

CASE NO: CR125/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

JOSEF JOSSOP and IVAN JOSSOP

[HIGH COURT REVIEW CASE NO.: 1722/06]

CORAM: VAN NIEKERK, J et PARKER, J

Delivered on:

2006.12.28

REVIEW JUDGMENT

PARKER, J.:

[1] The two accused persons were charged with a contravention of s. 6 of Ordinance 12 of 1956. The Accused No. 1 pleaded guilty, but having heard his plea explanation, the learned magistrate applied s. 113 of the Criminal Procedure Act (Act 51 of 1977) and entered a plea of not guilty. The Accused No. 2 pleaded not guilty. After evidence was led, the learned magistrate, in a well-reasoned judgment, convicted

both Accused No. 1 and No. 2 and were each sentenced to 10 months' imprisonment, five months of which were suspended on condition that each one of them paid a fine of N\$1,000.00 by 30 November 2006. The remaining five months were wholly suspended "on condition each accused does not within that period be found guilty of an offence for which theft is an element."

[2] The conviction is in order. But the formulation of the second 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] Furthermore, it is not proper for a court to suspend a part of a sentence on a certain condition and the other part on another condition. This would amount to imposing two suspended sentences for the same offence. Additionally, it is not competent for a court, in imposing a sentence of imprisonment, to impose a fine as an alternative to the sentence of imprisonment. [See s. 287 of the Criminal Procedure Act (Act 51 of 1977); *Du Toit* (2006), p 28-26; *S v Rulashe* 1970 (2) SA 724 (O), (Head note); *S V Randwa* 1961 (3) SA 545 (O), (Head note)]

By a parity of reasoning, it is not also competent for a court to suspend the sentence of imprisonment on condition that a fine is paid.

[4] For all the above reasons, the following orders are made:

(1) The conviction is confirmed in respect of both Accused No. 1 and Accused No. 2.

(2) The sentence is set aside and the following is substituted therefor:

Each accused person is sentenced to N\$1,000.00 or five months' imprisonment, plus a further five months' imprisonment wholly suspended for five years on condition that the accused person is not found guilty of an offence of which theft is an element, committed during the period of suspension. The payment of the fine is deferred to a date not later than 30 November 2006.

Parker, J

I agree.

Van Niekerk, J