

**REPUBLIC OF NAMIBIA**

**CASE NO.: CR 18/2011**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**STATE**

versus

**OLAVI INDONGO**

**(HIGH COURT REVIEW CASE NO.: 204/11)**

**CORAM: MULLER J et SMUTS J**

Delivered on: 28 February 2011

**REVIEW JUDGMENT**

**MULLER J** [1] The accused was charged with two offences of theft, both committed on the same day in respect of money stolen from one person. He pleaded guilty and after being questioned by the magistrate in terms of S 112 (1)(b) of the Criminal Procedure Act, no. 51 of 1977 (CPA) he was convicted on both counts and sentenced to 12 months imprisonment on count 1 and 24 months imprisonment on count 2, respectively

[2] I directed the following query to the Magistrate:

*"Despite the aggravating factors listed by the Magistrate in her reasons for sentence, the question is whether the total sentence of 36 months (3years) is in accordance with justice in relation to the offences committed on the same day. Did the Magistrate not consider to take the two convictions together for the purpose of sentence, or let part of one sentence run together with the other, or to suspend part of the sentence?"*

[3] The Magistrate responded as follows:

*"The court convicted the accused of two counts of theft that emanated or took place on the same date, but at different places. The court also noted that cash money amounting to N\$2 656.32 was stolen from one company named J.P Dagema; and the other amount of N\$5 088.00 was stolen from the other company R.N Market. Such companies/business places has different complainants.*

*What was aggravating in this case was that the accused was a security officer, and thus as having been stated and reiterated numerous times, that a position of trust existed between the companies and the security guards, and between that of the security and its employer; the accused breached such trust, and instead of guarding and protecting, basically stole from the hand the feeds him. In these circumstances the court felt that sentencing calls for each separate count to be separately punished and as such imposed the different sentences.*

*The court in the circumstances felt that separate thefts should be sentenced separately, and not as one. However, I stand to be corrected by the Honourable Judge."*

[4] I do accept the explanation of the Magistrate regarding the value of the cash stolen in respect of both counts and the fact that the accused was in a position of trust where he was employed as a security guard. Those are certainly aggravating circumstances. However, the accused was a first offender. In my opinion a total sentence of 3 years direct imprisonment is too high. Both offences were committed on the same day in respect of the same person, Andreas Cornwell. The Magistrate regarded these offences to be so serious that direct imprisonment is necessary. Although a first offender should normally be kept out of prison as far as possible, I agree with the Magistrate that due to the aggravating circumstances involved here, as well as the interest of society, a period of imprisonment is warranted. I believe that it would have been more fair under the circumstances to take both offences together for the purpose of sentence and to suspend part thereof. The accused would then have to serve a period of time in prison and the suspended part of the sentence would hang over his head for a considerable period. Hopefully that would deter him from committing such an offence again. He will in any event lose his job and may find it difficult to find employment again.

[5] In the result the conviction of the accused is confirmed and the sentences imposed are set aside and are substituted with the following sentence:

1. The two convictions are taken together for the purpose of sentencing; and
2. The accused is sentenced to two years imprisonment of which one year is suspended for a period of 3 years on condition that the accused is not convicted of the offence of theft committed within the period of suspension.

**MULLER, J**

I agree

**SMUTS, J**