
**CASE NO. CR /2011**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

versus

**NOWASEB ISAK** **ACCUSED**

HIGH COURT REVIEW CASE NO. 43/2011

**CORAM:** SHIVUTE,J *et* UNENGU,AJ

Delivered on: 25 February 2011

**REVIEW JUDGMENT**

**UNENGU,AJ.:** [1] This matter was submitted on review pursuant to the provisions of

section 302 of the Criminal Procedure Act 51 of 1977. The accused was charged with theft of which the annexure to the charge sheet thereof reads as follows:

*"THEFT*

*Count 1 (in respect of accused 1)*

*That the accused is guilty of the crime of theft. In that upon or about the 17th day of April 2010 and at or near Woermann Brock in the district of Rehoboth the said accused did wrongfully unlawfully and intentionally steal a bottle of Klipdrift with a value of N$87-99 the property or in the lawful possession of Woermann Brock and or Martin Kaatangwa."*

[2] When the charge was put to the accused, he pleaded guilty and the learned magistrate similarly convicted him on his plea of guilty, disposed of the matter in terms of section 112(1)(a) of the said Criminal Procedure Act and imposed a direct custodial sentence of three (3) months imprisonment.

[3] I directed the following query to the learned magistrate:

"1. Why did the learned magistrate impose a direct imprisonment sentence if the matter was disposed of in terms of Section 112(1)(a) of the Criminal Procedure Act, 51 of 1977?

2. Did the learned magistrate enquire from the public prosecutor as to whether or not he could proceed in terms of Section 112(1)(a) of the said Criminal Procedure Act?"

[4] The learned magistrate replied to the query as follows: (I quote verbatim)

*"I am responding to the Honourable Mr Justice Review remark letter dated 20 January 2011 regarding the above mentioned matter.*

*Accused was charged and convicted of a S112(1)(a) Criminal Procedure Act offence, My Lord. Upon conviction the Prosecutor informed the Court that accused has many records of which one is similar to the one of which accused is convicted.*

*I did not inquire because I didn't know whether accused has records or not. I only ask the prosecutor after conviction or judgment and he read them to the Court.*

*I hope my humble explanation will be understood by the Honourable Mr. Justice.*

*Yours faithful"*

[5] It is thus apparent from the answers of the learned magistrate that he did not acquaint himself with the provisions of section 112(1)(a) prior to and after the query. Had the learned magistrate acquainted himself with the provisions of that section, he would have known what the section provides and I believe, he would have answered the query properly.

[6] On query no 2, the magistrate replied that he did not enquire because he did not know whether the accused had records or not. He continued *"I only ask (sic) the prosecutor after conviction or judgment and he read them to the Court."* Further, he said *"I hope my humble explanation will be understood by the Honourable Mr Justice."* The answers tell again that the learned magistrate, never bothered to read the section to apprise himself of the contents thereof.

[7] Section 112(1)(a) together with sections 112(1)(b) and 115 are the frequent used sections by the Courts. Even newly appointed magistrates and public prosecutors are expected to know what these sections provide. That being the case, I think it is appropriate to quote the provisions of section 112(1)(a) for the benefit of the particular
magistrate and those other magistrates who are ignorant about the contents of Section 112(1)(a). It provides as follows:

*"(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the*

*charge and the prosecutor accepts that plea-*

*(a) the presiding judge may, if he is of the opinion that the offence does not merit the sentence of.....or the presiding judge, regional magistrate or magistrate may, if he is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention*

*without the option of a fine.....or a fine exceeding R300, convict the accused in respect of the offence of which he has pleaded guilty on his plea of guilty only and-*

*(i) impose any competent sentence, other than thsentence of imprisonment or any other form of detention without the option of a fine or a fine exceeding R300;*
*(ii) deal with the accused otherwise in accordance with law;"*
*(Emphasis added)*

[8] Meanwhile, the Criminal Procedure Amendment Act, 2010 (Act No 13 of 2010) which came into effect on 30 August 2010, amongst others, has amended section 112 of the principal Act, in particular the provisions of subsection (1)(a) by substituting the fine of not exceeding N$300 for a fine not exceeding N$6000. Therefore, I urge all magistrates to study the whole Criminal Procedure Amendment Act, 2010 to acquaint themselves with the changes to the principal Act, brought about by the aforesaid Amendment Act.

