REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA

REVIEW JUDGMENT

Case Title:	**Case No: CR 47 /2023**
The State v Chevlin Tjivese Accused	**Division of Court:** High Court, Main Division
Heard before: January J et D Usiku J	**Date of hearing:** 20 April 2023
	Delivered on: 20 April 2023
Neutral citation: *S v Tjivese* (CR 47/2023) [2023] NAHCMD 211 (20 April 2023)	
ORDER	
1. The conviction is confirmed. 2. The sentence is set aside and substituted with the following sentence: The accused is sentenced to a fine of N$500 (Five Hundred Namibia Dollars) or 3 (three) months' imprisonment.	
REASONS FOR ORDERS:	

D Usiku J (January J concurring):

[1] The matter before me is an automatic review from the magistrate's court in terms of s 302 of the Criminal Procedure Act 51 of 1977, as amended.

[2] The accused appeared before the Outjo Magistrate's Court, charged with assault read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The matter was disposed of in terms of s 112(1)(*a*) and accused person was convicted and subsequently sentenced to N$500 or failure thereof, a fine of 5 (five) months' imprisonment.

[3] On first consideration of the review, the following remark was directed to the learned magistrate:

'This case was disposed of in terms of section 112 (1) (*a)* of the CPA however the learned magistrate imposed a sentence which in my view is too harsh especially the term of imprisonment of 5 months. The section is usually for minor offences and I find the offence of this nature to be serious taking into account the provisions of Act 4 of 2003.'

[4] The learned magistrate conceded that the sentence is too harsh and not appropriate and responded as follows:

'Reference is made to the above subject matter. Kindly take notice that I received the remark from the Honourable Justice on the 13th March 2023, on the 14th of March I fell sick and took sick leave from the 14th to 17th of March 2023.

I concede Honourable Justice that the sentence of five (5) months should be set aside as its too harsh and inappropriate in terms of section 112 (*a*) of the CPA and should rather be a sentence of three (3) months.

I pray for the Honourable Reviewing Judge's indulgence and guidance in this regard.'

[5] The concessions made by the learned magistrate are indeed correctly made, and this court is of the view that the sentence imposed is too harsh and induces a sense of

shock.

[6] 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 extent. 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 invoked for the sake of disposing cases expeditiously without fully enquiring into the details of the offence.[1]

[7] In *S v Cook*,[2] the court held the following:

'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.'

[8] That said, the fine imposed by the learned magistrate is in order and there is nothing wrong with it. However, the same cannot be said about the five 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 lesser period of imprisonment, as the option to the fine imposed.

[9] In the result, the following orders are made:

1. The conviction is confirmed.

2. The sentence is set aside and substituted with the following sentence:

The accused is sentenced to a fine of N$500 (Five Hundred Namibia Dollars) or 3 (three) months imprisonment.

[1] *S v Mweshipange* 2011(2) NR 461.
[2] *S v Cook* 1977(1) SA 653 (A).

D USIKU **JUDGE**	**H C JANUARY** **JUDGE**