



CASE NO.: CR

19/2012

**IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

SHADUKA VIKTOR

(HIGH COURT REVIEW CASE NO.: 20/2012)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 21 September 2012

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused in this matter appeared in the magistrate's court Oshakati on thirteen charges in contravention of s 24 of the Value-Added Tax Act, 2000¹ (the Act). Despite having pleaded not guilty and

¹ Act 10 of 2000.

after evidence was heard, he was convicted on all the charges and sentenced as follows: 'N\$2 000 or 6 months imprisonment wholly suspended for a period of 5 years on condition that accused is not convicted of an offence of contravening section 24 [of] Act 10 of 2000'.

[2] When the matter came on review I directed a query to the presiding magistrate enquiring into the correctness of the formulation of the charges preferred against the accused, and the single sentence that was imposed. It appears from the date stamp that the query was received by the clerk of the criminal court as far back as the 22nd of February 2012; however, the magistrate's reply is dated the 15th of August, almost six months after the query was sent. In the absence of any explanation that could possibly explain the delay, I find the magistrate's remissness in this respect inexcusable. I am well aware that magistrates suffer from a heavy workload and seldom find sufficient time to attend to administrative functions such as responding to a query in addition to their court work; however, review proceedings are equally important and form an integral part of trial proceedings, thereby (ultimately) ensuring that an accused is afforded a fair trial.

[3] Although I initially had some reservations about the manner in which the charges are formulated pertaining to the time the alleged offences were committed, I am satisfied that the accused was at least duly informed as to

the specific months that he, being a registered vendor in terms of the Act, failed to submit tax returns to the Minister of Finance as he, by law, was required to do. Evidence was adduced that the accused, despite having been notified of his returns being outstanding, simply failed to submit the returns, thereby making himself guilty of contravening s 24 of the Act. Whereas he was unable to proffer any plausible explanation showing otherwise, I am satisfied that the court correctly convicted the accused on all thirteen charges. The convictions are thus in order and will be confirmed.

[4] The magistrate, as regards sentence, replied to the query that she omitted to note on the record that all charges were taken together for purpose of sentence; furthermore, she concedes that the sentence imposed is wrongly formulated in that the words 'committed during the period of suspension' were omitted.

[5] Although the taking of different counts together for purpose of sentence is not prohibited by the Criminal Procedure Act², such practice is undesirable and should only be adopted in exceptional circumstances. In *The State v Willem Visagie*³ the following was said regarding taking counts together for purpose of sentence at p3:

[6] It is trite law that when one comprehensive sentence is imposed in

2 Act 51 of 1977.

3 Unreported Case No CR 03/2010 delivered on 28.01.2010.

respect of two or more offences, it essentially means that the single sentence is to be regarded as the punishment in respect of each of the separate offences and therefore the comprehensive sentence imposed must be a suitable punishment in respect of each of the offences committed.'

(Emphasis provided)

[6] Any person failing to furnish tax returns in terms of those provisions set out in the Act is guilty of an offence and upon conviction liable to a fine prescribed in s 56 of the Act, not exceeding N\$4 000 or imprisonment for a period not exceeding one year or to both such fine and such imprisonment. Having taken the thirteen counts together for purpose of sentence the court imposed a wholly suspended fine which in effect lets the accused off the hook scot free as the accused, in the mean time, has closed down his business. Though the court in sentencing has a wide discretion, it is guided by well-established principles and guidelines which ought to be followed when determining what *suitable* punishment to impose on the offender. In this instance the accused was in default no less than *thirteen* times, despite having been notified of his failure to submit his tax returns.

[7] The sentence imposed, in my view, is not only extremely lenient and unjustified if regard is had to the accused's interests as well as that of society, but it clearly also fails to appreciate the seriousness of the offences committed by the accused over a long period of time. Although this might have been an instance where one comprehensive sentence could have been imposed in respect of all the charges, a clearer thinking in determining the appropriate

sentences was required in this instance for example a hefty fine which would also have served as general deterrence to others. This notwithstanding, besides correcting the formulation, the sentence imposed will not be interfered with.

[8] In the result, the sentence is amended to read:

'Counts 1 – 13 taken together for purpose of sentence: N\$2 000 or 6 months' imprisonment, wholly suspended for 5 years on condition that the accused is not convicted of contravening s 24 of Act 24 of 2000, committed during the period of suspension.'

LIEBENBERG, J

I concur.

TOMMASI, J