

NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 84/2012

In the matter between:

THE STATE

and

NELSON ANGULA

Neutral citation: *The State v Angula* (CR /2012) [2012] NAHCXD 19 (10 October 2012)

Coram: VAN NIEKERK J and UEITELE J

Delivered: 10 October 2012

Flynote: **Criminal procedure** – Plea – Plea of guilty – Conviction in terms of section 112(1)(a) of Criminal Procedure Act, 1977 - Accused sentenced to 6 months imprisonment wholly suspended – Section 112(1)(a) provides that any competent sentence may be imposed other than imprisonment without the option of a fine - Sentence not competent – Sentence set aside and substituted with a fine of N\$2 000 or 2 months imprisonment suspended on certain conditions

Criminal procedure – Compensation order in terms of section 300(1) of Criminal Procedure Act, 1977 - may only be made on application by prosecutor or

complainant – record does not reflect that this was done – order set aside but compensation of complainant ordered as condition of suspended sentence

Summary: The accused was convicted in terms of section 112(1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977) and sentenced to 6 months imprisonment wholly suspended for 2 years on condition of good behaviour. As section 112(1)(a) provides that the court may impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine”, the sentence imposed is not competent. In addition the magistrate made an order in terms of section 300 of Act 51 of 1977 that the accused should compensate the complainant in the amount of N\$2 519.00. The record did not reflect that the prosecutor or the complainant applied for a compensation order as required by section 300. Therefore this order is incompetent. The accused was also not heard prior to the making of the order as the rules of natural justice require. However, as the accused had promptly paid the compensation, he was not prejudiced. The sentence and the compensation order were set aside and substituted with a sentence of N\$2 000 or 2 months imprisonment suspended for 2 years on condition of good behaviour and that the accused compensates the complainant in the above amount by close of business on the day that sentence was passed.

ORDER

1. The conviction is confirmed.

The sentence and compensation order are set aside and substituted with the following sentence:

‘N\$2 000 (Two thousand Namibia Dollar) or 2 (two) months imprisonment wholly suspended for 2 (two) years on condition that (i) the accused is not convicted of the offence of malicious damage to property committed within the period of suspension; and (ii) the accused compensates the complainant, Willem Barnabas, by payment in the amount of N\$2 519.00 (Two thousand

five hundred and nineteen Namibia Dollar), such payment to be made to the Clerk of the Court, by close of business today.’

2. The sentence is backdated to 15 July 2011.

REVIEW JUDGMENT

VAN NIEKERK, J (UEITELE, J concurring):

[1] The accused pleaded guilty in the magistrates’ court to a charge of malicious damage to property. The magistrate applied section 112(1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), and convicted the accused without any questioning. Thereafter the magistrate sentenced the accused as follows:

“6 months direct imprisonment, wholly suspended for two years on condition that accused is not convicted of the offence of malicious damage to property committed within the period of suspension. Further accused must compensate complainant Willem Barnabas the amount of N\$2519.00 payment to be made at clerk of court.”

[2] When the matter was sent on automatic review, I directed the following query to the magistrate:

- “1. Is the sentence imposed competent in a case where section 112(1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), is applied?
2. Is the compensation order part of the suspended sentence or not? If not, was the order properly made in terms of section 300 of Act 51 of 1977?
3. Should a date not have been fixed by when the compensation should have been paid?
4. Should the accused not have been heard on the issue of compensation?”

[3] In respect of question 1 the learned magistrate correctly conceded that the sentence imposed is not competent as section 112(1)(a) provides that the court may “impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding N\$6 000”.

[4] In respect of question 2 the magistrate responded that the compensation order was not made as part of the suspended sentence, but under section 300 of Act 51 of 1977. The magistrate further stated that section 300 was not properly applied although the State made an application to the court for a compensation order. She does not state why section 300 was not properly applied. However, the record does not reflect that the prosecutor made such an application (or that the complainant did so) as is required by section 300(1). The magistrate does concede in respect of question 4 that the accused was not heard on the issue of compensation.

[5] As far as question 3 is concerned, the magistrate responded that a date need not be fixed as this is not a requirement of section 300. Whilst section 300 does not expressly require a date to be fixed, it makes practical sense to do so. Where a compensation order is a condition of a suspended sentence the date should always be included so that the accused knows how much time he/she has to fulfil the condition.

[6] Enquiries made with the clerk of the particular court revealed that the accused

in this matter did fully compensate the complainant on the date that sentence was passed. It seems therefore that, in spite of not being heard as the rules of natural justice require, the accused was not prejudiced in the sense that non-compliance had a negative consequence on his punishment. I shall therefore not order that the compensation be paid back. However, as the record does not reflect that section 300 was applied on application by the prosecutor or the complainant, I shall set the compensation order aside, but achieve the same effect by ordering compensation as a condition of suspension of the sentence to be imposed.

[7] The result is as follows:

1. The conviction is confirmed.

The sentence and compensation order are set aside and substituted with the following sentence:

'N\$2 000 (Two thousand Namibia Dollar) or 2 (two) months imprisonment wholly suspended for 2 (two) years on condition that (i) the accused is not convicted of the offence of malicious damage to property committed within the period of suspension; and (ii) the accused compensates the complainant, Willem Barnabas, by payment in the amount of N\$2 519.00 (Two thousand five hundred and nineteen Namibia Dollar), such payment to be made to the Clerk of the Court, by close of business today.'

2. The sentence is backdated to 15 July 2011.

K van Niekerk

Judge

S Ueitele

Judge