

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

NESTOR KANDUME

(HIGH COURT REVIEW CASE NO.: 298/07)

CORAM: MAINGA, et VAN NIEKERK, JJ

Delivered on: 2007-04-13

REVIEW JUDGMENT:

VAN NIEKERK, J:

[1] In this matter the accused was convicted of assault with intent to do grievous bodily harm. The conviction is in order.

[2] The accused was sentenced as follows:

"Sixteen (16) months imprisonment of which six (6) months is wholly suspended for 5 years on condition accused does not within that period of suspension be found guilty of Assault with intent to do grievous bodily harm."

[3] On review I directed the following query to the learned magistrate:

- "1. The formulation of the sentence imposed appears unsatisfactory. As it stands now the condition of suspension is that the accused is not found guilty of the same offence within the period of suspension. There is no requirement that the offence must have been committed within the period of suspension. This means

that, even if the accused had committed assault with intent to cause grievous bodily harm before the sentence was passed and in respect of which the accused is convicted within the period of suspension, the condition would be violated. Does this not amount, in effect, to imposing a sentence retrospectively? Was this the intention of the learned magistrate?

2. Furthermore, even if the accused commits the same offence in the future within the period of suspension, but is convicted outside the period of suspension, the suspended sentence may not be brought into operation. Was this the intention of the learned magistrate?

3. Does it serve any useful purpose to state that the six months is "wholly" suspended - surely the six months cannot be partly suspended?"

[4] In his reply the magistrate agrees that the sentence must be reformulated to address the concerns raised by the query. He refers to the cases of *S v Kakulu* 1990 NR 282 (HC); *S v Skrywer* 1990 NR 343 (HC); *S v Heita Bonifatius* (unreported) (High Court Case No. CR 123/2006); *S v Josef Jossop and Ivan Jossop* (unreported) (High Court Case No. CR 125/2006); and *S v Nikiwe Msimanga* (unreported)(High Court Case No. 126/2006).

[5] In the result the following order is made:

1. The conviction and sentence are confirmed.

2. The conditions of suspension are deleted and the following conditions are substituted therefor:

"Sixteen (16) months imprisonment of which six (6) months is suspended for five (5) years on condition that the accused is not convicted of assault with intent to do grievous bodily harm committed within the period of suspension."

VAN NIEKERK, J

I agree

MAINGA, J