

**REPUBLIC OF NAMIBIA**

**NOT REPORTABLE**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**REVIEW JUDGMENT**

**Case No: CR11/2017**

**THE STATE**

versus

**SAMUEL NENDOMBO**

**ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 51/2016)

(MAGISTRATE'S SERIAL NO. 88/2015)

**Neutral citation:** *S v Nendombo* (CR 11/2017) [2017] NAHCMD 20  
(31 January 2017)

**Coram:** LIEBENBERG J and SHIVUTE J

**Delivered:** 31 January 2017

---

## ORDER

---

- a) The conviction on all counts is confirmed as well as the sentence on the second count.
- b) The sentence on the first and third counts are altered as follows:
1. First count: N\$3000 (three thousand Namibian Dollars) fine in default 6 (six) months imprisonment.
  2. Third count: N\$ 300 (three hundred Namibian Dollars) fine or 1 (one) month imprisonment wholly suspended for 2 (two) years on condition accused is not convicted of crimen injuria committed during the period of suspension.
- c) The sentence is antedated to 25 November 2015.
- 

## REVIEW JUDGMENT

---

SHIVUTE J (LIEBENBERG J concurring):

[1] The accused was convicted on the following offences:

1. Assault by threat read with the provisions of the Domestic Violence Act of 2003 and sentenced to 12 (twelve) months' imprisonment of which 6 (six) months are suspended for 4 (four) years on condition accused is not convicted of assault by threat during the period of suspension.
2. Assault common read with the provisions of the Domestic Violence Act of 2003 and fined N\$ 500 (five hundred Namibian Dollars) in default 1 (one) month imprisonment.
3. Crimen injuria and fined N\$ 300 (three hundred Namibian Dollars) or 1 (one) month imprisonment wholly suspended for 2 (two) years on condition accused not convicted of crimen injuria during period of suspension.'

[2] Without a query directed to the learned magistrate, the learned magistrate wrote a letter posted to the Reviewing Judge as follows:

'I...do hereby confirm and now inform you that I made an error or irregularity in a case before me.

The case is **The State vs. Samuel Nendombo, Case no MRT-CRM 1040/2015**. The irregularity pertains to the first count (count 1) of Assault by threat read with provisions of the Domestic Violence Act, 4 of 2003. The court erroneously invoked section 112 (1) (a) of Act 51 of 1977 on misdirection of the prosecutor. Instead the court should have applied section 112 (1) (b) of Act 51 of 1977 as a sentence of imprisonment was imposed for count 1.

I confirm the irregularity and the matter may be sent back to me for the right procedure to be followed.'

[3] The trial magistrate correctly conceded that the procedure followed was incorrect based on the premise that a custodial sentence was imposed and not coupled with a fine as provided for in terms of section 112 (1) (a).

[4] In S v Aniseb and Another 1991 (2) SACR 413 (NM) the court stated that:

'The policy behind s 112(1) (a) is clear. The Legislature has provided machinery for the swift and expeditious disposal of minor criminal cases where an accused pleads guilty. The trial court is not obliged to satisfy itself that an offence was actually committed by the accused but accepts his plea at face value. The accused thus loses the protection afforded by the procedure envisaged in s 112(1) (b), but he is not exposed to any really serious form of punishment. The court may not pass a sentence of imprisonment or any other form of detention without the option of a fine...'

[5] Section 112 (1) (a) of the Act was amended to read as follows:

'(a) The presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or a fine exceeding N\$ 6000, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and –

- (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding N\$ 6000;
- or

(ii) Deal with the accused otherwise in accordance with law.’

[6] As stated above, section 112 (1) (a) cannot be invoked without considering the option of a fine. The magistrate misdirected himself by imposing a custodial sentence. It must be noted, however, that the accused person has already served the sentence imposed by the trial magistrate, therefore rendering this review judgment purely academic.

[7] Although the learned magistrate did not alert the reviewing court to the sentence imposed in respect of count 3, the reviewing court has observed that the condition of the suspended sentence imposed on the 3<sup>rd</sup> count is too vague as it has omitted the word ‘committed’. The condition of suspended sentence should be clear so that the accused can know what is expected of him. It could not have been the magistrate’s intention that the suspended sentence is to be put into operation if the accused is alleged to have committed an offence, to which the condition does not state the period within which the offence will potentially trigger the setting into operation of the suspended sentence. It should be made clear to the accused which offence he is prohibited from committing and for which he or she may be convicted if he or she committed that offence during the period of suspension. Therefore, the sentence imposed in respect of count 3 cannot be allowed to stand.

[8] In the result, the following order is made:

- a) The conviction on all counts is confirmed as well as the sentence on the 2<sup>nd</sup> count.
- b) The sentence on the 1<sup>st</sup> and 3<sup>rd</sup> counts are altered as follows:
  1. First count: N\$3000 (three thousand Namibian Dollars) fine in default 6 (six) months imprisonment.
  2. Third count: N\$ 300 (three hundred Namibian Dollars) fine or 1 (one) month imprisonment wholly suspended for 2 (two) years on condition accused is not convicted of crimen injuria committed during the period of suspension.
- c) The sentence is antedated to 25 November 2015.

---

N N Shivute

Judge

---

JC Liebenberg

Judge