

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTION 61

Case Title: The State v Riaan Griffiths	Case No: CR 140/2023
High Court MD Review No: 1328/2023	Division of Court: High Court, Main Division
Coram: Usiku J <i>et</i> Christiaan AJ	Delivered: 4 December 2023
Neutral citation: <i>S v Griffiths</i> (CR 140/2023) [2023] NAHCMD 786 (04 December 2023)	
ORDER: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The accused to be released from custody and if fine is paid, it is to be refunded.	

REASONS FOR ORDERS:

CHRISTIAAN AJ (USIKU J concurring):

[1] This review matter came before me in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 and was sent by the Principal Magistrate of Otjinene with the following remarks:

'It was irregular for the accused to be charged again as the conviction and sentence was set aside by the High Court previously. There has been an error by the court in that the procedure followed was wrong and the conviction and sentence cannot stand as the second conviction would not be in accordance with justice as the as the matter was set aside and there were no further instructions by the High Court to remit the matter back to start de novo as such the learned magistrate prays:

1. That the conviction and sentence dated 20 July 2023 be set aside.
2. That the accused person be released from custody and the paid fine be refunded.
3. An order as the Honorable court deems fit.'

[2] From the record, the two accused persons first appeared before the Otjinene Magistrates' Court on 5 December 2022, and the accused was convicted and sentenced on his plea of guilty for possession of dependence producing substances – contravening s 2(b) of Act 41 of 1971 ('the Act'). The particulars of the charge were that upon or about 30 November 2022 and at or near du Plessis, in the district of Otjinene, the accused did unlawfully have in his possession or use, a dependence-producing drug or plant from which such drug can be manufactured, to wit 40 grams of 'skunk' to the value of N\$2000. Accused was convicted and sentenced to pay a fine of N\$10 000 or 24 months' imprisonment. The matter was sent on review and the conviction and sentence was set aside.

[3] On 20 July 2023, the accused appeared on a summons again on the same charges. After the matter was finalized, the magistrate realised that the accused was

previously charged, convicted and sentenced on 5 December 2022 on the same particulars.

[4] The matter was ultimately referred by the Principal Magistrate, on the 27th of July 2023, to this court for special review, as aforesaid.

[5] Article 12(2) of the Constitution. Article 12(2) provides that:

'No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Article shall be construed as changing the provisions of the common law defenses of "previous acquittal" and previous conviction.'

[6] The old decision of the Appellate Division of *R v Manasewitz*¹ laid down the law on double jeopardy when it said the following:

'I accept, for the purpose of these reasons, the following requisites to establish a plea of *autrefois acquit*, namely that the accused has been previously tried (1) on the same charge, (2) by a court of competent jurisdiction and (3) acquitted on the merits. Obviously an accused so tried must have been in jeopardy. The proposition is sometimes stated slightly differently thus: That the accused has been previously indicted on the same charge, was in jeopardy, and was acquitted on the merits. If so stated it is necessary to add that if the indictment was invalid or the Court had no jurisdiction the accused was not in jeopardy. Again, if after conviction a superior court quashes an indictment as bad *ab initio* the accused cannot on retrial rely upon the previous-ultimate-acquittal. This view can be justified either on the ground that the crime alleged in the subsequent, good, indictment is not that alleged on the previous, bad indictment, or on the ground that the accused was never (legally) in jeopardy or that the acquittal was not on the merits.'

[6] The above remarks apply with equal force to the present matter. And for the same reasons the proceedings cannot be allowed to stand due to the irregularity referred to.

¹ *R v Manasewitz* 1933 AD 165 at 173-174.

<p>[7] In the result, the following order is made:</p> <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The accused to be released from custody and if fine is paid, it is to be refunded.	
<p>P CHRISTIAAN ACTING JUDGE</p>	<p>D USIKU JUDGE</p>