

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGMENT

Case Title: <i>Efraim Johannes Benjamin v State</i>	Case No: HC-NLD-CRI-APP-CAL-2021/00014
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J <i>et</i> Honourable Mr. Justice Kessler AJ	Heard on: 21 January 2022 Delivered on: 11 February 2022
Neutral citation: <i>Benjamin v S</i> (HC-NLD-CRI-APP-CAL-2021/00014) [2022] NAHCNLD 8 (11 February 2022)	
The order: <ol style="list-style-type: none">1. The conviction of contempt of court and the sentence of N\$500 or 30 days imprisonment for 1 September 2020 are set aside with immediate effect.2. The conviction of contempt of court and the sentence of N\$2000 or 6 Months imprisonment for 19 January 2021 are set aside with immediate effect.3. The conviction of contempt of court and the sentence of 6 months imprisonment for 20 April 2021 are set aside with immediate effect.4. If the appellant paid a fine on any of the above sentences, same should be refunded to the lawful depositor.5. In the event that the matter has not yet been finalized, the matter is remitted to the Magistrate for him to conduct a proper inquiry into the absence of the appellant and to make an appropriate order in accordance with legal principles as set out herein.	

Reasons for the order:

SALIONGA J (KESSLAU AJ concurring):

[1] This is an appeal where the appellant was convicted of contempt of court, after he had failed to appear at court on the date to which proceedings were adjourned. He was charged in the Outapi Magistrate's court on a charge of contravening section 4 (1) (a) read with section 1, 4 (2) (a) , 8, 9, 12, 13, and 14 of the Controlled Wild Life Products and Trade Act 9 of 2008- Possession of any controlled wildlife product.

[2] During the hearing Mr Jafet appeared for the appellant and Mr Matota appeared for the respondent.

[3] The proceedings in the court a quo depicts the appellant who while on bail failed to appear in court resulting in a warrant being issued for his arrest, bail being provisionally cancelled and bail money being provisionally forfeited to the State. After the expiration of a period of 14 days his bail was finally cancelled and bail money finally forfeited to the State. On 20 April 2021, the appellant appeared on a warrant of arrest before the Magistrate who on this date held inquiry for his failure to appear in court. The appellant was convicted and sentenced to 6 (six) months imprisonment. After sentencing the appellant, the Magistrate did not pronounce himself on the issue of bail but postponed the matter to 13 .7. 2021 for section 119 plea. It is the proceedings of 20 April 2021 that the appellant has appealed against.

[4] From the onset it must be pointed out that counsel for the respondent rightly conceded that the Magistrate had acted *ultra vires* and that the conviction and sentence in this matter ought to be set aside. I also settle down with counsel's further concession that given the nature of the irregularities involved' this matter should have been brought on automatic review in terms of section 20 of the High Court Act, 16 of 1990 since the criminal proceedings had not yet been finalised instead of it being brought by way of an appeal.

[5] Another misgiving this court has although not specifically addressed neither by the appellant in his notice of appeal or his heads of arguments nor by the respondent in the heads of argument, is the other convictions and sentences highlighted below while following the same procedure. The background of the matter is that on 2 March 2020 the appellant's case

was postponed to 12 May 2020 for further investigation and appellant's bail was extended. On 12 May 2020 accused was absent and only came to court on the return date, the 26 May 2020. On that date no enquiry was held and his bail was extended to 3 August 2020. Again appellant was absent from court on 3 August 2020 and a warrant for his arrest was issued with a return date of 21 August 2020. His bail was finally cancelled and his bail money forfeited to the State on 21 August 2020.

[6] The appellant appeared on a warrant of arrest on 1 September 2020. The Magistrate despite the order for 21 August 2020 finally cancelling bail and forfeiting bail money, conducted an inquiry into his failure to attend court on 3 August 2020. The court was not satisfied with explanation and convicted the accused for failing to appear in court. The appellant was sentenced to N\$500 or 30 days imprisonment. The matter was postponed to 23 November 2020 for section 119 plea and bail was fixed at N\$500 which appellant paid. On 23 November 2020 the appellant was once again absent from court and a provisional order for the cancellation and forfeiture of his bail was issued with a return date of 8 December 2020 which order was made final on 8 December 2020.

[7] On 19 January 2021 the appellant then appeared on a warrant of arrest and the Magistrate once again despite the final order of 8 December 2020 proceeded to conduct an inquiry where after he convicted the appellant for contempt of court and sentenced him to N\$2000 or 6 Months imprisonment. On the same day, appellant was once again granted bail of N\$1000 which he paid.

