



REPORTABLE

CASE NO: SCR 4/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

and

**POLICAP PULENI
PATRICIOUS PULENI**

Coram: SHIVUTE CJ, MAINGA JA and FRANK AJA

Heard: IN CHAMBERS

Delivered: 9 June 2021

Summary: The accused were arraigned in the magistrate's court for Eenhana on charges of fraud. They pleaded guilty, duly convicted and were each sentenced to N\$1000 or 30 days imprisonment. In an automatic review pursuant to s 304 of the Criminal Procedure Act 51 of 1977 (CPA) to the High Court, the High Court upheld the convictions of the accused, but was of the view that the sentences imposed were 'shockingly inadequate'. The court set them aside with directives to the magistrate to sentence the accused afresh and to increase the sentences to a more appropriate level. The magistrate queried the decision of the High Court for not being a competent order and because the High Court was *functus officio*, it could not revisit the matter.

In terms of s 16 of the Supreme Court Act 15 of 1990, the Supreme Court invoked its powers of review in this matter.

Held, the fact that the review court felt that the sentence was 'shockingly inadequate' did not make it unlawful or incompetent as contended by the reviewing judges. As the sentence fell within the discretion of the magistrate, he acted well within his competency and the law when he passed the sentences.

Held that, the magistrate is correct - the High Court could not order him pursuant to a review in terms of s 304 of the CPA to increase the sentences. It thus follows that the order of the High Court setting aside the sentences could not stand.

REVIEW IN TERMS OF SECTION 16 OF THE SUPREME COURT ACT 15 OF 1990

FRANK AJA (SHIVUTE CJ and MAINGA JA concurring):

Introduction

[1] Messrs Policap Puleni and Patricius Puleni (the accused) were arraigned in the magistrate's court for Eenhana on charges of fraud. Each of them faced one count of fraud namely that on 23 October 2018 each of them pretending to be someone else wrote a test for a learner's driver's licence for such other persons at the premises of Namibian Traffic Information System (NATIS) at Eenhana.

[2] Each accused pleaded guilty to the charge levelled at him and after being questioned in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA), they were duly convicted. Certain factors were then placed on record relevant to

sentencing whereafter they were each sentenced to N\$1000 or 30 days imprisonment.

[3] As both accused were unrepresented, the record was forwarded to the High Court for automatic review pursuant to s 304 of the CPA.

[4] The judges of the High Court dealing with the review upheld the convictions but were of the view that the sentences imposed were 'shockingly inadequate' and set them aside with directives to the magistrate to sentence the accused afresh and to increase the sentences to a more appropriate level.

[5] The magistrate queried the decision of the High Court on the basis of a decision of this court¹ which found that a sentence imposed by a magistrate cannot be increased in an automatic review to the High Court pursuant to s 304 of the CPA.

[6] In the result, it is unclear what the position is with regard to the sentences of the accused and, indeed if there are any sentences in place. This is so because the High Court set aside the sentences, the magistrate says this was not a competent order and the High Court being *functus officio*, cannot revisit the matter.

[7] It is against this backdrop that the matter landed up in this court for review in terms of s 16 of the Supreme Court Act.²

¹ *State v Matine* (SCR 2/2020) [2020] NASC (28 July 2020).

² Act 15 of 1990.

Decision of the High Court

[8] As indicated above, the High Court felt that the sentences imposed were 'shockingly inadequate' and thus had to be increased.

[9] The High Court in motivating its decision quotes extensively from a Full Bench judgment of that court in *S v Arebeb*³ but surprisingly, seems not to have realised that the *Arebeb* case did not support the proposition that a sentence can be increased where it involves an automatic s 304 review. Thus the court in the *Arebeb* case concluded on this aspect as follows:

' . . . it is clear that the Legislature did not consider that a court deriving its powers from s 304(2) had the power to increase a sentence.'⁴

[10] The Full Bench also in its discussion dealt with the issue where sentences were given that were not in accordance with the law, ie incompetent sentences as follows:

'The courts have drawn a distinction between sentences which are competent and those which are incompetent and have declined to increase on review sentences which are competent but too light. However, in respect of incompetent sentences by reason of its power to 'alter' sentences, it has imposed different sentences which in effect have amounted to making sentences more onerous. However, it is wrong to regard this as increasing a sentence. The sentence having been incompetent in the first place, there was no sentence. The reviewing court therefore had to impose a sentence afresh.'⁵

³ 1997 NR 1 (HC).

⁴ *Arebeb* case at 7G.

⁵ *Arebeb* case at 8B.

[11] In response to the comments of the magistrate, one of the judges who set the original sentence aside relies on the South African case of *S v Nteleki*⁶ as 'persuasive' authority for this court to reconsider the legal position set out above. For this purpose he relies on the following extract from the *Nteleki* case:

'The powers of a court on automatic review do not include the power to increase a sentence or to make orders more onerous for the accused, where the sentence was a competent sentence. See *S v November and Three Similar Cases* 2006 (1) SACR 13 (C) at 219*e-i*. Where, however, a magistrates' court has imposed an unlawful or incompetent sentence, the court may on automatic review impose the correct sentence, even where this would result in the sentence being increased. See *S v Msindo* 1980 (4) SA 263 (B) at 265F-G.'

[12] In the *Nteleki* case, the Act under which the charges were brought provided for the imposition of a custodial sentence and made no provision for a fine. The magistrate nevertheless imposed a fine. As there was no provision in law for a fine, the sentence imposed was incompetent and hence a new sentence had to be passed that was in line with the relevant legislation.

[13] I am afraid that the *Nteleki* case does not support the suggested reconsideration at all. It is totally in line with the approach in the *Arebeb* case and the approach of this court in the *Matine* case. The fact that the review court felt that the sentence was 'shockingly inadequate' did not make it unlawful or incompetent as contended by the reviewing judges. As the sentence fell within the discretion of the

⁶ 2009 (2) SACR 323 (O).

magistrate he acted well within his competency and the law when he passed the sentences. The fact that the High Court did not agree with the sentence imposed by the magistrate did not make it either incompetent or unlawful.

Conclusion

[14] As pointed out by this court in the *Matine* case:

‘ . . . s 304(2)(c)(ii) of the CPA does not confer the power to impose (or to direct the magistrate to impose) a harsher sentence on an accused person when a matter is forwarded to the High Court for an automatic review. The process of automatic review is to protect unrepresented accused persons who have no input in such reviews. The prosecution is protected by its ability to appeal where it is dissatisfied with a decision.’⁷

[15] The only qualification to the above statement is where the sentence imposed by the court *a quo* was incompetent or unlawful in the sense explained above in both *Areseb* and *Nteleki* cases. In such cases sentences, must be imposed afresh so as to bring them in line with the relevant legislation or the law.

[16] It follows that the magistrate is correct that the High Court could not order him pursuant to a review in terms of s 304 of the CPA to increase the sentences. It thus further follows that the order of the High Court setting aside the sentences cannot stand.

⁷ *Matine* case para 6.

[17] In the result, the following order is made:

- (a) The order of the High Court of 2 August 2019 setting aside the sentences and referring the matter back to the magistrate with a directive to increase both sentences is herewith set aside.

- (b) The original sentence of N\$1000 or 30 days imprisonment imposed on each accused on 2 April 2019 is reinstated.

FRANK AJA

SHIVUTE CJ

MAINGA JA