



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: CR 49 /2013

THE STATE

Versus

IMMANUEL NAKALE

(HIGH COURT MAIN DIVISION REF. NO 744/2013)

(MAGISTRATE SERIAL NO. : 11/2011)

Neutral citation: *S v Nakale* (CR 49/2013) [2013] NAHCMD 217 (26 July 2013)

Coram: SHIVUTE, J *et* PARKER, AJ

Delivered: 26 July 2013

ORDER

The sentence of three months' imprisonment without the option of a fine is set aside and substituted by the following sentence:

N\$600.00 fine or 3 months' imprisonment suspended as a whole for 3 years on condition that the accused is not convicted of theft committed during the period of suspension. The sentence is antedated to 15 March 2013.

REVIEW JUDGMENT

SHIVUTE J (PARKER, A J concurring):

[1] The accused person pleaded guilty to one count of theft.

[2] The accused was sentenced as follows:

“Three months imprisonment without the option of a fine.”

[3] I directed the following query to the magistrate:

1. Which section was invoked by the court?
2. If the court invoked s 112 (1) (a) of the Criminal Procedure Act 51 of 1977, is the sentence imposed competent?

[4] The magistrate responded in the following terms.

1. “Section 112 (1) (a) was invoked in these proceedings.”
2. “In hindsight I came to notice that I impose a sentence of a term of imprisonment without the option of a fine which then becomes incompetent as I proceeded to finalize the matter in terms of s 112 (1) (a). The error is regretted and I humbly request the Honourable Review Judge to review as set aside the sentence and impose an appropriate sentence herein.”

[5] The magistrate rightly conceded that the sentence imposed is incompetent.

[6] Section 112 (1) (a) of Act 51 of 1977 as amended by s 7 of Act 13 of 2010 reads as follows:

“(a) *the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment or any other form of detention without the option of a fine or a fine exceeding N\$6000, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-*

- (i) *impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding N\$6000; or*
- (ii) *deal with the accused otherwise in accordance with law;*

[7] In light of the above-mentioned provision the sentence imposed cannot be allowed to stand. The accused will have to be sentenced afresh. Since the accused has already served part of the sentence. I do not think I should remit the matter to the magistrate for purpose of sentence.

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

The sentence of three months' imprisonment without the option of a fine is set aside and substituted by the following sentence:

N\$600.00 fine or 3 months' imprisonment suspended as a whole for 3 years on condition that the accused is not convicted of theft committed during the period of suspension. The sentence is antedated to 15 March 2013.

N N Shivute
Judge

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C PARKER
Acting Judge

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