

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Gerhardt Gaseb Accused	Case No: CR 7/2024 High Court Review No: 1932/2023 Division of Court: High Court, Main Division
Heard before: January J <i>et</i> D Usiku J	Delivered on: 05 February 2024
Neutral citation: <i>S v Gaseb</i> (CR 7/2024) [2024] NAHCMD 32 (05 February 2024)	
ORDER: 1. The conviction is confirmed. 2. The sentence is set aside and substituted with the following: The accused is sentenced to 4 years' imprisonment of which 1 year is suspended for a period of 5 years, on condition that the accused is not convicted of housebreaking with intent to steal and theft, committed during the period of suspension. 3. The sentence is antedated to 8 November 2023.	

REASONS FOR ORDER:

D Usiku J (January J concurring):

[1] The matter before us is an automatic review from Outjo Magistrate's Court in terms of s 302 of the Criminal Procedure Act 51 of 1977 (the CPA), as amended.

[2] The accused appeared before the Outjo Magistrate's Court, charged with the offence of housebreaking with intent to steal and theft. He pleaded guilty to the charge, whereafter, he was questioned in terms of s 112 (1) (b) of the (CPA). Accused was subsequently found guilty and convicted as charged, whereafter he was sentenced to 5 years' imprisonment.

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

'In the light that the accused tendered a guilty plea, he is a first offender, is the sentence not too harsh under the circumstances?'

[4] The learned magistrate in his reply stated as follows:

'I accept that the perception that the sentence can be considered to be harsh.

I did not take that position when sentencing the accused in this matter taking into consideration the value and the fact that the goods were not recovered and the fact that the accused had benefited by selling the goods to the value of N\$8000-00.

A further consideration is the Drotsky case, the accused pleaded guilty to theft of goods valued at N\$9800-00 and the sentence was 4 years 1 year suspended and some of the items were recovered. The value is this close is about 3 times that of Drotsky and the principle of proportionality and consistency will call for a sentence that is aligned with the Drotsky case.

There is nothing which I found to call for suspension of the sentence and being harsh cannot always be considered in view of the length but the totality of the circumstances.

The first being the value, the good not recovered and thirdly, the accused benefited from the offence in the amount of N\$8000-00. I find that the sentence is fair in the circumstances.'

[5] The concessions by the learned magistrate are indeed correctly made. The sentence imposed is not in accordance with justice because the sentence is too harsh. The accused tendered a guilty plea and did not waste the court's time, further, the accused is a first time offender. On that score, the learned magistrate could have explored the option of a lesser sentence or a sentence part of which is suspended.

[6] A suspended sentence will serve the interest of both the accused and society. The accused is a young man who has the ability to be rehabilitated and a suspended sentence will further encourage the accused to stay away from crime and be a law abiding citizen. In *S v Bohitile*¹, it was held:

'A substantial part of the sentence suspended to encourage rehabilitation and to keep accused on the straight and narrow.'(sic)

[7] In the result, the following order is made:

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

The accused is sentenced to 4 years imprisonment of which 1 year is suspended for a period of 5 years, on condition that the accused is not convicted of housebreaking with intent to steal and theft, committed during the period of suspension.

3. The sentence is antedated to 8 November 2023.

D USIKU	JANUARY

¹ *S v Bohitile* (CC 4/2011) [2019] NAHCNLD 135 (29 November 2019).

<p>JUDGE</p>	<p>JUDGE</p>
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