



CASE NO.: CR 24/2010

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

MATUHUPUPI KAKONDO

(HIGH COURT REVIEW CASE NO.: 174/2010)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: October 06, 2010.

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused was arraigned in the Magistrate's Court Opuwo on charges of assault with intent to do grievous bodily harm and malicious damage to property. He pleaded guilty and was subsequently convicted on his plea and sentenced as follow:

“6 (six) months imprisonment wholly suspended on the following conditions.

(a) Accused is not convicted of assault with intent to do grievous bodily harm or malicious damage to property committed within the period of suspension.

(b) Accused performs 210 hours of community service at Opuwo State Hospital in the following terms:

(i) That community service starts on 31.05.2010 and must be completed within seven

hours of that date.

(ii) The community service must be done every Monday to Friday, not a public holiday between 08:00am and 13:00pm and from 14:00pm to 16:00pm.

(iii) The community service must be done to the satisfaction of the person in charge of that institution who may on good cause shown grant accused leave of absence on day/s or hour/s but such leave of absents shall not shown as part of community service hours to be completed.”

[2] The conviction is in order and will be confirmed; however, the sentence is not.

[3] When the matter came before me on review I directed a query to the magistrate as to the reason why only one sentence was imposed when the accused was convicted on two charges; and to which charge the sentence applied? The magistrate’s response was in the following terms:

“..., I should have sentence accused on each count and I only sentenced him on the last count i.e. assault with intent to do grievous bodily harm. The sentence is not in order as in the wording of a sentence I indicated that accused is not convicted of assault with intent to do grievous bodily harm or malicious damage to property. The sentence is not in accordance to Justice and cannot stand.” (sic)

[4] Despite the explanation proffered by the magistrate that she had sentenced only on count 1, it is evident from the manner in which the conditions of suspension are framed, that she actually took both charges as one, when sentencing. However, she omitted to note that on the record. There is no need to set aside the sentence which, in any event, would prejudice the accused, who by now would already have served his community service. The defective sentence can be cured by stating that counts 1 and 2 to be taken together for sentence.

[5] There is however something else. As regards the first condition of suspension referring to good conduct i.e. that the accused is not convicted of assault with intent to do grievous bodily harm or malicious damage to property, reference is made to the period of suspension without stating what that period is. A condition of suspension aimed at the future conduct of an accused is meaningless where the period of suspension is indeterminable. Without knowing such period, the accused would not know for how long he must steer clear of being convicted of the prohibited offences; neither would another court when approached with an application to have the suspended sentence put into operation, be able to give effect to the sentence earlier imposed, due to an improper formulation of the suspended sentence. The maximum period of suspension is five years (s 297 (1)(b) of Act 51 of 1977). The sentence imposed by the trial court therefore stands to be amended.

[6] In the result, it is ordered:

1. The convictions on counts 1 and 2 are confirmed.
2. The sentence is confirmed but amended only in the following respects:
Counts 1 and 2 taken together for sentence. The words “for a period of three years” are inserted after the word “suspended” in the sentence.

LIEBENBERG, J

I concur.

TOMMASI, J