

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT
PRACTICE DIRECTIVE 61

Case Title: The State v David Kaheka	Case No: CR 115/2023
High Court MD Review No: 1721/2023	Division of Court: High Court, Main Division
Coram: Liebenberg J <i>et</i> Shivute J	Delivered: 3 November 2023
Neutral citation: <i>S v Kaheka</i> (CR 115/2023) [2023] NAHCMD 703 (3 November 2023)	
ORDER: <ol style="list-style-type: none">1. The convictions of accused 1 and 2 are confirmed.2. The sentence in respect of accused 1 is set aside.3. The matter is remitted to the trial court to deal with in accordance with the law.	
REASONS:	
LIEBENBERG J (SHIVUTE J concurring):	

[1] This is a review from the Magistrate's Court of Windhoek. Accused was arraigned with one other on charges of a contravention of s 2(b) read with sections 1, 2(i) and/or 2 (iv), 7, 8, 10, 14, and Part 1 of the Schedule of Act 41 of 1971 – Possession of dependence-producing substances. He pleaded not guilty to the charge and after evidence was led, accused 1, in respect of whom this review relates, was convicted and sentenced to 24 months' imprisonment. His co-accused, accused 2, was also convicted but his case was postponed to 27 October 2023 on account of him being a minor pending his pre-sentence report from Welfare Services.

[2] On review, it was queried why only accused 1 was sentenced whereas the case in respect of accused 2 was postponed. The magistrate, in response, highlights that it was an error on her part when she finalised the case in respect of accused 1 and postponed that of accused 2 and acknowledges that her actions amounted to a separation of trial whilst no such application was before her as would be contemplated in s 157(2) of the Criminal Procedure Act 51 of 1977 (the CPA). According to the magistrate, the postponement in respect of accused 2 was occasioned by the need to first obtain a presentence report because of his age. The age of accused 2 is captured as 16 in the response from the court *a quo*.

[3] The magistrate rightly concedes that the sentence stands to be set aside and the matter remitted to the trial court for sentencing of both the accused. There is no doubt that the procedure adopted by the magistrate is irregular as the CPA does not make provision for it. Where there is more than one accused in a matter, unless there is a separation of trials, the proceedings must be finalised at the same time as opposed to the irregular piecemeal approach adopted in this instance where one accused is sentenced and the sentence in respect of another accused is postponed to a subsequent date.¹ When regard is had to the foregoing, it follows that the sentence must be set aside and the matter remitted to the trial court for accused 1 to be sentenced afresh and alongside his co-accused.

[4] In the result, it is ordered that:

¹ See: *S v Maasdorp* 2015 (4) SA 1109 (HC) at 1110 H – J and 1111 A – E; *The State v Ngundja* (CR 292/2016) [2016] NAHCNLD 98 (1 December 2016).

1. The convictions of accused 1 and 2 are confirmed.
2. The sentence in respect of accused 1 is set aside.
3. The matter is remitted to the trial court to deal with in accordance with the law.

J C LIEBENBERG
JUDGE

N N SHIVUTE
JUDGE