REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case no: CR 04/2013

In the matter between:

THE STATE

and

SEM FILLEMON **ACCUSED**

High Court NLD review case ref no: (215/2012)

Neutral citation: *The State v Fillemon* (CR 04/2013) [2013] NAHCNLD 12 (15 March 2013)

Coram: TOMMASI J and LIEBENBERG J

Delivered: **15 March 2013**

Flynote: Criminal Procedure – Special Review - Sentence – Omission by magistrate to insert conjunctive “and” or “or” resulting in conditions of suspension having appearance of separate sentences which does not qualify as sentences in terms of s276 – magistrate may have intended it to be conditions of suspension – court however unable to alter sentence to include same as conditions as it does not comply with requirements – not clear and does not relate to offence accused was charged with – sentence as set out in paragraph 1 confirmed - paragraphs 2 - 4 of sentence not in accordance with justice and set aside.

Summary: The accused appeared on a warrant of arrest before a magistrate who held the view that the sentence was not proper. The matter was remitted for special review in terms of s304(4). The court held that the conviction and sentence contained in paragraph 1 of the sentence was in accordance with justice and it was accordingly confirmed. Paragraphs 2-4 of the sentence were found not to be in order and were set aside.

ORDER

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1. The conviction is confirmed;
2. The sentence of N$500.00 or five months imprisonment wholly suspended for a period of 5 years on condition that the accused is not convicted of theft committed during the period of suspension is confirmed.
3. Paragraphs 2, 3 and 4 of the sentence are set aside.

REVIEW JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1] This is special review in terms of section 304(4) of the Criminal Procedure Act, 51 or 1977. The accused (convicted of theft on 2 February 2007) appeared before the magistrate on 18 September 2012 on a warrant of arrest. The warrant was accompanied by a report prepared by a Community Service Orders Officer who stated therein that the accused failed to report for community service as per order of court.

[2] The sentence was imposed by a magistrate who is no longer serving as such. The matter was placed before another magistrate in order to put the suspended

sentence into operation. The latter magistrate was of the opinion that the sentence was not proper and consequently refused to put it into operation. The matter was subsequently referred to this court for special review.

[3] Before dealing with the actual proceedings before the original magistrate, I pause here to remark on the proceedings used to secure the accused's presence before the district court in order to put the suspended sentence into operation. The accused was brought in terms of a warrant issued in terms of section 43 of the Act, whereas a warrant in terms of section 297(9)(*a*) of the Act ought to have been issued. Judicial officers should be vigilant when issuing a warrant of arrest so as to ensure that a valid warrant is issued. Sight should not be lost that a warrant of arrest legally empowers the person executing it to encroach on a person's constitutional right to liberty. The warrant of arrests furthermore serves to inform the person why he/she is being deprived of his/her liberty. A warrant of arrest should be in accordance with procedures established by law failing which the execution thereof could violate a person's constitutional right to liberty[1].

[4] The accused was sentenced six years ago and the magistrate who sentenced him is not available to provide this court with reasons for the sentence imposed. The sentence, as correctly pointed out by the magistrate who refused to put into operation the sentence, is clearly not a proper sentence and not in accordance with justice. Given these circumstances this court is of the view that it would be prejudicial to the accused if the matter is not dealt with expeditiously.

[5] The accused, on 2 February 2007, appeared in the magistrate's court of Oshakati on a charge of theft. The charge sheet reflected that the accused was 15 years old but the proceedings took place in the absence of a guardian. A birth certificate of the accused formed part of the record although it is not apparent how this was placed before the court. It was in all likelihood provided to the court to indicate that the accused was already 18 years old and that the presence of a guardian was not required. The accused pleaded guilty and admitted when questioned in terms of section 112(1)(*b*), that he stole a bottle of brandy valued at

[1] Article 8 of the Namibian Constitution

N$200 without the permission or consent of the owner thereof. The accused, having admitted all the elements of theft, was properly convicted. The conviction will therefore be confirmed

[6] No previous convictions were proven against the accused. The accused informed the court in mitigation that he was 17 years old, a grade 10 learner and that he could afford to pay a fine of N$400.00. The magistrate, without any further investigation, hereafter imposed the following sentence:

"1. 500.00 or 5 months imprisonment wholly suspended for 5 years on condition accused not convicted of theft committed during the period of suspension.

