prejudice suffered by accused – Act 23 of 1963 substituted with Act 9 of 2003– Magistrate invoked s 112(a) of Act 51 of 1977 - Failed to invoke the provisions of s 39(2) of Act 9 of 2003 – Irregular proceedings – Matter remitted – Magistrate to invoke the provisions of s 112(1)(b).

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### **ORDER**

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- (a) The conviction and sentence are set aside.
  - (b) The matter is remitted to the magistrate in terms of s 312 of the Criminal Procedure Act 51 of 1977 with the direction for the court to invoke the provisions of s 112(1)(b).
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### **REVIEW JUDGMENT**

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SHIVUTE J, (NDAUENDAPO J concurring)

[1] The accused was charged with failure to pay maintenance, contravening s 11(1) of the Maintenance Act 23 of 1963.

[2] He pleaded guilty to the charge and was convicted on his own plea of guilty. He was sentenced to a fine of N\$ 4000 (four thousand Namibia dollar) or to 6 months' imprisonment suspended as a whole on the following conditions:

- '(a) That the accused is not convicted of failure to pay maintenance committed during the period of suspension.
- (b) That the accused should pay N\$ 550 per month, N\$ 350 towards the maintenance and N\$ 200 towards the arrears until such arrears are fully paid.
- (c) Bail refunded and goes to the arrears.'

[3] When the matter came before me for review I directed a query to the learned magistrate whether the maintenance Act 23 of 1963 was not repealed and whether the sentence imposed was not too vague.

[4] The learned magistrate conceded that it was an oversight from the court and that the accused should effect payment on the date of sentence.

[5] It is of importance to note that the Maintenance Act 23 of 1963 has been repealed by the Maintenance Act 9 of 2003 and thus the provisions of Act 9 of 2003 applies. Furthermore, the learned magistrate dealt with the matter in terms of s 112(a) of Act 51 of 1977. It is wrong to deal with this matter in terms of this section because s 39(2) of the Maintenance Act 9 of 2003 provides that:

'If the defence is raised in any prosecution for an offence under this section that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she is not, merely on the grounds of such defence entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or to his or her misconduct.'

This provision was not brought to the attention of the accused. The question that arises is whether the accused will be prejudiced if the provisions of the Maintenance Act 9 of 2003 is applied as opposed to the provisions of the Maintenance Act 23 of 1963. The review court is of the view that no prejudice will be suffered by the accused person in this regard. Therefore, the repealed Act is substituted with a contravention of s 39(1) of the Maintenance Act 9 of 2003.

[6] The concession made by the learned magistrate is noted. However, it is not enough to state that the accused should effect payment on the date of sentence, what is imperative is for the accused to know exactly on or before which date, every month payment should be effected. Therefore, the sentence imposed by the magistrate is wrong.

[7] Having said that, since the provision of s 39(2) was not brought to the attention of the accused, the conviction cannot be allowed to stand. It also follows that the sentence cannot be allowed to stand.

[8] In the premises, the following order is made:

(a) The conviction and sentence are set aside.

(b) The matter is remitted to the magistrate in terms of s 312 of the Criminal Procedure Act 51 of 1977.with the direction for the court to invoke the provisions of s 112(1)(b).

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NN SHIVUTE  
Judge

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GN NDAUENDAPO  
Judge