[9] No sentence of imprisonment or any other form of detention without the option of a fine or a fine exceeding N$6000 is allowed if section 112(1)(a) is applied. The High Court has delivered many review judgments on section 112(1)(a) and (b). Some have been reported in the Namibian Law Reports while others still unreported. I am also aware that a Training Officer has been appointed by the Magistrates' Commission whose duty and functions are to train magistrates. The Criminal Procedure Act 51 of 1977 is one of the aspects he is concentrating on during Training Workshops. Similarly, I am again aware that the same Training Officer went around to all Magistrates' Courts and trained magistrates face to face in their offices after he had identified the shortcomings of the particular magistrate. Therefore, it is difficult to understand why some

magistrates are still making simple mistakes like the one in this Review case.

[10] Hannah, AJ (as he then was) in S *v Aniseb and Another* 1991 NR 203 at 205 I-J

has this to say regarding Section 112(1)(a):

> *"The policy behind s 112(1)(a) is clear. The legislature has provided machinery for the swift and expeditions disposal of minor criminal cases where an accused pleads guilty. The trial court is not obliged to satisfy itself that an offence was actually committed by the accused but accepts his plea at face value. The accused thus loses the protection afforded by the procedure envisaged in s 112(1)(b) but is not exposed to only <u>really serious form of punishment</u>: (Emphasis added)*

On page 206 A - B he proceeded on to say:

> *"<u>The Court may not pass a sentence of imprisonment or any form of detention without the option of a fine</u>....."*

(Emphasis added again)

[11] The message is crystal clear that if the Court applies section 112(1)(a) then that Court may not pass a sentence of imprisonment or any other form of detention without the option of a fine.....and the fine imposed must not exceed N$300.00. That is therefore, a magistrate will act *ultra vires* if he or she imposes a direct imprisonment when section 112(1)(a) is applied which is the situation *in casu.* An incompetent sentence was passed by the learned magistrate in this case because of the failure by the magistrate to engage the prosecutor before he decided to dispose of the case in terms of section 112(1)(a). If he had asked the prosecutor whether he (prosecutor) was prepared to accept the plea, I believe the prosecutor would have alerted the magistrate to the record of previous convictions because the

prosecutor was aware of the previous convictions of the accused. Upon application of section 112(1)(a), the magistrate was supposed to pretend as if the accused was a first offender who did not have previous convictions when sentencing him.

[12] Be that as it may, the accused has suffered injustice in that he has to sit in jail for three (3) months to serve an incompetent sentence. He was convicted and sentenced on 19 April 2010. Why the matter was only submitted for review in February 2011 is not explained. Further, it is also not clear whether the matter was transmitted for Special Review in terms of section 304, because, under normal circumstances the sentence imposed in the matter is not subject to automatic review in terms of section 302.

[13] I have previously indicated that the sentence is incompetent and as such cannot be allowed to stand. However, due to the fact that the accused served the sentence already, it will serve no purpose to refer the matter back for sentencing afresh by the magistrate. In terms of section 304(2)(c)(iv) of Act 51 of 1977, this Court has the power to impose a sentence the magistrate's court ought to have imposed in this matter at the

trial.

[14] In the result, I make the following order:

1. The conviction is in order and is confirmed.

2. The sentence of three (3) months imposed by the learned magistrate is set aside and

the following sentence is substituted for:

Fined Three Hundred Namibia dollars (N$300.00) or three (3) months imprisonment wholly suspended for a period of three (3) years on condition that accused is not convicted of theft committed during the period of suspension.

**UNENGU, AJ**

I agree

**SHIVUTE, J**