[8] Although the other two sentences and convictions were not specifically appealed against I had requested counsel to address us on the issue at the hearing. Counsel for the appellant okayed the procedure adopted by the magistrate while counsel for the respondent rightly conceded that irregular procedures were followed and all convictions and sentences imposed have to be set aside.

[9] I am alive to the findings of the court in *Joseph v S*¹ where inherent jurisdiction was described as follows:

'[21] The High Court is not entitled to make substantive law and cannot act contrary to statutory prohibition. Still, it has a reservoir of power to be employed in circumstances where the law does not

¹ *Joseph v S* (HC-NLD-CRI-APP-CAL-2020/00056) [2021] NAHCNLD 48 (26 May 2021)

cater for a given situation in advancing the administration of justice. This power will be used by the High Court sparingly and only in exceptional circumstances. If the court purports to exercise an inherent jurisdiction in cases where it cannot do so, the decision will be a nullity.² In my view it will be in the interest of justice and advancing the administration of justice that this Court exercises its inherent jurisdiction to review them and ensure that justice is done in this matter.³

[10] The procedure to be adopted when dealing with an accused who is on bail and absent from court is provided for in terms of section 67 of the Criminal Procedure Act, 51 of 1977. This section provides as follows:

'Failure of accused on bail to appear

67. (1) If an accused who is released on bail -

(a) fails to appear at the place and on the date and at the time -

(i) appointed for his trial; or

(ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or

(b) fails to remain in attendance at such trial or at such proceedings, the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.

(2) (a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.

(b) If the accused satisfies the court that his failure was not due to fault on his part,

the provisional cancellation of the bail and the provisional forfeiture of the bail

money shall lapse. (c) If the accused does not appear before court within fourteen

days of the issue under subsection (1) of the warrant of arrest or within such

² *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* 2010 (2) NR 703 (HC) paragraph 30
Once the court has correctly determined that a given situation calls for the exercise of its inherent jurisdiction, it must be exercised by discretion. The word discretion cannot be used as carte blanche to ignore existing rule and precedent.

³ *S v Amukoto* (HC-NLD-CRI-APP-SNA-2021/00012) [2021] NAHCNLD 62 (29 June 2021)

extended period as the court may on good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.

- (3) The court may receive such evidence as it may consider necessary to satisfy itself that
- the accused has under subsection (1) failed to appear or failed to remain in attendance,
- and such evidence shall be recorded.'

[11] Mainga J in *S v Paulus* 2007 (2) NR 622 (HC) set aside a similar order and made the following observations:

'[7] Section 67 makes clear the procedure to be adopted by the court when an accused on bail fails to appear. It makes no provision for the summary inquiry and punishment thereafter when convicted where adopted by the magistrate. It only makes provision for the estreatment of bail. It appears the legislature regarded the forfeiture of bail a sufficient punishment in the case where accused failed to appear. Therefore the magistrate had no authority in terms of s67 to act as he did.' (See also *S v Ndakolute* 2005 NR 37 (HC); *Leonard v S* (HC-NLD-CRI-APP-CAL-2018/00045) [2018] NAHCNLD 106 (11 October 2018) and *S v Muronga* 2004 NR 134 (HC)). In my view this is an error which could have been prevented given the number of case law on this point.

[12] From the aforesaid cases, it is crystal clear that section 67 of the Act makes no provision for the summary inquiry as adopted by the Magistrate and does not provide for punishment in that regard. The Legislature clearly regards the final cancellation of bail and forfeiture of the bail money as sufficient punishment in this regard. The procedure adopted by the Magistrate is irregular and constitutes a double jeopardy for an accused.

[13] By adopting these procedures, the magistrate acted *ultra vires and* misdirected himself and as such all convictions and sentences ought to be set aside. As a consequences of setting aside the convictions in the appeal, the issue of sentences automatically falls away.

[14] In the result it is ordered that:

1. The conviction of contempt of court and the sentence of N\$500 or 30 days imprisonment for 1 September 2020 are reviewed and set aside.
2. The conviction of contempt of court and the sentence of N\$2000 or 6 Months

imprisonment for 19 January 2021 are reviewed and set aside.

3. The conviction of contempt of court and the sentence of 6 months imprisonment for 20 April 2021.
4. If the appellant paid a fine on any of the above sentences, same should be refunded to the lawful depositor.
5. In the event that the matter has not yet been finalized, it is remitted to the Magistrate to act in accordance with legal principles as set out herein.

	Comments:
Salionga J	NONE
Kesslau AJ	NONE
Counsel:	
Appellant	Respondent
Mr. K. Jafet Kangumu Attorneys, Outapi	Mr. L. Matota Of Office of the Prosecutor-General, Oshakati