

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

<b>Case Title:</b> S v Rodney Kahuika	<b>Case No:</b> CR 75/2023
<b>High Court MD Review No:</b> 263/2023	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Claasen J et Christiaan AJ	<b>Delivered on:</b> 07 July 2023
<b>Neutral citation:</b> <i>S v Kahuika</i> (CR 75/2023) [2023] NAHCMD 385 (07 July 2023)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The discharge in terms of s 174 in respect of count 1 and count 2 is confirmed.</li><li>2. The conviction on count 3 is confirmed but the sentence on count 3 is set aside. The court <i>a quo</i> is to consider the period of imprisonment that the accused has served on count 3, in considering an appropriate sentence.</li><li>3. The conviction and sentence on count 4 is set aside. The matter is remitted to the court <i>a quo</i> for the magistrate to start afresh from the stage of plea. In the event of a conviction, that the sentence served on this count, (if any) is to be taken into consideration.</li></ol>	
<b>Reasons for order:</b>  CLAASEN J (CONCURRING CHRISTIAAN AJ):	

[1] This is a criminal review matter submitted under s 302 of the Criminal Procedure Act 51 of 1977 as amended (the CPA). The accused was charged with four charges in the District court of Keetmanshoop. No issues arose in respect of counts 1 and count 2 and no further reference will be made to them.

[2] Count 3 is a count of common assault and count 4 is a count of theft of a cell phone. The accused was convicted on these charges on his own pleas of guilt, and was sentenced to pay a fine of N\$2000 or 10 months' imprisonment on each of the charges. The review court addressed a query to the magistrate on count 4, namely whether it was appropriate to have disposed of the matter in terms of s 112(1)(a) of the CPA and secondly, whether the ratio between the fine and imprisonment was proportional to each other.

[3] In reply, the court *a quo* motivated her stance as to why she regarded count 4 as suitable to be dealt with in terms of s 112(1)(a) of the CPA. She gave a rather lengthy explanation but the crux thereof is set out below:

'... I normally look at the item stolen and its value to be indicative of whether or not I might apply section 112(1)(a) or (b). Hence *in casu* the offence is one of theft of a cellphone valued at N\$ 399 which to me appears trivial because I would not impose a sentence in excess of N\$ 6 000 in this matter and thus the value of the item and the specific item trivialises the offence, so much so that the envisioned sentence appeared to be within the sentencing limitation of section 112(1)(a) of the Criminal Procedure Act in my mind.' (sic)

[4] Since it was done without questioning in terms of s 112(1)(b) of the CPA, there are no details as to the circumstances or methodology used to steal the cellphone. The response by the magistrate shows that she was swayed by the penalty clause of s 112 (1)(a) of the CPA and the price of the cell phone which is why she regarded it as a minor offence. We pause for a moment to consider the sentence imposed, which has an alternative of a whopping 10 months' imprisonment. This disproves the contention by the magistrate that she regarded it as a minor offence. That in our view, disproves the contention of this being a minor offence. The same is evident from the considerations in sentence as per her explanation to the review query. She *inter alia* stated that, 'The

accused stole the cellphone, knowing that it is not his, and it was returned to the complainant at no effort by the accused whilst also violating the constitutional right to property of the victim. . .’

[5] While we accept that there may be factors that may mitigate or aggravate theft in a given case, we are hard pressed to find theft of this cell phone as a trivial offense. In modern day living it has become indispensable for most people, thus it can hardly be regarded as an item of no or low significance. This corresponds to the sentiments expressed by January J in *S v Friedrich*<sup>1</sup> at para 5:

‘This case is another example where the magistrate applied section 112(1)(a) of the Criminal Procedure Act in a matter where she undoubtedly had doubt to the seriousness of the relevant charge. Theft of a cell phone is not a “minor” or “trivial” offence. In my view proper questioning would in all probability have put any doubt rest especially where the cell phone was stolen.’

[6] In the matter herein, the court *a quo* did not exercise her discretion to use s 112(1)(a) of the CPA judiciously, and the conviction on count 4 will be set aside on account of that.

[7] In turning to the qualm raised in respect of the sentencing on count 4, the review court did not address a query as to the sentence on count 3, this court will nevertheless address it in this judgment, because it suffers from a similar disproportional ratio between the fine and the imprisonment. Whilst there is no qualm that the magistrate utilised s 112(1)(a) of the CPA for the offence of common assault, the sentence imposed is a different matter. In *S v Nyumba*<sup>2</sup> it was underscored that s 112(1)(a) deals with matters that are not of a serious nature where a presiding officer is of the view that a reasonably minor punishment will be imposed whereas s 112(1)(b) is invoked where a more heavier sentence is likely to follow. In a similar vein, it was held in *S v Zauisomwe*<sup>3</sup> that it is implicit in s 112(1)(a) of the CPA that the sentence to be imposed must be commensurate to a minor offense and that a lengthy term of imprisonment is irreconcilable with the nature of the provision. This matter was sent on review, which

<sup>1</sup> *S v Friedrich* (CR 14/2019) [2019] NAHCNLD 23 ( 28 February 2019).

<sup>2</sup> *S v Nyumba* (CR 31/2019) [2019] NAHCMD 97 (12 April 2019).

<sup>3</sup> *S v Zauisomwe* (CR 10/2020) [2020] NAHCMD 44 (11 February 2020).

means the convicted person could not pay the fine. That also means that the alternative sentence came into operation. A period of 10 months' imprisonment, is shockingly inappropriate for slapping a person, which is the particulars alleged herein. As such the sentence on count 3 stands to be set aside and is to be adjusted in accordance with the fine.

[8] I now turn to the issue of finalising cases in terms of s 112(1)(a) of the CPA and then slapping the accused with a heavy custodial sentence as an alternative. *S v Plaatjie*<sup>4</sup> concerns two criminal review matters done by this specific magistrate and the sentences were set aside on exactly the same principle. Despite being informed of that in 2020, this magistrate continues to disregard an established principle in sentencing, namely that when imprisonment is imposed as an alternative to a fine, the ratio between the two should be proportional to each other. Furthermore that severe imprisonment is not suitable for minor offences done in terms of s 112(1)(a) of the CPA. It puts unnecessary pressure on the review system when it has to be set aside and the cause for that has been explained repeatedly. Thus, it has become necessary to inform the Magistrates Commission to ensure that magistrates' attend to these recurrent problems.

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

1. The discharge in terms of s 174 in respect of count 1 and count 2 is confirmed
2. The conviction on count 3 is confirmed but the sentence on count 3 is set aside. The court *a quo* is to consider the period of imprisonment that the accused has served on count 3, in considering an appropriate sentence.
3. The conviction and sentence on count 4 is set aside. The matter is remitted to the court *a quo* for the magistrate to start afresh from the stage of plea. In the event of a conviction, that the sentence served on this count( if any) is to be taken into consideration.

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<sup>4</sup> *S v Plaatjie* (CR 58/2020) [2020] NAHCMD 362 (18 August 2020).

<b>C CLAASEN JUDGE</b>	<b>CHRISTIAAN P ACTING JUDGE</b>