



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT REVIEW

Case no: **CR 10 /2020**

In the matter between:

**THE STATE**

And

**CONRAD NDIVAOVE ZAUISOMWE**

HIGH COURT MAIN DIVISION REF NO. 2301/2019

**Neutral citation:** *S v Zauisomwe* (CR 10/2020 [2020] NAHCMD 44 (11 February 2020))

**Coram:** CLAASEN, J and UNENGU, AJ

**Delivered:** 11 February 2020

**Flynote:** Criminal Procedure – Guilty Plea – Section 112(1)(a) of the Criminal Procedure Act as amended – Increase in the monetary limit to fine not exceeding N\$ 6 000.00 did not alter the basic principle that the section is reserved for minor offenses – A lengthy term of imprisonment term irreconcilable with nature of the provision.

**Summary:** The accused was charged with a traffic violation. He pleaded guilty at his first appearance at court and was convicted under section 112(1)(a) of the Criminal Procedure Act as amended. In sentencing the court treated the matter as a serious offense and imposed a fine of N\$ 3000.00 or 12 months imprisonment.

*Held* – It is implicit in section 112(1)(a) of the CPA that the sentence to be imposed must be commensurate to a minor offence. Therefore a lengthy imprisonment term, even as an alternative to a fine, is irreconcilable with the nature of the provision.

*Held* – It is prudent that magistrates do not accelerate into section 112(1)(a) of the Criminal Procedure Act as amended without considering whether it is sensible in the particular circumstances of the case.

*Held* – On review the sentence was set aside and replaced with a fine of N\$ 3000.00 or 3 months imprisonment.

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### ORDER

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- a) The conviction is confirmed.
- b) The sentence is set aside and substituted as follows: Accused to pay a fine of N\$ 3000.00 or 3 months imprisonment.
- c) The sentence is antedated to 25 October 2019.

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### REVIEW JUDGMENT

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**Claasen, J (Unengu, AJ concurring)**

[1] The accused herein appeared before the Magistrate Court of Outjo on a charge of contravening regulation 50(3)(a) of the Road Traffic and Transportation Regulations as promulgated in GN 53 of 30 March 2001 (GG No. 2503). The charge particulars were that on 25 October 2019 on a public road to wit C35-C40 at Kamamjab in the district of Outjo the accused wrongfully and unlawfully operated a silver Isuzu motor

vehicle displaying a license disk N 24346 WB whilst that license disk was not applicable to the specific motor vehicle.

[2] The accused conducted his own defense and he elected to plead guilty. The court applied section 112(1)(a) of the Criminal Procedure Act as amended, (hereinafter referred to as the CPA) and imposed a fine of N\$ 3000.00 or 12 months imprisonment.

[3] The matter came before me on automatic review. I addressed a query to the magistrate on whether the 12 months imprisonment was appropriate in the circumstances.

[4] The learned magistrate replied promptly and suggested 6 months imprisonment as more suitable as an alternative sentence to the fine.

[5] The provision applicable to sentence under section 112(1)(a) of the CPA reads as follows:

'(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offense does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N\$ 6000, convict the accused in respect of the offense 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 the law'

[6] The increase of the monetary limit from a fine of not more than N\$ 300.00 to a fine not exceeding N\$ 6 000.00 did not alter a basic principle regarding the nature of section 112(1)(a) of the CPA, i.e. that it contemplates convictions in respect of minor offenses. This tenet was eloquently expressed in *S v Aniseb*<sup>1</sup> as follows:

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<sup>1</sup> 1991 NR 203 (HC)

'The policy behind section 112(1)(a) is clear. The legislature has provided machinery for the swift and expeditious disposal of minor criminal cases where the accused pleads guilty. The trial court is not obliged to satisfy itself that an offense 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 section 112(1)(b), but he is not exposed to any really serious form of punishment...'

[7] Although a court has a range of options within the sentencing margins of section 112(1)(a) of the CPA, care must be taken that the sentence is commensurate with a minor offense. Therefore a lengthy imprisonment term, even as an alternative to a fine, is irreconcilable with the character of the provision.

[8] In light of the offense in question being a traffic violation there is no issue that section 112(1)(a) of the CPA was applied. The issue of concern was whether the 12 months imprisonment was appropriate in the circumstances.

[9] In considering the information relevant for sentencing, the starting point is the prescribed maximum penalty for the offense in question which is a fine of N\$ 4000.00 or one year imprisonment or both.

[10] In mitigation of sentence the accused person informed the court that he is 34 years old and unemployed. He explained that the vehicle was repaired after having been in an accident and that he did not collect the disc yet as he travelled over the weekend. This information stood unchallenged as the prosecutor placed no aggravating factors before the court. Additional considerations that ought to have been considered as factors in favour of the accused is that he is a first offender and offered a guilty plea during his first appearance at court.

[11] The court in its reasons for sentence came to the conclusion that he considers the offense is a serious one and ultimately imposed a fine of N\$ 3000.00 or 12 months imprisonment.

[12] I have no qualm that driving a vehicle that was not yet certified as roadworthy after having been in an accident may be regarded in a more serious light, but then the court should not have applied the provision for minor offenses.

[13] The anomaly in the matter lies in the fact that the provision of minor offenses was used to convict the accused whereas in sentencing the matter was treated as serious. The reclassification of the matter as serious resulted in the imposition of a rather heavy custodial sentence, which as I said earlier cannot be mentioned in the same breath as section 112(1)(a) of the CPA. The approach to sentence in guilty pleas under section 112(1)(a) of the CPA is succinctly captured in the headnote of a recent review matter *S v Nuyumba*<sup>2</sup> that it is not intended for excessive fines or lengthy custodial sentences.

[14] It is prudent that magistrates do not accelerate into section 112(1)(a) of the CPA without taking a moment to consider whether it is the sensible path to follow in the particular circumstances of a case. It is apposite to refer to the matter of *S v Onesmus, S v Amukoto, S v Shipange*<sup>3</sup> where the point is made that if a presiding officer is hampered by information to decide whether to apply section 112(1)(a) or section 112(1)(b) a short summary of the State's case may be requested.

[15] It is for these reasons that the alternative part of the sentence, i.e. the 12 months imprisonment is disproportionate to the circumstances of the matter.

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<sup>2</sup> (CR 31/2019) [2019] NAHCMD 97 (12 April 2019)

<sup>3</sup> 2011 (2) NR 461

[16] In the result it is ordered:

- (a) The conviction is confirmed.
- (b) The sentence is set aside and substituted as follows: Accused to pay a fine of N\$ 3000.00 or 3 months imprisonment.
- (c) The sentence is antedated to 25 October 2019.

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C CLAASEN  
JUDGE

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E P UNGENGU  
ACTING JUDGE