



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case no CR: 2 /2017

In the matter between:

**THE STATE**

**And**

**JOEL MATTI ALWEENDO**

**ACCUSED**

**GROENWALD DAVID MARCHEL**

**ACCUSED**

HIGH COURT NLD REVIEW CASE REF NO.: 287/2015

HIGH COURT NLD REVIEW CASE REF NO.:87/2016

**Neutral citation:** *The State v Alweendo*;

*The State v Marchel* (CR 2 /2017) [2017] NAHCNLD 23

(28 March 2017)

**Coram:** TOMMASI J and JANUARY J

**Delivered:** 28 March 2017

**Flynote:** Sentence – An accused entitled to plead not guilty and to challenge the prosecution to prove his guilt – Irregular to reason that accused wasted the court's time by challenging the State's case.

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## ORDER

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1. *S v Alweendo* [Magistrate's Case no 722/10]

1.1 The conviction is confirmed;

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

The accused is ordered to pay a fine in the sum of N\$2000 or in default of payment, 6 months' imprisonment.

1.3 The sentence is ante-dated to 22 July 2015.

2. *S v Groenwald David Marchel* [Case no OSH-CRM-3326/2015]

2.1 The convictions are confirmed;

2.2. The sentence is amended to read as follow:

Count 1: The accused is fined N\$ 1500.00 or in default of payment 12 months imprisonment wholly suspended on condition that the accused is not found guilty of the offence of malicious damage to property committed within the period of suspension'

Count 2: Twelve (12) month's imprisonment;

Count 3: Six (6) months' imprisonment

2.3 It is ordered that the sentence imposed in count 3 run concurrently with the sentence imposed in count 2.

2.4 The sentences are antedated to 2 February 2016.

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## REVIEW JUDGMENT

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TOMMASI J (JANUARY J concurring):

[1] The above matters came before me on automatic review. The same issues cropped up in these two matters and this court deemed it expedient to deal with them simultaneously.

[2] The learned magistrate, when sentencing the accused, reasoned that the accused had 'wasted the court's time as the evidence against him was clear' or words to this effect.

[3] This court already indicated that it was irregular for the sentencing court to consider the fact that the accused pleaded guilty, as an aggravating factor. *S v Martin* 2009 (1) NR 306 (HC) the court held that an accused is presumed innocent until proven guilty; that a magistrate cannot therefore impose a heavier sentence on an accused by reason of the fact that he pleaded not guilty. Shilungwe AJ in this case, at page 307 C-D states the following:

'It is thus needless to stress that an accused person is fully entitled to plead not guilty to a criminal charge, in which event, it behoves the prosecution to lead evidence so as to prove the case against such accused beyond reasonable doubt. In the circumstances, the question whether the accused wasted the court's time and put the State to a great expense, on account of his plea of not guilty, is irrelevant and, as such, should not be reckoned as an aggravating factor for purposes of sentencing.'

In *S v Zemburuka* 2008 (2) NR 737 (HC) Van Niekerk J, at page 742, para 18, remarked as follows:

'I agree with amicus curiae that the remark that the court's time was wasted 'tremendously' and the fact that it is specifically mentioned in what is otherwise a very brief judgment mentioning only aggravating circumstances, leads one to the inescapable conclusion that the alleged waste of the trial court's time weighed

against the appellant when sentence was passed. An irregularity which prejudiced appellant was committed.'

[4] If an accused plead guilty it may be taken as a sign of remorse but this is not always the case. Where an accused pleads not guilty, which he/she has every right to do, "the Court would take into consideration once an accused has been found guilty, that the accused by pleading 'not guilty' and persisting in an obviously false defence, had not shown any remorse and would consequently be dealt with more harshly than an accused who had admitted his guilt and co-operated with the prosecution in bringing the matter to an expeditious conclusion' (*S v Monday* 2002 NR 167 SC, page 171 J -172A). This does not mean that a sentencing court may hold it against an accused if he/she challenges the prosecution in a trial to prove its case against him. The learned author, SS Terblance in the Guide to Sentencing in South Africa, 2<sup>nd</sup> ed., at page 190, states the following: '... the offender is entitled to plead not guilty, to challenge the prosecution to prove his guilt, and to attack in cross-examination the witnesses' version of events. This should never be held against him when sentence is imposed.'

[5] It is irregular for the learned magistrate to consider the fact that the accused had 'wasted time as the evidence is clear against him was clear' as an aggravating factor. The more correct approach would be for the learned magistrate to consider whether or not the accused had shown remorse.

[6] It is not however every irregularity which vitiates the sentencing procedure. The learned magistrate, in numerous matters which came before me on automatic review, used more or less the same phrase in her reasons for sentence. It however does not appear that the learned magistrate placed undue emphasis on this factor in some of these matters. The sentences in these matters were considered to be appropriate and were confirmed.

