



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 29/2019

In the matter between:

THE STATE

v

MARIA TJARURA KAZOMO

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 161/2019)

Neutral citation: *S v Kazomo* (CR 29/2019) [2019] NAHCMD 89 (8 April 2019)

Coram: USIKU J and UNENGU AJ

Delivered: 8 April 2019

Flynote: Criminal Procedure – Section 112 (1) (a) – Guilty plea – Duty to impose fine coupled with imprisonment – Regard be had to the nature of the offence – Where there is doubt about the seriousness of the offence questioning ought to take place.

Summary: The accused was charged in the Magistrate's Court at Rundu with an offence of Crimen Injuria. She pleaded guilty to the charge whereafter the matter was disposed of in terms of section 112 (1) (a) of Criminal Procedure Act. After

conviction and before sentence the state proved previous convictions against the accused which she admitted. She was subsequently sentenced to pay a fine of N\$3000 or in default eight months imprisonment. On review the sentence was set aside and substituted with a sentence of fine of N\$1000 or in default three months imprisonment. The sentence is ante dated to 21 September 2018.

ORDER

Accused is sentenced to pay a fine of N\$1000 in default thereof, 3 months imprisonment. The sentence is ante dated to 21 September 2018.

REVIEW JUDGMENT

USIKU J, (UNENGU AJ concurring)

[1] The accused appeared before the Magistrate' Court at Rundu on a charge of Crimen Injuria in that upon or about the 16th day of September 2018 at or near Ndama in the district of Rundu the accused did unlawfully and intentionally injure and impair the dignity of Andreas Siyare by using obscene language, to wit by mentioning his private part in the presence of his wife and children and thus the accused did commit the offence of Crimen Injuria.

[2] When the charges were put to the accused he tendered a plea of guilty and the matter was disposed of in terms of section 112 (1) (a) of the Criminal Procedure Act, Act 51 of 1977 as amended. The accused was thereafter sentenced to pay a fine of N\$3000 or in default eight months imprisonment.

[3] When the matter was forwarded to me on review I directed the following query to the learned magistrate. 'Why was the matter dealt with in terms of section 112 (1) (a) if

the learned magistrate intended to impose such a sentence of imprisonment and in the light of the fact that the accused had previous convictions?’

[4] The learned magistrate responded to query as hereinunder; ‘Initially when the accused pleaded guilty, it was not clear if she had some previous convictions. The prosecutor did not inform the Court as to which section should be applied neither did she inform this Court that there are previous convictions recorded against the accused. Conviction of the accused person since it is not legally permitted to disclose them before conviction. Section 271 (1) of Act 51 of 1977 as amended reads as follows: The prosecutor may, after an accused has been convicted but before sentence has been imposed upon him, produce to the Court for admission or denial by the accused. The prosecutor was correct to keep the records of the accused’s previous convictions before the Court could find him guilty although she was expected to ask the Court to apply either section 112 (7) (a) or (b) of Act 51 of 1977.

Section 112 (1) (a) of Act 51 of 1977 as amended reads as follows: Where an accused at a summary trial in any Court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea. The presiding judge, regional magistrate or magistrate may, if he/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 not exceeding N\$6000 convict the accused in respect of the offence of which he has pleaded in respect of the offence of which he has pleaded guilty on his plea of guilty only and; following the provisions of the above mentioned section, the sentence imposed by the Court is a competent sentence as authorised by section 7 of the Criminal Procedure Act, Act 13 of 2010. The magistrate request that the conviction and sentence be confirmed.’

[5] Section 112 (1) (a) deals relatively with matters that are not of a serious nature and were the presiding officer is of the view that a reasonably minor punishment will be imposed whereas section 112 (b) is invoked were serious injustice is possible, which means were a heavier punishment can be invoked. It is desirable for the prosecutor to guide the court when it comes to guilty plea and advice the appropriate section to be applied.

[6] In the present case it appears that the trial magistrate on her own proceeded to apply section 112 (1) (a) whereafter the state handed in record of the accused's previous convictions. Whereas the Criminal Procedure Act, Act 51 of 1977 as amended makes provisions for the court to impose a fine not exceeding N\$6000 the term of imprisonment is not provided. Eight months imprisonment in default of payment of a fine appear to be harsh when considered in the light of the accused person's personal circumstances. Firstly that the accused was not charged with such a serious offence. She was at an advanced age. She offered a plea of guilty and had five grandchildren to look after. The vulgar language used was not disclosed, to determine the extent of the insult against the complainant.

[7] For the aforesaid reasons the sentence of eight months in default of payment of a fine of N\$3000 is too harsh and shocking under the circumstances and is hereby set aside and substituted with the following sentence.

[8] Accused is sentenced to pay a fine of N\$1000 in default thereof, 3 months imprisonment. The sentence is ante dated to 21 September 2018.

D N USIKU
Judge

E P Unengu
Acting Judge