

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGEMENT

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| <b>Case Title:</b><br>The State v Lukamba Marculino<br>Sikwete   | <b>CR No.: 6/2022</b><br>Case No.: Outapi 193/2020   |
|  | <b>Division of Court:</b><br>Northern Local Division |
| <b>Heard before:</b><br>Honourable Mr Justice Munsu, AJ <i>et</i><br>Honourable Mr Justice Kessler AJ  | <b>Delivered on:</b> 15 March 2022                   |
| <b>Neutral citation:</b> <i>S v Sikwete</i> (CR 6/2022) [2022] NAHCNLD 19 (15 March 2022)  |  |
| <b>The order:</b><br><br><ol style="list-style-type: none"><li>1. The conviction is confirmed.</li><li>2. The sentence is substituted with the following:<br/>36 months imprisonment of which 12 months is suspended for 5 years on condition that the accused is not convicted of contravening section 2 (a) or 2 (b) of the Abuse of Dependence-Producing Substance and Rehabilitation Act, Act 41 of 1971 – deal in or possession of cannabis, committed during the period of suspension.</li><li>3. The sentence is antedated to 30 December 2020.</li></ol> |  |

**Reasons for the order:**

MUNSU AJ, (KESSLAU AJ concurring):

[1] This matter came before me on automatic review in terms of section 304 of the Criminal Procedure Act, Act 51 of 1977 (the CPA).

[2] The accused was arraigned before the Outapi Magistrates Court on one count consisting of a main charge of contravening section 2 (a) read with section 1, 2(i) and/or 2 (ii), 7, 8, 10, 14 and Part I of the Schedule of Act 41 of 1971 - dealing in prohibited dependency producing drug and an alternative charge of contravening section 2 (b) read with sections 1, 2(i) and/or 2(iv), 7, 8, 10, 14 and Part I of the Schedule of Act 41 of 1971 – possession of cannabis.

[3] He pleaded guilty to the charge and was questioned in terms of section 112 (1) (b) of the CPA. Having being satisfied that he admitted all the allegations contained in the charge, the presiding magistrate convicted the accused and sentenced him as follows:

‘36 months imprisonment of which 12 months is suspended in terms of section 297 CPA 51/77 for a period of 5 years on condition that you are not convicted of contravening any drug related offence in terms of the Abuse of Dependence Producing Substances and Rehabilitation Centre Act 41 of 1971 as amended.’

[4] I am satisfied with the conviction of the accused. Regarding the sentence, the following query was directed to the learned magistrate:

‘It would appear that the sentence imposed omits at the end, words that are supposed to form part of the suspended sentence, being ... ‘committed within the period of suspension’. Is the sentence competent?’

[5] The learned magistrate replied as follows:

‘I agree with the honourable Judge that the sentence imposed by this court is not competent in

that it omitted words that are supposed to form part of the suspended sentence. The sentence should have read as “36 months imprisonment of which 12 months is suspended for a period of 5 years on condition that accused is not convicted of any drug related offence in terms of the abuse of dependence producing substance and rehabilitation Act, Act 41 of 1971 as amended during the period of suspension. I am indebted to the honourable Judge for the direction.’

[6] The omitted words in the sentence were pointed out to the learned magistrate in the query, however, he still omitted the word ‘...committed...’ in his proposed ‘correct’ sentence. 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.<sup>1</sup>

[7] Further, the condition of suspension should only refer to an offence which has a material connection to the nature and circumstances of the offence of which the accused had been convicted of i.e. it must not be so wide that it has no nexus with the offence the accused had been convicted of.<sup>2</sup> The Act creates a wide range of offences some of which have no connection with the offence the accused was convicted of. It is trite that the condition of suspension must be reasonable and should further be formulated in such a way that it does not cause future unfairness and injustice.<sup>3</sup>

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

1. The conviction is confirmed.
2. The sentence is substituted with the following:  
36 months imprisonment of which 12 months is suspended for 5 years on condition that the accused is not convicted of contravening section 2 (a) or 2 (b) of the Abuse of Dependence-Producing Substance and Rehabilitation Act, Act 41 of 1971 – deal in or possession of cannabis, committed during the period of suspension.
3. The sentence is antedated to 30 December 2020.

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

<sup>2</sup> *S v Radebe* 1973 (3) SA 940 (O).

<sup>3</sup> *The State v Efraim Guruseb* CR 31/2012 (15 May 2012).

| <b>Judge(s) signature</b> | <b>Comments:</b> |
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| MUNSU AJ                  | NONE             |
| KESSLAU AJ                | NONE             |