[7] In *S v Alweendo* [Magistrate's Case no 722/10] the learned magistrate convicted the accused of having contravened s 85(2)(b) of the Road Traffic and Transportation Act, 22 of 1999 in that he was found in possession of a license which had been tampered with. The conviction is in order and may be confirmed.

[8] The accused testified that he was a single parent of 2 children, aged 7 and 3 years respectively; he was earning a living by doing 'piece work' as a bricklayer; he completed grade 10; he had no assets of value; and he was able to pay a fine of

N\$500. The State prosecutor informed the court that the accused pleaded not guilty and he had wasted the court's time for 4 years. She called for a fine in the sum of N\$2000 or 6 months imprisonment. The learned magistrate took into consideration his personal circumstances, the offence which he has committed, that he is a first offender and unemployed. The learned magistrate remarked that 'The accused has wasted the court's time as the evidence against him was clear.' The court *a quo* imposed a fine of N\$4000 or 12 months imprisonment of which N\$2000 or 6 months was suspended.

[9] The sentence imposed appears to be unduly harsh. The only explanation must be found in the learned magistrate's dissatisfaction that the accused had wasted the court's time when the evidence against him was clear. The learned magistrate clearly held the view that he ought to have pleaded guilty under the circumstances. In view of the misdirection this court may interfere with the sentence. An appropriate sentence under the circumstances is the one proposed by the State Prosecutor in the court *a quo* i.e a fine in the sum of N\$2000 or 6 months imprisonment.

[10] In *S v Groenwald David Marcel* [Case no OSH-CRM-3326/2015] the accused was convicted of malicious damage to property (count 1); assault by threat read with the provisions of the Combating of Domestic Violence Act, 4 of 2003; and assault read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. The accused was properly convicted and the convictions will be confirmed. He was sentenced to: Count 1 - A fine of N\$1500 or 12 months imprisonment; Count 2 – 12 months imprisonment; Count 3 – 6 months imprisonment. It was ordered that the sentences run cumulatively. The learned magistrate reasoned *inter alia*, that the accused had: 'wasted the court's time by taking the matter on trial when the evidence clearly pointed to himself.'

[11] The accused committed all offences in one evening. He threw a brick at the windows of the room his girlfriend's mother was renting; he assaulted his girlfriend's mother; and he threatened to kill his girlfriend's mother. He is 35 years old and a first offender. At the time he was sentenced he was gainfully employed as an electrician and earned N\$3500 per month. He is not married but has 3 young children. The

youngest child is the child of his girlfriend. He requested the court *a quo* to impose a fine so that he could continue working in order to maintain his children.

[12] The learned magistrate when queried responded by saying that: "In fact the record is clear that accused wasted the court's time in taking this matter on trial because throughout trial accused had provided mutually destructive versions and his version of the events continuously changed." The learned magistrate remained adamant that the accused had wasted her time. I further wanted to know from the learned magistrate whether she had notified the complainant in terms of the provisions of s25 of the Combating of Domestic Violence Act and the learned magistrate responded that: '... although section 25 of Act 4 of 2003 allows the victim of domestic violence to be present specifically during sentencing, his/her presence is not a necessity and is thus accommodate if reasonably possible looking at each case in its entirety.'(sic) This is not a proper interpretation of s 25. The court is compelled to notify the victim, if reasonably possible. The learned magistrate admitted that she did not notify or even tried to notify the victim.

[13] For the aforesaid reasons I am of view that the sentence is not in accordance with justice. Given the learned magistrate's view in regard to this accused it would not be in the interest of justice to remit the matter to the concerned magistrate. The accused herein already served the sentenced imposed in count 2. This sentence, in any event is not shockingly inappropriate in view of the offence committed and bearing in mind the interest of society. This sentence may be confirmed. I am however of the view that this court ought to interfere with the sentence imposed in count 3 and 1.

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

1. *S v Alweendo* [Magistrate's Case no 722/10]
  - 1.1 The conviction is confirmed;
  - 1.2. The sentence is set aside and substituted with the following sentence:  
The accused is ordered to pay a fine in the sum of N\$2000 or in default of payment, 6 months' imprisonment.
2. The sentence is ante-dated to 22 July 2015.

1. *S v Groenwald David Marchel* [Case no OSH-CRM-3326/2015]

2.1 The convictions are confirmed;

2.2. The sentence is amended to read as follow:

Count 1: The accused is fined N\$ 1500 or in default of payment 12 months imprisonment wholly suspended on condition that the accused is not found guilty of the offence of malicious damage to property committed within the period of suspension'

Count 2: Twelve (12) month's imprisonment;

Count 3: Six (6) months' imprisonment

2.3 It is ordered that the sentence imposed in count 3 run concurrently with the sentence impose in count 2.

2.4 The sentences are antedated to 2 February 2016.

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JUDGE

M A TOMMASI

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JUDGE

H C JANUARY