

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: <i>The State v Willy Hermanus Polman</i>	Case No: CR 138/2022
High Court MD Review No: 1943/2022	Division of Court: High Court, Main Division
Coram: Liebenberg J <i>et</i> Shivute J	Delivered on: 06 December 2022
Neutral citation: <i>S v Polman</i> (CR 138/2022) [2022] NAHCMD 663 (06 December 2022)	
ORDER: <ol style="list-style-type: none">1. The conviction and sentence are confirmed.2. The order putting into operation the suspended sentence is set aside.3. The accused must be brought before the court <i>a quo</i> to be informed of the order which put the suspended sentence into operation, having been set aside on review.4. The magistrate to sign a substitute warrant of committal reflecting the conviction	

and sentence imposed on 13 October 2022.

REASONS FOR ORDERS:

LIEBENBERG J (SHIVUTE J concurring):

[1] The unrepresented accused appeared in the magistrate's court for the district of Luderitz on one count of housebreaking with intent to steal and theft. He was convicted on his plea of guilty and sentenced to 2 (two) years' imprisonment of which one year is suspended for a period of 5 (five) years on condition of good behaviour.

[2] Following the conviction, the state proved three previous convictions of which the one dated 12 April 2019 was a partly suspended sentence on a similar charge. With his conviction in the present instance, it is evident that the accused breached the condition of suspension in the former case. After passing sentence the court *a quo* indicated that the suspended sentence is enforceable and summarily ordered that it be put into operation.

[3] I have no qualms with the conviction and sentence imposed in this matter but the court's order by which the suspended sentence imposed in an earlier case is put into operation is procedurally flawed and irregular. In view thereof the provisions of s 304(2) (a) of the Criminal Procedure Act 51 of 1977 is invoked and the statement of the presiding officer is dispensed with as the accused may be prejudiced by any further delay.

[4] Dealing with the procedure to be followed when the magistrate wishes to put a suspended sentence into operation, Selikowitz J stated the following in the matter of *S v Hoffman*:¹

'When a court considers whether or not to put a suspended sentence into operation, it is required to exercise a judicial discretion. The accused has to be apprised of his right to lead evidence and to advance argument to the court with a view to resisting the putting into operation of the suspended sentence or to advance reasons for its further suspension of the sentence. . . In the exercise of its discretion the court is engaged in a sentencing process and must consider and

¹ *S v Hoffman* 1992 (2) SACR 55 at 63.

apply all the necessary principles which it would apply if it was imposing an original sentence. If the

court is asked to put a sentence into operation where the breach has resulted in a subsequent conviction, the court hearing the application ought, in my view, to know what sentence has been imposed in the later trial before it orders that the earlier and suspended sentence be put into operation. Furthermore, it is both impractical and potentially prejudicial to the accused to put the suspended sentence into operation in a case which is subject to automatic review in terms of s 302 or even 304A of the Act until the conviction and sentence have been confirmed. Where a suspended sentence is put into operation the decision so to do is not subject to automatic review nor is it appealable.'

[5] Whereas the proceedings of the court *a quo* is reviewable, it was wrong to put the suspended sentence into operation before those proceedings were found to be in accordance with justice. Only after the proceedings are confirmed on review could an application be made by the state to put the suspended sentence into operation. Furthermore, the court *a quo* did not warn the accused that the court was considering putting the previously suspended sentence into operation; neither was the accused afforded the opportunity to say anything before the court ordered the suspended sentence to be put into operation. It is evident that the record of previous convictions was merely produced for the purpose of sentence and the state made no application to have the suspended sentence put into operation. The court's decision to *mero motu* order the suspended sentence to be put into operation thus constitutes an irregularity and falls to be set aside.

[6] Furthermore, the application by the state to have the suspended sentence put into operation must be made in the matter in which the suspended sentence was imposed as it emanates from the same proceedings.² In support of the application the prosecutor must present to court a certified copy of the current charge sheet showing the charge and sentence, together with the review cover sheet as proof that the accused breached the conditions of suspension in the first case and that the subsequent proceedings have

²*S v Swartbooi* (CR 119/07) Delivered on 09 August 2007.

been confirmed on review. The court must then follow the procedure as set out in the *Hoffman*

case supra. Lastly, it need not be the same magistrate who imposed the suspended sentence who considers the application to have the suspended sentence put into operation as the application is separate from the trial proceedings. Also, where the original sentence

has already been confirmed on review, the matter is not reviewable if the suspended sentence were to be put into operation.

[12] In the result it is ordered:

1. The conviction and sentence are confirmed.
2. The order putting into operation the suspended sentence is set aside.
3. The accused must be brought before the court *a quo* to be informed of the order which put the suspended sentence into operation, having been set aside on review.
4. The magistrate to sign a substitute warrant of committal reflecting the conviction and sentence imposed on 13 October 2022.

J C LIEBENBERG
JUDGE

N N SHIVUTE
JUDGE