

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case no.: CR 3/2024

In the matter between:

THE STATE

v

TOBIAS LINEA

ACCUSED

HIGH COURT REF NO: 583/2023

THE STATE

v

NICOLAS TULONGA GIDEON

ACCUSED

HIGH COURT REF NO: 585/2023

Neutral citation: *S v Linea* (CR 3/2024) [2024] NAHCNLD 12 (30 January 2024)

Coram: SALIONGA, J and KESSLAU, J

Delivered: 30 January 2024

Flynote: Criminal Procedure – Guilty Plea – Section 112(1)(a) of the Criminal Procedure Act as amended (CPA) – Increase in the monetary limit to fine not exceeding

N\$ 6 000.00 did not alter the basic principle that the section is reserved for minor offenses – A lengthy term of imprisonment incompatible with nature of the provision.

Summary: Accused in both cases were charged with theft. They pleaded guilty and were convicted under section 112(1) (a) of the CPA. In sentencing the court treated the matters as serious offenses and imposed fine of N\$ 2000 or 6 months' imprisonment and N\$ 2000 or 12 months imprisonment of which N\$ 1000 or 6 months is suspended on conditions as per the record.

Held: – That it is implicit in section 112(1) (a) of the CPA that the sentence to be imposed must be commensurate to a minor offence. Therefore a lengthy imprisonment term, even as an alternative to a fine, is incomparable with the nature of the provision.

Held further: – That the convictions were confirmed and sentences were set aside and substituted in both matters on review.

ORDER

- (a) The convictions in both matters are confirmed.
- (b) The sentences in both matters are set aside and substituted as follows:
- (c) In case number OND-CRM-6553/2023 accused is sentenced to a fine of N\$ 1000 or 3 months' imprisonment.
- (d) In case number OND-CRM-6016/2023 accused is sentenced to N\$2000 or 3 months' imprisonment.
- (e) The sentences are antedated to 2 and 10 November 2023 respectively.

REVIEW JUDGMENT

SALIONGA, J (KESSLAU, J concurring)

[1] The aforementioned matters came before this court on automatic review in terms of S 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] In both matters the accused persons appeared before the same magistrate court sitting in Ondangwa district. They were charged separately with the offence of theft. Each accused person conducted his/her own defense and pleaded guilty to the charge. The magistrate disposed of the matters in terms of section 112 (1) (a) of the CPA on request of the public prosecutor. Each accused was convicted and subsequently the accused in case number OND-CRM-6553/2023 was sentenced to a fine of N\$ 2000 or 6 months' imprisonment. While accused in case number OND-CRM-6916/2023 was sentenced to 2000 or 12 months' imprisonment of which N\$ 1000 or 6 months is suspended on conditions as per the record.

[3] A query was sent for the magistrate to explain whether the sentences imposed in both cases were competent regard be had that accused were convicted pursuant to s 112 (1) (a) of the CPA Act 51 of 1977.

[4] The magistrate in a detailed reply conceded that the provisions of s112 (1) (a) of the CPA was to be applied in minor cases and the policy behind the section is clear in *S v Aniseb and another* 1991 NR 203 (HC) (1991 (2) SACR 413) at 415 g-i. That the section permits her to impose any competent form of punishment coupled with a fine not exceeding N\$6000. This section, though amended, does not amend the term of imprisonment.

[5] She also made reference to *S v Zauisomwe* (CR10/2020) [2020] NAHCMD 44 (11 February 2002) where the matter was finalised in terms of s 112(1) (a) of the CPA

and accused was sentenced to N\$3000 or 12 months imprisonment. However on review the High Court substituted it to a fine of N\$3000 or 3 months imprisonment. This court fully concurs with the magistrate in her analysis of the law.

[6] It is prudent that magistrates do not rush into section 112(1) (a) of the CPA without taking a moment to consider whether it is the sensible path to follow in the particular circumstances of a case. Nor should the magistrate easily accept the prosecutor's submission that s112 (1) (a) be applied. It is apposite to refer to the matter of *S v Onesmus, S v Amukoto, S v Shipange*¹ where the point is made that if a presiding officer is hampered by information to decide whether to apply section 112(1)(a) or section 112(1)(b) a short summary of the State's case may be requested. I find that to be the correct approach to follow.

[7] Although a court has a range of options within the sentencing margins of section 112(1) (a) of the CPA, care must be taken that the sentence to be imposed is proportionate with a minor offense. Resulting that a lengthy imprisonment term, even as an alternative to a fine, is incompatible with the character of the provision.

[8] In light of the offense the accused were convicted being that theft of goods with minimal values, I take no qualm that section 112(1) (a) of the CPA was applied in both cases. The issue of concern was the alternative part of the sentences, i.e. the 6 and 12 months imprisonment respectively which are disproportionate to the circumstances of the matter. In my view the magistrate concessions that the sentence be amended in both cases were properly made.

[9] In the result it is ordered:

(a) The convictions in both matters are confirmed.

(b) The sentences in both matters are set aside and substituted as follows:

¹*S v Onesmus, S v Amukoto, S v Shipange* 2011 (2) NR 461

- (c) In case number OND-CRM-6553/2023 accused is sentenced to a fine of N\$ 1000 or 3 months' imprisonment.
- (d) In case number OND-CRM-6016/2023 accused is sentenced to N\$2000 or 3 months' imprisonment.
- (e) The sentences are antedated to 2 and 10 November 2023 respectively.

J T SALIONGA
JUDGE

E E KESSLAU
JUDGE