



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

REVIEW JUDGMENT

Case No.: CR 34/2020

In the matters between:

THE STATE

v

WEYULU DIVIDED BOICKY

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: (60/2020)

THE STATE

v

SHAHULA NDESDELIU

ACCUSED 1

ERKI LUEAS SHOONGANYI

ACCUSED 2

(HIGH COURT NLD REVIEW CASE REF NO: (32/2020))

THE STATE

v

THOMAS MICHAEL DANIEL

ACCUSED

(HIGH COURT NLD REVIEW CASE REF NO: (64/2020))

Neutral citation: *S v Boicky* (CR 34/2020) [2020] NAHCNLD 71 (22 June 2020)

Coram: JANUARY J *and* SALIONGA J

Delivered: 22 June 2020

Flynote: Criminal procedure – Sentence – Condition of suspension – Condition that accused not to be convicted of prohibited offence *committed during period of suspension* omitted – Sentence corrected.

Summary: All three cases are before me for automatic review. The accused were convicted for specified offences. They were sentenced to imprisonment of which in one case it was wholly suspended and in two cases partly suspended. The suspended portions omitted the words: ‘committed during the period of suspension.’ The sentences are corrected to include the omitted words.

ORDER

1. The conviction of each of the accused is confirmed.
2. The sentences imposed are confirmed, but amended to read:
 - 2.1 In Review no. 60/2020 the sentence is rectified to read: The accused is sentenced to N\$3000 or 12 months imprisonment of which N\$1000 or 6 months imprisonment are suspended for 1 year on condition that the accused is not convicted of malicious damage to property read with the provisions of the Combating of Domestic Violence Act committed within the period of suspension.

- 2.2 In Review case no. 64/2020 the sentence is corrected to read: The accused is sentenced to 36 months imprisonment of which 5 months imprisonment are suspended for a period of 2 years on condition that the accused is not convicted for attempted murder or an offence of which violence against a person is an element committed within the period of suspension.
- 2.3 In Review case no. 32/2020 the sentence is corrected to read: N\$1000 or 6 months imprisonment wholly suspended for a period of 3 years on condition that accused 1 is not convicted of contravening section 2 read with sections 1, 11(1)(a), 15 and 17 of Act 12 of 1990 as amended –possession of stock suspected of being stolen.

JUDGMENT

JANUARY J (SALIONGA J concurring):

Introduction

[1] The three cases are before me for automatic review. They are all from the same magistrate at Outapi. I have directed a query in relation to each of the cases in the following terms:

1. 'Despite numerous cases where this court set aside incomplete sentences in relation to the conditions of suspension, more particularly the omission of the phrase; *committed during the period of suspension*, **the magistrate ignores the directives in those judgments?** Many of the judgments relate to review matters sent for review specifically from Outapi magistrate's courts.
2. The case is returned herewith.
3. The magistrate must explain why she continuously ignores those judgments.'

[2] This court has in the past corrected numerous cases where the sentences in relation to the condition of suspension were not correct.¹

[3] It has on numerous occasions in the past been directed that it is imperative that the phrase '*committed during the period of suspension*' must be included when sentences are suspended. It is an imperative condition otherwise the sentence is incomplete.

'The oversight by the magistrate on the formulation of one of the conditions of suspension is elementary and should have been guarded against; more so where this court in the past has delivered a number of similar judgments in cases where the same mistake has repeatedly been made.'²

[4] The learned magistrate conceded that the omission of the words '*committed during the period of suspension*' is wrong. Surprisingly she went ahead and corrected the sentences to include the omitted missing words. This amounts to tampering with the record. It is an action not authorized. The magistrate is *functus officio* after she submitted the court proceedings for review.

[5] In Review case no. 60/2020, *S v Boicky*, the accused was convicted for malicious damage to property read with the Combating of Domestic Violence Act, Act 4 of 2003. He damaged 16 windows (panes) to the value of N\$640. The conviction is confirmed.

[6] The accused was sentenced to N\$3000 or 12 months imprisonment of which N\$1000 or 6 months imprisonment is suspended for 1 year. The sentence is rectified to read: The accused is sentenced to N\$3000 or 12 months imprisonment of which N\$1000 or 6 months imprisonment are suspended for 1 year on condition that the accused is not convicted of malicious damage to property read with the provisions of the Combating of Domestic Violence Act committed within the period of suspension.

¹ *S v Louw & another* 1992 (1) SACR 688 (Nm); *S v Christiaan* (CR 77/2014) [2014] NAHCMD 377 (08 December 2014).

² See also: *State v Geinub* (CR 31/2016) [2016] NAHCMD 94 (06 April 2016); *S v Siua* (CR 21/2020) [2020] NAHCNLD 47 (20 April 2020); *S v Haufiku* 2007 (1) NR 94 (HC).

[7] In Review case no. 64/2020, the accused was convicted for attempted murder. The conviction is confirmed. The accused was sentenced to 36 months direct imprisonment of which 5 months is suspended for a period of 2 years on condition that accused is not convicted of attempted murder.

[8] The sentence is varied to read: The accused is sentenced to 36 months imprisonment of which 5 months imprisonment are suspended for a period of 2 years on condition that the accused is not convicted for attempted murder or an offence of which violence against a person is an element committed within the period of suspension.

[9] Accused 1 was convicted in Review case no 32/2020 of possession of suspected stolen stock in contravention of section 2 read with sections 1, 11(1)(A), 15 and 17 of Act 12 of 1990 as amended. Accused 2 was acquitted in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977. Both the conviction of accused 1 and the acquittal of accused 2 are confirmed.

[10] Accused 1 was sentenced to a fine of N\$1000 or 6 months imprisonment wholly suspended for a period of 3 years. The sentence is corrected to read: N\$1000 or 6 months imprisonment wholly suspended for a period of 3 years on condition that accused 1 is not convicted of contravening section 2 read with sections 1, 11(1)(a), 15 and 17 of Act 12 of 1990 as amended –possession of stock suspected of being stolen.

[11] In the result:

1. The conviction of each of the accused is confirmed.
2. The sentences imposed are confirmed, but amended to read:
 - 2.1 In Review no. 60/2020 the sentence is rectified to read: The accused is sentenced to N\$3000 or 12 months imprisonment of which N\$1000 or 6 months imprisonment are suspended for 1 year on condition that the accused is not convicted of malicious damage to property read with the provisions of the Combating of Domestic Violence Act committed within the period of suspension.

- 2.2 In Review case no. 64/2020 the sentence is corrected to read: The accused is sentenced to 36 months imprisonment of which 5 months imprisonment are suspended for a period of 2 years on condition that the accused is not convicted for attempted murder or an offence of which violence against a person is an element committed within the period of suspension.
- 2.3 In Review case no. 32/2020 the sentence is corrected to read: N\$1000 or 6 months imprisonment wholly suspended for a period of 3 years on condition that accused 1 is not convicted of contravening section 2 read with sections 1, 11(1)(a), 15 and 17 of Act 12 of 1990 as amended –possession of stock suspected of being stolen.

H C JANUARY

JUDGE

I agree,

J T SALIONGA

JUDGE