

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SPECIAL REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: <i>The State v Pakina Hameva</i>	Case No: CR 76/2023
High Court Review No: 1270/2022	Division of Court: Main Division
Heard before: January J et Shivute J	Delivered on: 21 July 2023
Neutral citation: <i>S v Hameva</i> (CR 76/2023) [2023] NAHCMD 425 (21 July 2023)	
The order: 1. The conviction and sentence are confirmed. 2. In accordance with s 91(2) of the Act, the sentence of imprisonment imposed under ss (1) commences on the date of expiry of any other sentence of imprisonment which the offender concerned is liable to serve on the date of commission of the disciplinary offence in question.	
Reasons for order:	
JANUARY J (Shivute J concurring)	

[1] This matter came on special review from the Magistrate, Omaruru, under a covering letter. The accused was charged of contravening s 86(1)(b) of the Correctional Services Act 9 of 2012 (the Act) – Receives or has possession of a prohibited article, to wit: a communication device or component thereof namely, a Nokia cell phone.

[2] The magistrate raised concerns in the covering letter because, according to her, the accused, raised the possibility of a special plea before he pleaded. The Magistrate stated that he is uncertain if the proceedings are in accordance with justice as he has not dealt with such matters previously.

[3] The record of proceedings, before the charge was put to the accused, reflects as follows:

‘Acc: I was wondering whether one can be tried twice, since I was already tried on this matter.

Crt: When, where and by who?

Acc: In 2020 the 6th month by prison authorities. I had a copy of the conviction however I lost it when I ask about it, I was informed to tender a written request for such copy.

Crt: Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge that is in terms of section 106(2) of the Criminal Procedure Act 51 of 1977. That means that accused can tender a plea of guilty or not guilty, however that should the accused plea (sic) guilty he cannot use a “special plea” however should the accused plead not guilty he may proceed and use a special plea as well. Do you understand that?

Acc: Yes.

Crt: In terms of sub 3 of the same Act, an accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea: provided that the requirement of such notice may be waived by the Prosecutor-General or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given. Do you understand that?

Acc: Yes.

Crt: Do you wish to proceed with the plea proceedings or be given time to consider whether you will use a special plea as well and if so to give notice as required?

Acc: I can proceed with the plea proceedings.

.....'

[4] The charge was then put to the accused whereupon he pleaded guilty. The Magistrate applied s 112(1)(b) of the Criminal Procedure Act 51 of 1977 (the CPA) and convicted the accused. The prosecution proved a previous conviction of the accused where he was sentenced to 18 years' imprisonment for murder. He was serving that sentence at the time when this case was adjudicated. He was sentenced to 45 days imprisonment.

[5] The CPA provides in section 106 amongst others as follows:

'106 Pleas

(1) When an accused pleads to a charge he may plead-

(a) that he is guilty of the offence charged or of any offence of which he may be convicted on the charge; or

(b) that he is not guilty; or

(c) that he has already been convicted of the offence with which he is charged; or

(d)

(2) Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge.

(3) An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea: Provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.'

[6] It is clear that the magistrate explained the provisions of subsections 2 and 3 of the

CPA to the accused i e, a plea of guilty may not be pleaded with any other plea, that he must give reasonable notice and state the ground(s) on which his plea is based. The accused understood and made an informed decision not to raise a special plea. In addition, there are requirements to be met by an accused who wants to raise a plea of *atrefois convict* in terms of section 106(1)(c). These are that the accused was already convicted for the same offence or a substantially same offence and by a court of competent jurisdiction.

[7] The Act provides for disciplinary proceedings in s 85, minor offences and s 86, major offences. The offence that the accused was charged with falls within a major offence, to wit contravening s 86(b), receives or has in his or her possession a prohibited article.

[8] Section 88 of the Act, amongst others, provides that:

'88 Disciplinary inquiry for, or trial of, offenders

(1) A charge against an offender for a major disciplinary offence may be heard and determined by-

(a) a presiding officer at a disciplinary inquiry within a correctional facility; or

(b) a magistrates court where, owing to the gravity of the offence or for other sufficient cause, the officer in charge decides to transfer the matter for trial to such court.'

[9] Section 89 provides for sanctions to be imposed at a disciplinary hearing. It is clear from the wording that the Act, in no uncertain terms, distinguishes a presiding officer at a disciplinary inquiry and a magistrate court. Furthermore, it does not provide for sentences, but sanctions, at a disciplinary hearing and that a disciplinary board means a disciplinary board appointed under s 51(1) of the Act. The Act also does not grant criminal jurisdiction to the disciplinary panel and is therefore not a court of competent jurisdiction. An accused who is sanctioned at such disciplinary hearing can thus not plead that he was previously convicted for the same offence by a competent court.

[10] Accordingly, we find the conviction and sentence to be in accordance with justice.

[11] In the result, the following orders are made;

1. The conviction and sentence are confirmed.

2. In accordance with s 91(2) of the Act, the sentence of imprisonment imposed under ss (1) commences on the date of expiry of any other sentence of imprisonment which the offender concerned is liable to serve on the date of commission of the disciplinary offence in question.

H C JANUARY JUDGE	N N SHIVUTE JUDGE