

CASE NO.: CR 126/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

NIKIWE MSIMANGA

[HIGH COURT REVIEW CASE NO.: 1727/06]

CORAM: VAN NIEKERK, J *et* PARKER, J

Delivered on: 2006.12.27

REVIEW JUDGMENT

PARKER, AJ.:

[1] The accused pleaded guilty to a contravention of s. 2 (a) of Act 41 of 1971 or, in the alternative, s. 2 (b) of the said Act. He was convicted on the main charge and sentenced to 12 months' imprisonment, six months of which were "suspended wholly on condition accused does not within five years be found guilty" under s. 2 (a) of Act 41 of 1971.

[2] The first point is that it is contradictory for the learned magistrate to say that the sentence is suspended “wholly” when only part of it is suspended. Besides, the formulation of the condition is wrong because the suspension is subjected to the condition that both the commission of the offence and the accused’s conviction should be within the suspended period of five years. A condition of suspension should not be formulated in such a way as to include both the commission of the offence and the conviction of the accused in the period of suspension because, for all manner of reasons, it can happen that the conviction only follows after the period of suspension has expired. If that happens, the suspended fine or imprisonment cannot be put into operation because the accused has not been convicted within the period of suspension.

[3] That being the case, the following orders are made:

- (1) The conviction and sentence are confirmed.
- (2) The condition of suspension is deleted and the following condition is substituted therefor:

Twelve months’ imprisonment, six months of which are suspended for five years on condition that the accused is not found guilty of contravening s. 2 (a) of Act 41 of 1971, committed during the period of suspension.

Parker, J

I agree.

Van Niekerk, J