

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Rivaldo Nguherimo	Case No: CR 90/2023
High Court MD Review No: 1374/2023	Division of Court: High Court, Main Division
Coram: Liebenberg J et Christaan AJ	Delivered: 08 September 2023
Neutral citation: <i>S v Nguherimo</i> (CR 90/2023) [2023] NAHCMD 561 (08 September 2023)	
ORDER: 1. The sentence is set aside and substituted with the following: 'The accused is sentenced to 18 months' imprisonment.' 2. The sentence is antedated to 03 August 2023.	

REASONS FOR ORDERS:

LIEBENBERG J (CHRISTIAAN AJ concurring):

[1] This is a review from the magistrate's court for the district of Karibib where the accused was convicted of theft of '2 boerewors and 1 packet of gizzards'. The accused was convicted on his plea of guilty and sentenced to 36 months' imprisonment of which 12 months is suspended for a period of 5 years on condition the accused is not convicted of the offence of theft, committed during the period of suspension.

[2] On account of the prejudice accused is likely to suffer, the reviewing court is of the view that this is an instance where a statement should not first be requested from the magistrate to avoid any further delay of the matter. The court will therefore proceed in terms of s 304(2)(a) of the Criminal Procedure Act 51 of 1977.

[3] In sentencing the accused to 36 months' imprisonment for theft of 2 boerewors and gizzards, valued at N\$115, the magistrate applied the triad of factors. Reliance was placed on the fact that the accused is not a first offender but has two previous convictions of the same nature. In both instances, the accused was sentenced to pay a fine, alternatively, imprisonment. The last sentence was as recent as 1 February 2023. With regards to the accused's personal circumstances, the court took into consideration that he is 24 years of age, with one child and unemployed, making a living from doing casual work. The trial court was further of the view that in light of the accused not suffering from any ailments, there is nothing preventing him from seeking more honest means to earn a living, other than by stealing. Moreover, given the previous convictions of theft, the court reasoned that a deterrent sentence was called for, especially in view of the prevalence of the offence of theft in the court's jurisdiction.

[4] Despite it being common cause that the stolen property was recovered, the court reasoned that the potential loss the complainant would have suffered 'cannot be measured'. I find it difficult to comprehend how the court came to this conclusion as the value of the stolen property was admitted to have been N\$115. Be that as it may, there was no monetary loss suffered by the complainant.

[5] As borne out by the court *a quo's* reasons on sentence, the fact that the accused

has two relevant convictions, was aggravating and led to the sentence ultimately imposed. The position as regards the weight to be accorded to previous convictions has been stated as follows in *S v Jahrs*¹:

'It has been said that the accused should primarily be punished for the offence he committed and not so much for his previous convictions for which he has already been sentenced. In *S v Baartman*² at 305b-e it is stated thus:

"But the period of imprisonment must be reasonable in relation to the seriousness of the offence. Otherwise it inevitably overemphasises the interests of society at the expense of the interests of justice and the interest of the offender. If it does this, it cannot be a just sentence.

In a case as this it is necessary to be aware of three considerations:

- (a) The accused should be sentenced for the offence charged and not for his previous record;
- (b) The public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and
- (c) While it might be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased."

[6] When applying the stated principles to the present circumstances, it is evident that the a court *a quo* accorded too much weight to the accused's personal circumstances which, in the end, culminated in unjustified punishment for the offence under review.

[7] Although a deterrent sentence is called for, a custodial sentence of 36 months' imprisonment is so disproportionate to the offence committed, that it is found to be shockingly inappropriate.

[8] The magistrate therefore failed to exercise his discretion judiciously as there was no proper balance struck between the offence, the offender, and the interests of society. As stated in *S v Rabie*,³ 'punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.' In these circumstances the sentence cannot be permitted to stand and needs to be ameliorated.

¹ *S v Jahrs* (CR 23/2017) [2017] NAHCMD 88 (16 March 2017) para 6.

² *S v Baartman* 1997(1) SACR 304 (E).

³ *S v Rabie* 1975 (4) SA (AD) at 862G-H.

<p>[9] In the result, the court makes the following order:</p> <ol style="list-style-type: none">1. The sentence is set aside and substituted with the following: ‘The accused is sentenced to 18 months’ imprisonment.’2. The sentence is antedated to 03 August 2023.	
<p>JC LIEBENBERG JUDGE</p>	<p>P CHRISTIAAN ACTING JUDGE</p>