

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Jonas Nghidini Ndhidipaa</i> <i>The State v Michael Tomas Nailenge</i> <i>The State v Keendjele Moses Martin</i>	Case No: 31/2023 Outapi: 395/2019; 92/2023; 184/2023
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler J	Delivered on: 4 September 2023
Neutral citation: <i>S v Ndhidipaa; S v Nailenge; S v Martin</i> (CR 31/2023) [2023] NAHCNLD 92 (4 September 2023)	
It is hereby ordered that: 1. The convictions in all three matters are confirmed. 2. The sentences in all three matters are confirmed, however the conditions of suspension are amended as follows: <u>In respect of case number 395/2019</u> 'The Accused is sentenced to 9 (nine) month's imprisonment suspended in total for a period of 3 (three) years on the condition that the accused is not convicted of contravening section 16 (1) of the Combating of Domestic Violence Act 4 of 2003: Breaching of a protection order, committed during the	

period of suspension’.

In respect of case number 92/2023

‘The accused is sentenced to 24 (twenty-four) months imprisonment of which 12 (twelve) months are suspended for a period of 3 (three) years on the condition that the accused is not convicted of theft of stock (read with the provisions of the Stock Theft Act 12 of 1990, as amended), committed during the period of suspension’.

In respect of case number 184/2023

‘The accused is sentenced to 24 (twenty-four) months imprisonment of which 12 (twelve) months are suspended for a period of 2 (two) years on the condition that the accused is not convicted of robbery committed during the period of suspension’.

Reasons for the order:

KESSLAU J (SALIONGA J concurring)

[1] The matters came to this court on review in terms of Section 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA). The cases all emanated from the Magistrates Court of Outapi, finalised by the same magistrate. The convictions appear to be in accordance with justice and will be confirmed.

[2] These accused persons were all sentenced to partially or totally suspended sentences in which the word ‘committed’ was not included as part of the sentencing condition. The magistrate was *inter alia* queried in that regard.

[3] Other queries to the magistrate were mostly in respect of errors on the review cover sheet, including errors regarding the names of the accused and the sentences imposed. As the review cover sheet is certified by the magistrate as being a reflection of the proceedings recorded, it is imperative that it should be correct in every aspect.¹ The

¹ *S v Omar* (CR 50/2020) [2020] NAHCMD 297 (17 July 2020) par 3; *S v Steenkamp and 2 Others* (CR 113/2022) [2022] NAHCMD 575 (21 October 2022).

document is used to inform the Correctional Facility of the outcome of the review and incorrect information can thus be prejudicial to a convicted person.

[4] The recently appointed magistrate, instead of offering an explanation to the queries, altered the court records to reflect the word 'committed' as part of the sentence imposed and returned them for review. Once sentence is pronounced the court is *functus officio* and thus the changing of a record in these circumstances is not allowed and furthermore it might be seen as a misrepresentation.

[5] Suspended sentences are a popular form of punishment and imposed *ad nauseam*. These sentences are hardly put into operation either because of the deterrent effect it has or, possibly, that due to improper record keeping or a lack of time, the State does not apply for these to be put into operation.

[6] Be that as it may, it is trite law that the condition of suspension attached to any sentence should not be ambiguous or vague to ensure that the accused person knows which conduct will bring about the imposition of such suspended part.² Magistrates are urged to familiarise themselves with the correct formulation of a suspended sentence.³ The sentences, in its current form, is not clear and will be amended accordingly.

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

1. The convictions in all three matters are confirmed.
2. The sentences in all three matters are confirmed however the conditions of suspension are amended as follows:

In respect of case number 395/2019:

'The Accused is sentenced to 9 (nine) month's imprisonment suspended in total for a period of 3 (three) years on the condition that the accused is not convicted of contravening section 16 (1) of the Combating of Domestic Violence Act 4 of 2003: Breaching of a protection order, committed during the period of suspension'.

² *S v Shapange* (CR 5/2021) [2021] NAHCNLD 06 (29 January 2021); *S v Negongo* (CR 10/2019) [2020] NAHCNLD 19 (4 February 2020); *S v Mashuna*; *S Mupopya* (CR 6/2021) [2021] NAHCNLD 07(29 January 2021); *S v Lukeiko* (CR 25/2021) [2021] NAHCNLD 104 (3 November 2021).

³ *S v Louw and Another* 1999 NR 11 (HC).

In respect of case number 92/2023:

'The accused is sentenced to 24 (twenty-four) months imprisonment of which 12 (twelve) months are suspended for a period of 3 (three) years on the condition that the accused is not convicted of theft of stock (read with the provisions of the Stock Theft Act 12 of 1990, as amended), committed during the period of suspension'.

In respect of case number 184/2023:

'The accused is sentenced to 24 (twenty-four) months imprisonment of which 12 (twelve) months are suspended for a period of 2 (two) years on the condition that the accused is not convicted of robbery committed during the period of suspension'.

Judge(s) signature	Comments:
KESSLAU J:	None
SALIONGA J:	None