

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Titus Nehale</i>	<b>Case no.:</b> CR 2/2024
<b>Heard before:</b> Lady Justice Salionga <i>et</i> Mr Justice Kesslau	<b>Delivered on:</b> 30 January 2024
<b>Neutral citation:</b> <i>S v Nehale</i> (CR 2/2024) [2024] NAHCNLD 11 (30 January 2024)	
<b>It is hereby ordered that:</b> <ol style="list-style-type: none"><li>1. The conviction is confirmed.</li><li>2. The sentence is set aside.</li><li>3. The matter is remitted to the magistrate's court to have the alleged previous convictions properly proven and/or admitted before they are considered in sentencing the accused afresh.</li><li>4. The court in sentencing must consider the period already served.</li></ol>	
<b>Reasons for the order:</b>	
[1] This is a review matter submitted in terms of section 302 (1) and section 303 of	

the Criminal Procedure Act 51 of 1977 as amended (CPA). The unrepresented accused appeared in the magistrate's court for the district of Tsumeb, on a charge of malicious damage to property. The accused pleaded guilty, was questioned in terms of s112 (1) (b) of the CPA and convicted as charged. He was subsequently sentenced to 5 years imprisonment.

[2] On review I queried the presiding magistrate whether the sentence imposed was not too harsh where accused pleaded guilty and is a first offender. The reviewing court also wanted to know whether it was proper for the magistrate to submit and consider previous convictions which were not proven by the state or admitted by the accused.

[3] In response the learned magistrate stated that 5 years for a first offender appears to be harsh, however the accused person is not a first offender. He went further to state that due to an oversight, the prosecutor failed to present and prove the previous convictions. Accused person has about 5-6 previous convictions already from Otjiwarongo and Tsumeb. The manner in which the record appears gives an impression that the accused person who is a first offender received the maximum punishment of the law which is not in accordance with justice. He nevertheless prays that the reviewing judge sets the sentence aside and remits the matter back to the district court for the previous convictions to be proven.

[4] Section 271 (1) of the Criminal Procedure Act 51 of 1977 states the following in relation to the proving of previous convictions:

'The prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.

(2) The court shall ask the accused whether he admits or denies any previous conviction referred to in subsection (1).

(3) If the accused denies such previous conviction, the prosecution may tender evidence that the accused was so previously convicted.

(4) If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in

respect of the offence of which the accused has been convicted.'

[5] It is clear from the language used in s 271 (1) of the CPA that the prosecution is not obliged to prove previous convictions. Section 271 (4) obliges the court to take such conviction into account when imposing any sentence only if such previous conviction is not disputed by the accused. In the present matter, it appears the prosecution knew about the previous convictions well in advance but elected not to place them before the trial court.

[6] In *S v Smith* 2019 (1) SACR 500 (WCC) the Full Bench of the Western Cape Division likewise asserted that it is imperative for the prosecution to produce the record of an accused's previous convictions to enable the sentencing court to properly discharge its sentencing function. Where the prosecution elected not to do so, the previous convictions may not be taken into account instead evidence has to be led as required by section 271 of the CPA.

[7] The magistrate in his judgment on sentence records that:

'in as much as there were not previous convictions submitted to this court, the court has on two occasions already sentenced the accused person before. One of the case is TSU CRM-683/2022 for malicious damage to property where he was sentenced to 6 months imprisonment and another case of assault with intent to do grievous bodily harm this year alone when accused person took a pair of nail clippers and assaulted another inmate at the correctional Facility. In both cases his explanation was that because I left like it...' (Sic)

[8] In *S v Khambule* 1991 (2) SACR 277 (W) it was held that:

'[Section] 271 of the Criminal Procedure Act did not confer the power on a magistrate to adopt a procedure of questioning the accused as to his previous convictions, he was limited to asking whether the accused admitted or denied the record of previous convictions produced by the State'.

[9] It is apparent from the record as well as from his response to the query that the magistrate was also well aware of the accused's previous convictions. It is also apparent that the magistrate relied heavily on the previous conviction to determine the sentence he imposed because in his view the similar previous convictions did not deter the accused from committing the offence. The CPA does not confer any power on the magistrate to submit/prove previous convictions *mero motu*. The alleged previous convictions the magistrate considered in sentencing the accused were never proven or admitted. In my view the magistrate should have remanded the matter and direct the state to prove the previous convictions or enquired whether accused admits them.

[10] In the instant case no previous convictions were proven by the state or admitted by the accused. The magistrate by considering the convictions *mero motu* committed an irregularity that vitiates the sentence imposed. Therefore the sentence stands to be set aside. However since accused pleaded guilty to the charge no prejudice will be suffered if the matter is referred back to the same magistrate to have the previous convictions proved and to re-sentence the accused.

[11] In the result, it is ordered that;

1. The conviction is confirmed.
2. The sentence imposed is set aside.
3. The matter is remitted back to the magistrate to have the alleged previous convictions properly proven and/or admitted before they are considered in sentencing the accused afresh.
4. The court in sentencing must consider the period already served.

<b>J T SALIONGA</b> <b>JUDGE</b>	<b>E E KESSLAU</b> <b>JUDGE</b>