



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 31 /2019

In the matter between:

THE STATE

v

KLEMENCE KLEMENCE NYUMBA

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 201/2019)

Neutral citation: *S v Nyumba* (CR 31/2019) [2019] NAHCMD 97 (12 April 2019)

Coram: USIKU, J and UNENGU, AJ

Delivered: 12 April 2019

Flynote: Criminal Produce – Automatic review – Plea – Guilty – Section 112(1) (a) of the Criminal Procedure Act 51 of 1977– Sentencing discretion of magistrate limited to a certain extend – Section as amended by Criminal Procedure Act 13 of 2010 not intended for excessive fines or lengthy custodial sentences – Section meant for minor offences – No address from both the accused and state.

Summary: Criminal Procedure. The accused was charged with an offence of possession of dependence – producing substance, a contravention of s 2(2) of Act 41 of 1971. He was subsequently convicted on his plea of guilty in terms s 112(1)(a) of the Criminal Procedure Act 51 of 1971, and was sentenced to pay a fine of N\$3000 or eight months imprisonment. On review, the sentence substituted with a sentence of a fine of N\$3000 or three months imprisonment. The court, therefore, *held*: that s 112(1)(a) limits sentencing discretion of the magistrate. *Held* further: that s 112(1)(a) as amended by the Criminal Procedure Act 13 of 2010 not intended for excessive fines or lengthy custodial sentences. *Held*: that s 112(1)(a) is meant for minor offences without address from both the accused and the State.

ORDER

- (i) The sentence imposed by the learned magistrate on 20 September 2018 is hereby set aside and substituted with the following sentence:
“Fined N\$3000 or three months imprisonment.”
 - (ii) The sentence is backdated from 20 September 2018.
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REVIEW JUDGMENT

UNENGU, AJ (USIKU, J concurring):

[1] This is a review matter submitted on automatic review from the Rundu Magistrate’s Court.

[2] The accused who conducted his own defence, was charged with and convicted of possession of dependence – producing substance a contravention of s 2(2) read with sections 1, 2(i) and/or 2(iv), 7,8, 10, 14 and part of Schedule of Act 41 of 1971, as amended.

[3] After conviction in terms of s 112(1)(a) of the Criminal Procedure Act¹ (the CPA), the accused was sentenced to pay a fine of N\$3000 or eight months imprisonment.

[4] The matter, when submitted before me for review, I addressed the following query for the attention of the learned magistrate

‘1. Is eight months imprisonment imposed as an option to a fine of N\$3000.00 in a matter disposed of in terms of s 112(1)(a) of the Criminal Procedure Act 51 of 1977 not too harsh and shocking?

2. Why was the matter not disposed of in terms of s 112(1)(b) of the CPA in view of the fact that the State intended to prove a previous conviction against the accused?

Your urgent response is appreciated.’

[5] The learned magistrate responded as follows:

‘The Magistrate remarks as follows:

(1) In responding to the query the magistrate has considered the penalty clause for the second or subsequent conviction, which is created under section 2 (b) paragraph (iii) of the Act 41 of 1971, as amended, a fine not exceeding R30 000 or to imprisonment for a period not exceeding 15 years or both such fine and such imprisonment. At the time the magistrate was imposing this sentence, was of the opinion that it was in accordance with Justice since he was not a first offender.

(2) Section 112(1)(a) was invoked based on the fact that the value was not substantive and that by then it was not clear if he had any previous convictions. The prosecutor had never at any stage disclosed that accused person was never a first offender. She is perfectly entitled to withhold previous conviction from the court until after conviction is secured.

(3) The magistrate request that the sentence which is viewed to inducing the sense of shock, be quashed and be replaced with any sentence which will be in accordance with Justice.

Much obliged my lordship.’

[6] The learned magistrate in para 3 of the response to the query conceded that part of the sentence namely eight months imprisonment imposed as an option to the

¹ Act 51 of 1977 as amended.

fine, viewed to induce a sense of shock be quashed and be replaced with any sentence which will be in accordance with justice. That will be done.

[7] This matter was disposed of in terms of s 112(1)(a) of the Criminal Procedure Act, therefore, the sentencing discretion of the magistrate was limited to a certain extend. Section 112(1)(a) as amended by the Criminal Procedure Act 13 of 2010 was not intended for magistrates to impose excessive fines or lengthy custodial sentences. Similarly, s 112(1)(a) cannot be involved for the sake of disposing cases expeditiously without fully enquiring into the details of the offence.²

[8] In *S v Cook*³ the following was said: 'For a court to convict without evidence, it must be obvious that the sentence will be less than a certain level and that the conviction can take place without the need for an address on sentence'. Section 112(1)(a) is therefore meant for minor offences where it is possible to convict on a mere plea of guilty without evidence and sentencing without address from both the accused and the prosecutor in mitigation and in aggravation respectively.

[9] It is advisable, when applying s 112(1)(a), to find out from the prosecutor information which will help the magistrate to make a proper judicial discretion. Had the learned magistrate in the instant matter enquired from the prosecutor about information which could influence a severe sentence, the prosecutor most probably would have requested the questioning in terms of s 112(1)(b) in order to prove a record of a previous conviction against the accused.

[10] Eight months imprisonment even though imposed as an alternative to a sentence of a fine, is in my view, too harsh and induces a sense of shock where s 112(1)(a) has been followed to dispose of the matter.

[11] That said, the fine imposed by the learned magistrate in my view is in order and nothing wrong with it. However, the same cannot be said about the eight months period of imprisonment which was imposed as an option to the fine. It is too severe and harsh for s 112(1)(a), therefore, it has to be set aside and be substituted with a less serious period of imprisonment as the option to the fine imposed.

[12] Consequently, I make the following order:

² See *S v Onesmus*; *S v Amukoto*; *S v Mweshipange* 2011(2) NR 461.

³ 1977(1) SA 653 (A).

- (ii) The sentence imposed by the learned magistrate on 20 September 2018 is hereby set aside and substituted with the following sentence:
“Fined N\$3000 or three months imprisonment.”
- (ii) The sentence is backdated from 20 September 2018.

E P UNENGU
Acting Judge

D N USIKU
Judge