

**REPUBLIC OF NAMIBIA**

**CASE NO.: CR 22/2011**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**STATE**

versus

**LEONARD PETRUS**

***(HIGH COURT REVIEW CASE NO.: 547/11)***

**CORAM: VAN NIEKERK, J et SIMPSON, AJ**

Delivered on: 15 March 2011

**REVIEW JUDGMENT**

**VAN NIEKERK, J** [1] The accused in this matter was charged with fraud, alternatively theft. The charges were framed as follows:

"Fraud

Count 1 (in respect of accused 1)

That the accused is guilty of the crime of Fraud.

In that, upon or about the 31 day of July 2010 and at or near First National bank in the district of Gobabis the said accuse did wrongfully, unlawfully, falsely and with intent to defraud give out and pretend to Hendrik Odendal or First National bank that he deposit the amount of N\$4045.00 in cash into the account of Lewis stores at First National bank, Gobabis and did then and there by means of the said false pretences

induce the said Hendrik Odendal or First National bank to the actual or potential loss or prejudice of cash money to the amount of N\$4045.00

Whereas in truth and in fact the accused when he so gave out and pretended as aforesaid, well knew that he did not deposit the amount of N\$4045.00 into the account of Lewis store and thus the accused did commit the crime of Fraud.

Theft

1<sup>st</sup> Alternative to Count 1 (in respect of accused 1) That

the accused is guilty of the crime of Theft.

In that upon or about the 31 day of July 2010 and at or near First National bank district of Gobabis the said accused did wrongfully, unlawfully and intentionally steal money in the amount of N\$4045.00 the property of or in the lawful possession of Hendrik Odendal or First National bank."

[2] The accused pleaded guilty to both counts, but after questioning in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977, he was convicted on the main charge. The sentence imposed is a fine of N\$1500 or 12 months imprisonment wholly suspended for two years on condition that the accused compensates First National Bank in two instalments via the clerk of the court, Gobabis within a stipulated time and a further condition of good behaviour.

[3] In a letter accompanying the case record on automatic review the trial magistrate states that she only learnt some time after the sentence was passed that the complainant's losses had already been recovered from the accused before the trial. She requests this Court to change the sentence to the following: N\$1500 or 12 months imprisonment, plus 9 months imprisonment suspended for two years on condition that the accused is not convicted of fraud or theft convicted within the period of suspension.

[4] Before I deal with the magistrates' request it is necessary to deal with the conviction. The main charge of fraud appears to lack some averments and does not make sense. It alleges that the accused "did then and there by means of the said false pretences induce the said Hendrik Odendal or First National Bank", but does not continue to state what effect the inducement had. In other words, the charge does not state what it was that the complainant was induced to do or to omit to do. The matter was not cleared up during the section 112(1)(b) questioning. In my view the conviction of fraud cannot stand on this charge. The accused did however admit that he stole the money in question from the complainant. He should therefore be convicted of theft instead.

[5] This Court cannot change the sentence solely on the basis of the magistrate's letter, as section 304 of Act 51 of 1997 does not provide for such a procedure. However, the sentence is in any event not in order. The magistrate imposed the condition of compensation without hearing the accused on the matter. It is prudent and a matter of common sense that a court which is considering to order monetary compensation should first ask the accused whether he/she has already compensated the complainant and to first establish if the accused is able to effect such compensation in the instalments and over the time period contemplated. In this case the magistrate did not hear the accused on the issue of compensation. Of course the court would not be bound by the accused's responses, but the court would be in a better position to make adjustments to the proposed order to ensure that the ultimate purpose is more likely to be met, namely the compensation of the complainant. Where as in this case, the compensation order is part of a suspended sentence it makes even more sense to obtain input from the accused, because the court's intention is to keep him out of jail. Had the magistrate done so she would have established that the money had already been recovered from the accused. By failing to do so the magistrate prejudiced the accused, who is at risk of being arrested for failure to comply with the terms of one of the conditions on which the

sentence was suspended. In the circumstances this condition should merely be deleted from the sentence.

[7] The magistrate's proposal for the sentence to be substituted amounts to an increase in the sentence. This is not permitted on review. (*S v Arebeb* 1997 NR 1 (HC)).

[8] In the result the following order is made:

1. The conviction on fraud is set aside and substituted with a conviction on theft.

The sentence is set aside and substituted with the following sentence:

2.1. N\$1500 (One Thousand Namibia Dollars) or 12 (twelve) months imprisonment wholly suspended for 2 (two) years on condition the accused is not convicted of fraud or theft committed within the period of suspension.

3. The sentence is backdated to 13 August 2010.

**VAN NIEKERK, J**

I concur.

**SIMPSON, AJ**