



**CASE NO. CR 24 /2010**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

versus

**ANTON HABAB GARISEB**

**ACCUSED**

HIGH COURT REVIEW CASE NO. 128/2010

**CORAM:** VAN NIEKERK *et* SWANEPOEL, J

Delivered on: 30 September 2010

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**REASONS**

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**SWANEPOEL, J.:** [1] This matter came before me on automatic review. The accused was convicted of theft of bedding and clothing to the value of N\$450.00 from a washing line belonging to one Pineas Kapembe. He pleaded guilty after questioning in terms of section 112(1)(b) of the Criminal Procedure Act, Act no. 51 of 1977 was duly found guilty and then sentenced to 9 months direct imprisonment.

[2] I directed the following query to the learned magistrate:

*“The learned magistrate’s reasons for sentencing the accused to direct imprisonment without an option of a fine (as was suggested by the State in its address to the court) are requested. Particularly so in view of the fact that the accused is a relatively young first offender (25 years) who has pleaded guilty for items with a low value and no evidence that the bedding and clothing were not retrieved and handed back to the complainant”.*

[3] The learned magistrate provided reasons for her sentence. She stressed the prevalence of the crime in her area of jurisdiction; the gravity of this type of theft and the fact that the accused indicated that he could not pay a fine. The learned magistrate did not take into account the accused’s pregnant girlfriend *“because the accused does not even know where the woman resides. He said in mitigation that she is in the area of Dordabis”* The aforesaid reply in my view is not indicative of the fact that the accused did not know where she resides.

[4] This court is alive of the fact that sentencing is the prerogative of the court of first instance, but if there is a striking disparity between the sentence of the magistrate and the one that I would have imposed had I been the court of first instance, this court is at large to interfere with the sentence.

[5] Apart from the mitigating factors set out in my query to the learned magistrate there is also the plea in mitigation that the accused has a grandfather and a sister who depend on him.

[6] The gravity of the offence and the deterrence effect that a sentence should have could also have been achieved with a partly suspended sentence. As the accused had already completed almost half of his prison sentence, the conviction was confirmed and the sentence of 9 months imprisonment was substituted with the following:

*“Accused is sentenced to 9 months imprisonment of which 5 months imprisonment is suspended for 3 years on condition that the accused is not convicted of theft committed during the period of suspension.”*

[7] A Warrant of Liberation was duly issued on the 1<sup>st</sup> of April 2010.

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**SWANEPOEL, J**

I agree

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**VAN NIEKERK, J**