

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

SAMUEL HOMATENI IMENE

(HIGH COURT REVIEW CASE NO.: 1565/2007)

CORAM: VAN NIEKERK, J et MULLER, J

Delivered on: 26 October 2007

SPECIAL REVIEW JUDGMENT

MULLER, J: [1] The accused was convicted of being in possession of suspected stolen goods and sentenced to N\$800 or in default to 4 months imprisonment. It was further ordered that this sentence should run concurrently with a prison sentence that he is already serving.

[2] The prison authorities informed the magistrate that the last part of the sentence was not in order. The magistrate discovered that it was indeed so and submitted the matter for special review. The magistrate requests that this last part of the sentence be set aside, namely by

deleting the words: *“to run concurrently with the one accused is serving.*

[3] If the sentence should remain, it would mean that there would be no incentive for the accused to pay the fine. He would not pay it and then his sentence is one of 4 months imprisonment, which runs concurrently with the sentence that he is serving. Effectively he would not be penalised for his conviction at all.

[4] In an unreported judgement of *S v Simbarashe Marisa*, Case No. CR 19/2006, this Court on review considered other cases where these types of sentence were imposed. The view of Melunsky, J in *S v Hutton* 1998 (2) SACR 474 (E) at 477 was preferred, namely that it was desirable that a court should order that a sentence will run concurrently only if the fine is not paid. In this case the magistrate did not make such an order.

[5] When reading the record it is evident that this portion was only included as a result of the accused asking for a sentence that will run concurrently with the one he is already serving when he made submissions in mitigation of sentence. From the magistrate’s judgment on sentence it is evident that he intended the accused to be punished for this offence, but added to his sentence that it should run

concurrently with the one the accused is serving. The magistrate clearly did not consider the effect of this addition to the sentence, as I have indicated above. It is further desirable that the magistrate should have indicated that the sentence shall run concurrently only if the fine is not paid. This he did not do. I agree with the magistrate's suggestion that the last portion of the sentence should be deleted.

[6] In the result, the conviction and sentence of the accused are confirmed, except for the words: "*to run concurrently with the one the accused is serving,*" which words are deleted from the sentence.

MULLER, J

I concur

VAN NIEKERK, J