

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 35/2016

In the matter between

THE STATE

And

ARNOLD KEMP

HIGH COURT MD REVIEW CASE NO 416/2015

Neutral citation: State v Kemp (CR 35/2016) [2016] NAHCMD 106 (11 April 2016)

CORAM: LIEBENBERG J et PARKER AJ

DELIVERED: 11 April 2016

Flynote: Criminal procedure – Sentence – Counts taken together for sentence – Sentence of 3 months' imprisonment, wholly suspended imposed – Conviction on count 1 under s 112 (1)(a) – Punishment of imprisonment without option of a fine not permissible – Counts separated in sentencing.

Criminal procedure – Sentence – Periodical imprisonment in lieu of any other punishment – Accused sentenced to imprisonment, wholly suspended – Periodical imprisonment cannot be condition of suspension.

Criminal procedure – Sentence – Periodical imprisonment – Serving of – Governed by Correctional Service Act – Person must be detained at correctional facility – Order directing accused to serve sentence of periodic imprisonment at police station null and void.

ORDER

1. The convictions on counts 1 and 2 are confirmed.
2. The sentence imposed is set aside.
3. On count 1 the accused is cautioned and discharged.
4. On count 2 the accused is sentenced to three (3) months' imprisonment, wholly suspended for a period of 3 years, on condition that the accused is not convicted of assault, committed during the period of suspension.
5. The sentence is antedated to 22 December 2014.

JUDGMENT

LIEBENBERG J: (Concurring PARKER AJ)

[1] At the outset it needs mentioning that this review matter was allocated to an acting judge of this court on 06 March 2015, with whom it remained until it ended up on my desk on 05 April 2016, more than one year later. The accused by now would have served the sentence imposed by the trial court (albeit erroneously), and the outcome of the present proceedings thus purely academic.

[2] The accused appeared in the Mariental Magistrate's Court on charges of *crimen injuria* (count 1) and assault (count 2) to which he pleaded guilty. The convictions are in order and will be confirmed. He was sentenced to three (3) month's imprisonment, wholly suspended on condition *inter alia* that he undergoes periodical imprisonment.

[3] The Principal Magistrate at the court *a quo* subsequently sent the proceedings for review in terms of s 304 (4) of Act 51 of 1977¹ and in his accompanying reasons pointed out that the sentence imposed was not competent, in that a sentence of periodical imprisonment cannot be a condition of suspension.² In addition, it appears from the record, though not specifically stated, that both counts were taken together for sentence. Whereas the court convicted the accused on count 1 in terms of s 112 (1) (a), it was not permitted to impose a custodial sentence without the option of a fine – even where the counts were taken together for sentence. To this end, the sentence imposed is also improper.

¹Hereinafter 'the Act'

²See *S v Vlotman* 1991 (1) SACR 319 (C)

[4] In terms of s 285 (1) of the Act a court ‘convicting a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, may, in lieu of any other punishment, sentence such person to undergo in accordance with the laws relating to correctional facilities, periodical imprisonment ...’. (Emphasis provided) The section makes plain that periodical imprisonment is imposed *in lieu of any other punishment* and thus cannot be combined with any other form of punishment provided for in s 276 (1) of the Act. It furthermore requires that periodical imprisonment must be served in accordance with the laws relating to correctional facilities. In turn, s 102 of the Correctional Service Act 9 of 2012 provides as follows:

‘102 Periodic imprisonment

Unless the court specifically directs otherwise, a person who has under the provisions of any law been sentenced to periodic imprisonment must be periodically detained in a correctional facility in the prescribed manner.’ (Emphasis provided)

Adding insult to injury, the court *a quo* ordered that the periodical imprisonment must be served at Kalkrand police station, which had not been declared a prison as provided for in the Correctional Service Act.³ The magistrate thereby clearly exceeded his powers when making the order, thus rendering it null and void.

[5] As stated, the accused by now would have finished serving the periodic sentence imposed on him and for that reason I decline to refer the matter back to the trial court to sentence him afresh. Justice will best be served if the matter is finalised by this court by determining the sentence the trial court ought to have imposed in respect of those counts the accused was convicted of.

[6] As regards count 1, the court, by taking the counts together, clearly intended incorporating punishment on count 1 with that of count 2, namely a sentence of three months’ imprisonment, wholly suspended. In view of the accused having been convicted in terms of s 112 (1)(a) on count 1, the accused must be sentenced separately on each

³Section 16

count. The offence committed in count 1 can be described as trivial and, in the circumstances of the case, a mere caution will suffice.

[7] On count 2 the court was of the view that a wholly suspended sentence would be appropriate, but then muddled it up with the conditions of suspension attached thereto. The conditions therefore have to be corrected to reflect the sentence initially intended.

[8] In the result, it is ordered:

1. The convictions on counts 1 and 2 are confirmed.
2. The sentence imposed is set aside.
3. On count 1 the accused is cautioned and discharged.
4. On count 2 the accused is sentenced to three (3) months' imprisonment, wholly suspended for a period of 3 years, on condition that the accused is not convicted of assault, committed during the period of suspension.
5. The sentence is antedated to 22 December 2014.

J C LIEBENBERG

JUDGE

**C PARKER
ACTING JUDGE**