2. Perform community service at Oshikuku Cemetery every Sunday for 2 weeks from 14H00 – 17H00

3. Ordered to attend church service to be assisted spiritually.

4. Burned (Banned) from going to cuca-shops".

[7] Paragraph 1 of the sentence appears under the circumstances to be an appropriate sentence and no interference is warranted.

[8] Paragraphs 2 - 4 have the appearance of conditions of suspension but in its current form, constitute separate sentences which do not qualify as sentences which the court was permitted to impose in terms of section 276 of the Act. The magistrate may have intended it to be conditions of suspension imposed in addition to or in the alternative to the first condition in terms of section 297(1)(*a)(i)(cc)* and *(hh*). The magistrate however erred by omitting to insert the conjunctive "and" or "or" after each paragraph. Paragraphs 2 – 4, for this reason alone, are not in accordance with justice. This court may alter the sentence to incorporate paragraphs 2 – 4 if it is satisfied that it complies with the requirements for conditions of suspension.[2].

[9] Paragraph 2 of the sentence required of the accused to perform community service at a cemetery for three hours on two Sunday afternoons. The nature of the offence, the admission of guilt and the facts placed before the court in mitigation are factors indicating that community service would be appropriate. These were however

[2]See S v Oupieti; S v Boois; S v Josef and Another 1991 NR 93 (HC)

not the only factors which a court has to consider before ordering the accused to perform community service. In S v Sikunyana 1994 (1) SACR 206 (TK) that court held that: "At the very least, a court which was considering the imposition of a community service order should obtain the requisite information such as: (a) whether community service was an appropriate sentence in the particular circumstances of the case; (b) whether the accused was a suitable candidate for community service; (c) whether the accused was willing to submit himself to rendering such service; (d) the identification of a suitable place for the rendering of such service; (e) the identification of a suitable person under whose supervision and control the service should be rendered; (f) the determination of the number of hours and the days on which the service should be rendered; (g) the date on which the rendering of the service should commence; and (h) the duration of the period of such service." These guidelines are equally useful for courts in this jurisdiction when considering whether it would be appropriate to impose community service as a condition of suspension under section 297(1)(*a)(i)(cc*) of the Act. A practice has developed in the district courts to obtain prior to sentencing a report containing this information but no such report forms part of the record of the proceedings; neither is it apparent from the record that the magistrate conducted an investigation in this regard.

[10] Paragraph 2 further lacks clarity in that it does not stipulate the nature of the services to be rendered; the date on which the accused was supposed to have commenced community service; and the name of the person who the accused should have reported to. It comes as no surprise that the accused failed to report for community service.

[11] Paragraph 3 of the sentence compelled the accused to go to church. It is formulated in vague and extremely wide terms. The magistrate made no enquiry to ascertain what the accused's religious convictions are. Compelling the accused to go to church without determining what his religious convictions are, may violate his constitutional protection against discrimination on the ground of religion. Under these circumstances such a condition of suspension would be inappropriate.

[12] Paragraph 4 of the sentence barred the accused from *cuca* shops and similarly lacks particularity in respect of the area which is covered by and the duration of the restraining order. In its current form it is so wide that it would be virtually impossible to supervise and enforce. The administration of justice would fall into disrepute if conditions of suspension are imposed which are not feasible or capable of being enforced. It furthermore unreasonably restricts the accused from fraternising *cuca* shops in the area where he resides which could very well be the only shops in the area.

[13] The accused was convicted of having stolen liquor from a *cuca* shop. A requirement of a condition of suspension is that it should have some relationship with the offence of theft. One of the aims of a condition of suspension is to deter the accused from committing further offences. This was adequately provided for in the condition imposed in the first order. To restrain the accused from going to places similar to the one where he committed the offence, would not deter him from committing the offence at any other place. A condition restraining the accused from going to *cuca* shops does not sufficiently relate to the offence which the accused had committed and would under the circumstances be unreasonable and superfluous.

[14] Paragraphs 2, 3 and 4 of the sentence are, for the above reasons, not in accordance with justice and should be set aside.

[15] In the premises the following order is made:

1. The conviction is confirmed;
2. The sentence of N$500.00 or five months imprisonment wholly suspended for 5 years on condition that the accused is not convicted of theft committed during the period of suspension is confirmed.
3. Paragraph 2, 3 and 4 of the sentence are set aside.

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MA Tommasi

Judge

JC Liebenberg

Judge