

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

“ANNEXURE 11”

Case Title: <i>The State v Benedictus Plaitjie</i> <i>The State v Sidney Kahure and Eduard Hangué</i>	Case No: CR 58/2020
High Court MD Review No: 863/2020 862/2020	Division of Court: Main Division
Heard before: Judge Claasen et Judge Parker	Delivered on: 18 August 2020
Neutral citation: <i>S v Plaitjie</i> (CR 58/2020) [2020] NAHCMD 362 (18 August 2020)	
The order: In both cases the respective sentences are set aside and replaced as follows: <i>The State v Benedictus Plaitjie:</i> Count 1: Accused to pay a fine of N\$ 1 500 or 4 months' imprisonment. Count 2: Accused to pay a fine of N\$ 1 000 or 3 months' imprisonment. The sentences are antedated to 13 May 2020. <i>The State v Sidney Kahure and Eduard Hangué:</i> Each accused to pay a fine of N\$ 1 500 or 4 months' imprisonment.	

The sentences are antedated to 15 May 2020.

Reasons for order:

Claasen J (concurring Parker J)

1. Both the matters were brought before the High Court on automatic review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA). I deal with them together as it turns on the same principle of law and emanate from the same court.
2. In the first matter *S v Plaatjie* the accused faced two charges in the District Court of Keetmanshoop. Count 1 comprised of a charge of theft of a jack, a wheel spanner and a spanner. The value of the items was not stated in the charge sheet. Count 2 was a charge of trespassing on land or a building situated at the Magistrates Court Offices at Keetmanshoop, without permission from the owner or lawful occupier. The accused decided to plead guilty on both counts at his first appearance at court. He was convicted on his own admissions in terms of s 112(1)(a) of the CPA. In respect of count 1 he was sentenced to a fine of N\$ 1 500 or 12 months' imprisonment and in respect of count 2 the sentence was a fine of N\$ 1 000 or 12 months' imprisonment.
3. In the second matter of *S v Kahure and another* the charge was that of possession of a dependence producing drug, to wit: 4 bales of cannabis to the value of N\$ 70. At their first appearance the accused persons pleaded guilty and were convicted in terms of s 112(1)(a) of the CPA. Each accused were given a fine of N\$ 1 000 or 9 months' imprisonment.
4. A query that pertains to sentencing was addressed to the magistrate in each of the matters. The question was posed along the lines that considering that the accused were convicted in terms of s 112(1)(a) of the CPA whether the respective terms of imprisonment were not disproportionately heavy?
5. In her replies the magistrate stated that she considered the offence, the personal circumstances and interest of the community and concluded that the imprisonment terms were suitable. She pointed out that s 112(1)(a) of the CPA does not limit the powers of a court in respect of the custodial part of a sentence.
6. The court rightfully referred to the *Zinn* principles (see *S v Zinn* 1969(2) SA 537 (A)) to guide her in

sentencing. I have no qualms with the general sentencing discretion of a court. She, however, appears to have missed the crux of the queries, which were about the principle of proportionality between a fine and a custodial sentence and the appropriateness of a severe custodial sentence for a conviction under s 112(1)(a) of the CPA.

7. The applicable legal principles were articulated in *S v Onesmus*, *S v Amukoto*, *S v Shipange*.¹ It reiterated the renowned principle that s112(1)(a) of the CPA is intended only for cases that are considered minor, trivial or not serious. This case also concerns the sentencing regime before the amendment². Before the amendment, where an accused was convicted under that provision, he/she was not at risk of severe punishment. That position has now somewhat changed, which nuance is expressed at para 8 of the same judgment:

'At present, because of the amendment of s 112 of the Act, this is no longer the case, for the maximum fine has been increased to N\$ 6000-00 This ultimately brought about an increased risk that an accused could now be fined far beyond his means, resulting in him having to serve the alternative of imprisonment; which often are lengthy terms. The reason for this is because of the legal principle that there should be a relation between the fine imposed and the alternative imprisonment.'

8. What was not changed, however, is the particular purpose of s 112(1)(a) of the CPA, namely that it concerns minor criminal offenses.
9. Regarding the issue at hand, in *S v Nuyumba*,³ it was held that excessive fines or lengthy custodial sentences are not appropriate for convictions under s 112(1)(a) of the CPA, as the provision is for minor offences only. *S v Mynhard*; *S v Kuinab*⁴ tells us that generally, a fine should serve as a punishment for lesser offenses and alternative to imprisonment; and more importantly fines should not be so high that the amount to direct imprisonment in the guise of a fine. In that regard the magistrate ought to take into account the accused's ability to pay.
10. In both matters before me the *court a quo* considered it appropriate to dispose of the cases under a provision established for trivial offences, but gave heavy custodial sentences as alternative to the fines. The inability to pay the court fines means that the accused in *S v Plaitjie* is to serve 24 months' imprisonment, and 9 months' imprisonment in *S v Kahure and another*. The respective

¹ 2011 (2) NR 461.

² Criminal Procedure Act 13 of 2010 as amended.

³ (CR 31/2019) [2019] NAHCMD 97 (12 April 2019).

⁴ 1991 NR 336 (HC).

custodial terms struck me as inappropriate for convictions under s 112(1)(a) of the CPA and disproportionately severe in relation to the fines.

11. For these reasons, the respective sentences are set aside and replaced as follows:

The State v Benedictus Plaitjie:

Count 1: Accused to pay a fine of N\$ 1 500 or 4 months' imprisonment.

Count 2: Accused to pay a fine of N\$ 1 000 or 3 months' imprisonment.

The sentences are antedated to 13 May 2020.

The State v Sidney Kahure and Eduard Hangué:

Each accused to pay a fine of N\$ 1 500 or 4 months' imprisonment.

The sentences are antedated to 15 May 2020.

C CLAASEN JUDGE	C PARKER JUDGE