

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

FRANCISKUS WITBOOI	First Accused
MICHAEL SWARTBOOI	Second Accused
RUBEN MARTIN	Third Accused
GREGORY NAKUSERA	Fourth Accused
SAGEUS BOOYSEN	Fifth Accused
DELEVAN APRIL	Sixth Accused

CORAM: MAINGA, J. *et* ANGULA, A.J.

HIGH COURT REVIEW CASE NO. 47/2006

Delivered on: 2007.08.09

REVIEW JUDGMENT

ANGULA, A.J.:

[1] This matter came before me for review. All six accused were charged with theft of liquor items from a motor vehicle which was parked in a street

at Karasburg. Even though they initially pleaded guilty to the charges, during the questioning by the Magistrate in terms of section 112 (1)(b) of the Criminal Procedure Act, 1977 ("the Act"), all claimed to have been so drunk that they did not know what they were doing, therefore the Magistrate entered pleas of not guilty in terms of section 113 of the Act. Their admissions made during the questioning were noted as admissions in terms of section 220 of the Act. Thereafter the State called the complainant as a witness. The accused did not dispute his evidence. The accused were accordingly found guilty as charged.

[2] The Magistrates imposed the following sentences:

"14 months imprisonment for each. For each 2 months is suspended wholly o/c each accd person pays a sum of N\$ 50-00 as restitution to the complainant payable through the clerk of court. A further 6 months for each is suspended wholly for 5 years o/c each accused is not within that period convicted of any offence involving theft. For accd 1 one month that had been suspended on the 29/05/06 is hereby brought into effect."

[3] I am satisfied that the convictions of all six accused are in accordance with justice and will be confirmed.

[4] I am, however, not satisfied with the sentences imposed on the Accused.

Firstly, the suspended sentence is divided into two parts. This is not permissible. It was decided in S v Dudela 1990 (2) SACR 355 that section 303 (1)(b) of the Criminal Procedure Act, No. 13 of 1983 (TK) (the equivalent of Section 297 of Act 51 of 1977) does not empower a court, in suspending a sentence, to divide the sentence into two parts, attaching a different condition to each part and suspending each part for different periods. It was held that the court has the option only of suspending the whole sentence or suspending a part thereof. It does not permit a sentence to be broken up into different parts.

[5] For those reasons the sentence imposed is incompetent and will be varied.

[6] Secondly, the manner in which the suspended sentence of Accused 1 was brought into operation was procedurally incorrect. The Magistrate did not follow the prescribed procedure; he did not warn accused that he was considering imposing the previously suspended sentence, neither was the accused afforded the opportunity to say anything before the suspended sentence was put into operation. In fact, it is for the State, and not the Magistrate, to apply to the Court for a suspended sentence to be brought into operation.

[7] It needs to be pointed out that the reasons for bringing the suspended sentence into operation are dealt with on the case record where the

accused's suspended sentence was imposed, and not on the record of the latest case. Furthermore, the application should not be brought until the latest case proceedings have been confirmed or reviewed or until the time for the accused to lodge an appeal against the latest conviction or sentence has expired.

- [8] Dealing with the procedure to be followed when the Magistrate wishes to put the suspended sentence into operation, Selikowitz J stated the following in the matter of S v Hoffman 1992 (2) SACR 55 at 63:

"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 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."

[9] The Magistrate did not indicate what were the conditions of the suspended sentence and in what respect the accused had breached such conditions. It is furthermore not indicated what was the time limit for the suspended sentence and whether the accused committed the offence before the time limit had expired.

[10] In the result I make the following order:

[10.1] The convictions and sentences are confirmed but the sentence is varied to read:

Fourteen (14) months imprisonment of which eight months are suspended for a period of five years on the following conditions:

- (i) Each accused person compensates the complainant in the amount of N\$50.00 (fifty Namibia dollars) on or before 31st August 2007, which amount is payable through the Clerk of the Court, Karasburg.

(ii) That the accused are not convicted of an offence of theft committed during the period of suspension.

[10.2] The sentence of one month brought into effect in respect of Accused 1 is set aside. In the event that the Magistrate still wishes to bring the suspended sentence into operation he should follow the prescribed procedure as outlined in this judgment and such proceedings must take place on the record of the case where sentence was suspended and not on the record of this case.

[10.3] The sentence is antedated to 27th September 2006.

ANGULA, A.J.

I concur.

MAINGA, J.