

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGEMENT

Case Title: The State v Nauyoma Elizabeth	CR No.: 5/2022 Case No.: Outapi 83/2019
	Division of Court: Northern Local Division
Heard before: Honourable Mr Justice Munsu, AJ <i>et</i> Honourable Mr Justice Kessler AJ	Delivered on: 15 March 2022
Neutral citation: <i>S v Nauyoma</i> (CR 5/2022) [2022] NAHCNLD 18 (15 March 2022)	
The order: <ol style="list-style-type: none">1. The conviction is confirmed.2. The sentence is set aside and substituted with the following: A fine of N\$ 1000.00 or 3 months imprisonment wholly suspended for three years on condition that the accused is not convicted of contravening section 70 (f) and (h) of the Liquor Act 6 of 1998: selling liquor without a licence, committed during the period of suspension.	

Reasons for the order:

MUNSU, AJ (KESSLAU, AJ concurring):

[1] This is a review matter in terms of section 302 of the Criminal Procedure Act, Act 51 of 1977 (CPA).

[2] The accused was issued with a notice to appear before Outapi Magistrates' Court on a charge of contravening section 70 (f) and (h) read with section 1, 56 and section 72 of the Liquor Act, Act 6 of 1998 (the Act) - selling liquor without a liquor licence. In terms of the notice, the accused had an option to pay admission of guilty (N\$ 4 000.00), which she did not do.

[3] On the date of trial, the accused pleaded guilty to the charge. The court proceeded to finalize the matter in terms of section 112 (1) (a) of the CPA. In passing sentence, the court stated the following:

'The offence is quite prevalent and serious in that offences such as domestic violence comes from people who takes alcohol especially when the take it bars (*sic*) and shebeens are closed. Accused's personal circumstances are that she is a single mother of three. Two of her children attend school. She looks after her mother and all children. She is remorseful as one could see from her demeanor.

You are sentenced to a fine of N\$ 4000.00 or 12 months imprisonment which is wholly suspended for a period of 3 years in terms of section 297 CPA 51 of 1977 on condition that accused is not convicted of liquor related offence during the suspension period.'

[4] The following query was directed to the presiding magistrate:

- '1. The sentence omits the words "...committed"...during the period of suspension, is the sentence competent?
2. Section 112 (1) (a) of the Criminal Procedure Act, 1977 was applied. I am especially concerned

about the alternative sentence of twelve (12) months. Is the learned magistrate of the view that such a lengthy custodial sentence could be imposed on an accused after applying section 112(1) (a). See *S v Onesmus and Others* 2011 (2) NR 461.'

[5] The learned magistrate replied as follows:

- '1. The words omitted being committed during the period of suspension is not a competent sentence and thus will be rectified.
2. The sentence in here as well what was stated in the cited authority is taken into consideration. (sic)'

[6] The learned magistrate rightly conceded that the sentence imposed in the matter is incompetent. It is trite that the conditions of suspension must be clear and specific as the accused must understand them and know how to behave himself in compliance thereof. The words 'Committed during the period of suspension' makes it clear that the period of suspension is related to the commission of the crime, and not, for example, the date of the conviction of the accused.¹

[7] The condition of suspension was that the accused should not be convicted of 'any liquor related offence'. It has been held that the condition of suspension must not be so wide that it has no nexus with the offence the accused had been convicted of.² The condition imposed in this matter fails to meet this requirement.

[8] Over and above, the matter was disposed of in terms of section 112 (1) (a) of the CPA, which provision is intended for minor offences.³ The following was said in *S v Erombu*:⁴

'The sentence imposed for an offence finalized under this provision, should correspond to the overarching tenet that it was a minor offence. Therefore in such cases, heavy terms of imprisonment are not appropriate.'

¹ Terblanche SS, 2007 *Guide to Sentencing in South Africa*, 2nd ed Lexis Nexis, Durban, 362.

² *S v Radebe* 1973 (3) SA 940 (O).

³ *S v Aniseb* 1991 NR 203 (HC); *S v Onesmus*, *S v Amukoto*, *S v Shipange* 2011 (2) NR 461; *The State and Daniel Ndamanguluka* (High Court review case no: 48/2011) (27 May 2011); *State v Michael* (CR 1/2017) [2017] NAHCNLD 17 (3 March 2017); *S v Nyumba* (CR 31/2019) [2019] NAHCMD 97 (12 April 2019).

⁴ *S v Erombu* (CR 114-2020) [2020] NAHCMD 594 (09 December 2020).

[9] The penalty clause in respect of the offence of which the accused was convicted of provides that:

‘(a) ...on a first conviction be liable to a fine not exceeding N\$4 000.00 or to imprisonment for period not exceeding one year or to both such fine and such imprisonment.’

(b) on a second or subsequent conviction be liable to a fine not exceeding N\$8 000. 00 or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment.⁵

[10] It is my considered view that an offence of which a sentence of one year imprisonment is permissible even on a first conviction is not a minor offence. In *S v Mostert*⁶ the court made reference to the following passage:

‘Where the statutory provision contravened permits a sentence exceeding the limits provided for in s 112(1)(a) the accused cannot be convicted in the absence of questioning or the proof of guilt by evidence.’⁷

[11] The sentencing court should always strive to ensure that the alternative term of imprisonment, although not capable of exact calculation, is proportionate to the fine and the gravity of the offence in line with the principle of proportionality.⁸ Therefore the sentence cannot be permitted to stand.

[12] In the result, it is ordered as follows:

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

A fine of N\$ 1000.00 or 3 months imprisonment wholly suspended for three years on condition that the accused is not convicted of contravening section 70 (f) and (h) of the Liquor Act 6 of 1998: selling liquor without a licence, committed during the period of

⁵ See section 72 of the Act.

⁶ *S v Mostert* 1994 NR 83 (HC).

⁷ Landsdown and Campbell *South African Criminal Law and Procedure* Vol V at 412; *S v Mkhafu* 1978 (1) SA 665 (O).

⁸ See *S v Erombu* supra.

suspension.	
Judge(s) signature	Comments:
MUNSU AJ	NONE
KESSLAU AJ	NONE