

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK

REVIEW JUDGMENT



NAMIBIA MAIN DIVISION,

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| Case Title: The State v Bernolius Van der Westhuizen Josef Mouton | | e No:121/2022 |
| Heard before: Hon. Judge Shivute <i>et</i> Hon. Judge Liebenberg | | Division of Court: Main Division |
| Neutral citation: <i>S v Van der Westhuizen and Another</i> (CR121/2022) [2022] NAHCMD 619 (14 November 2022) | | Delivered on: 14 November 2022 |
| The order: a. The conviction in respect of accused 1 and 2 is confirmed. b. The sentence imposed in respect of accused 1 is set aside and replaced with the following sentence: Accused is sentenced to 24 months' imprisonment of which six months are suspended for a period of five years on condition that the accused is not convicted of escaping from lawful custody (common law), committed during the period of suspension. c. The sentence is antedated to 13 May 2021. d. Accused 1 must be released from custody immediately. e. The sentence imposed in respect of accused 2 is confirmed but amended to read as follows: Accused is sentenced to 36 months' imprisonment of which six months are suspended for a period of five years on condition that the accused is not convicted of escaping from lawful custody (common law), committed during the period of suspension. | | |

Reasons for order:

SHIVUTE J, (LIEBENBERG J concurring):

[1] The accused persons were each charged with the crime of escaping from lawful custody under the common law, in the magistrate's court in the district of Keetmanshoop.

[2] The accused pleaded not guilty to the charge, but the court found them guilty. They were convicted as charged and sentenced as follows:

‘ Accused persons are each sentenced to 36 months' imprisonment of which six months is suspended for a period of five months on condition that accused are each not convicted for escaping from lawful custody under common law, during the period of suspension.’

[3] I directed a query to the magistrate to enquire from him, what he meant with the sentence he imposed and whether it is not too vague. I further enquired, why accused 1 who was a first offender was given a similar sentence to that of accused 2 who has previous convictions.

[4] The magistrate conceded that the sentence is too vague. He further responded that accused 1 being a first offender should not have been given a similar sentence as accused 2 and should have been given a lesser sentence.

[5] The accused were correctly convicted, however, the issue lies with the sentence imposed.

[6] The first issue is that the condition of sentence is too vague. It is an essential requirement of a suspensive condition that it must be formulated in such a way that it does not cause future unfairness or injustice; neither must it be too wide or vague.¹ This

¹ *S v Armstrong* (CR 60/2020) [2020] NAHCMD 380 (27 August 2020).

is because non-compliance with a condition of a suspended sentence has consequences for an accused. The imposition of suspensive conditions should be done with a proper consideration of the circumstances of the accused and the relevant facilities where the accused is to fulfil the suspensive conditions.²

[7] Secondly, the sentence imposed is unfair towards accused 1 as he was a first time offender. *Benjamin v S*, stated the following:

‘Courts properly exercising their discretion should be striving to impose an appropriate sentence. The trial court either did not exercise its discretion at all or exercised it improperly or unreasonably.’³

[8] The same can be said about the trial court in the present matter. The court failed to properly exercise its discretion when it came to imposing the sentence.

[9] It must also be mentioned that the period of suspension of five months does not make sense as the time the accused already served the sentence imposed then the condition would have expired. The magistrate, however, pointed out that it was wrong and that he intended the period of suspension to be five years.

[10] In the result the following order is made:

- a. The conviction in respect of accused 1 and 2 is confirmed.
- b. The sentence imposed in respect of accused 1 is set aside and replaced with the following sentence:
Accused is sentenced to 24 months’ imprisonment of which six months are suspended for a period of five years on condition that the accused is not convicted of escaping from lawful custody (common law), committed during the period of suspension.
- c. The sentence is antedated to 13 May 2021.
- d. Accused 1 must be released from custody immediately.
- e. The sentence imposed in respect of accused 2 is confirmed but amended to read as follows:

² *S v Frederick* (CR 76/2020) [2020] NAHCMD 459 (6 October 2020).

³ *Benjamin v S* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 12 (8 February 2021).

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| <p>Accused is sentenced to 36 months' imprisonment of which six months are suspended for a period of five years on condition that the accused is not convicted of escaping from lawful custody (common law), committed during the period of suspension.</p> | |
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| NN SHIVUTE JUDGE | JC LIEBENBERG JUDGE |