CASE NO.: CR 10/2012

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

MEKONDJA HELAO

HIGH COURT REVIEW CASE NO: 618/2010

CORAM: HOFF, J *et* MILLER, AJ

Delivered on: 15 February 2012

REVIEW JUDGMENT

HOFF, J: [1] The accused was convicted in the Walvis Bay magistrate's court inter alia of reckless or negligent driving in contravention of the provisions of section 80(1) of the Road Traffic and Transport Act, Act 22 of 1999, and of driving a motor vehicle with no driver's licence in contravention of section 31 (1)(a) of Act 22 of 1999.

[2] The sentence as it appears on the last page of the record reads as follows:

"Charge(s) Count 1, 4 taken together for sentencing – Road Traffic Act – Reckless or negligent driving. Road Traffic Act – No driver's licence.
Sentence: Fine
Fine amount: N$2 000.00 (Two Thousand Namibian Dollars) of which N$1 000.00 (One Thousand Namibian Dollars) is suspended for a period of 5(five) years on the following conditions:

1. On the condition that the accused is not convicted of RECKLESS OR NEGLIGENT DRIVING, committed during the period of suspension

Or

Sentence: Imprisonment
Term: 12(Twelve) Months Imprisonment of which 6(six) months is suspended for a period of 5(five) years on the following conditions:

1. On the condition that the accused is not convicted of RECKLESS OR NEGLIGENT DRIVING, committed during the period of suspension."

[3] Some of the queries which I directed to the magistrate were the following:

> "1. On what authority was the accused given a choice which sentence to serve since he was given a fine OR a term of imprisonment ?
>
> 2. Why were counts 1 and 4 (two distinct statutory offences) taken together for purpose of sentence.
>
> 3. Why was the accused not sentenced in respect of count 4."

[4] Count 4 was the conviction for driving a motor vehicle without a driver's licence.

[5] The presiding magistrate in respect of the first question replied that it was a NAMCIS generated "Court Order" which suggests that the Court imposed an alternative sentence and that it was a peculiarity of NAMCIS regarding the manner in which it records (or translates) a

sentence into an electronic friendly medium. The magistrate referred me to his handwritten record where the sentence imposed reads as follows:

> "In respect of counts one and four both counts are taken as one for purpose of sentence and accused is sentenced to a fine of two thousand dollar or twelve months imprisonment of which one thousand dollars or six months imprisonment is suspended for a period of five years on condition that the accused person is not found guilty of an offence involving reckless or negligent driving committed during the period of suspension."

[6] Even though the magistrate gave an explanation regarding what appears to be the imposition of an alternative sentence it, is in my view, a disturbing explanation. It appears to me the NAMCIS system, as explained by the magistrate, in respect of the formulation of at least this particular sentence, is impervious to the input and effort by a magistrate in the formulation of such a sentence.

[7] A magistrate's court is in terms of section 4(1) of the Magistrate's Court Act 32 of 1944 as amended, a court of record. The magistrate has certified the record of the proceedings as correct.

[8] The two sentences referred to namely the NAMCIS generated one and the handwritten one are ambivalent. It must be clear from the record which sentence was imposed and it is not for the reviewing judge to second guess which sentence a magistrate had intended to impose.

If the method of recording a sentence by the NAMCIS system cannot accurately record the intended sentence of the magistrate then in my view the use of such a system, for purposes of formulating sentences, should be reconsidered.

[9] Regarding the query why two distinct statutory offences had been taken together for purpose of sentence the magistrate replied that the two offences were closely connected to each other in terms of time, place and circumstance and in support of his explanation referred this Court to the matter of *S v Akanda* 2009 (1) NR 17 (HC) (in which Silungwe AJ referred with approval to S v Young 1977 (1) SA 602 (A)) and where the following appears on 17 I – J in the *Akonda* judgment:

> "Although that procedure is neither authorized nor forbidden by the Criminal Procedure Act 51 of 1977, it has emerged as a matter of practice. In principle, however, the practice should be resorted to in exceptional circumstances only, such as where various counts are part of a single transaction or are closely connected or similar in point time, place or circumstances."

[10] I agree with this exposition of the practice. It is however the correct implementation thereof which may be problematic.

[11] In my view the emphasis should not be that such a practice is not forbidden but that it is an undesirable practice as Silungwe AJ clearly explained in *Akonda (supra)* on p. 18 A – B:

> "This means that in other cases, magistrate should refrain from having recourse to such practice because, not only is it desirable that each separate crime should be punished separately (S v Swartz 2000 (2) SACR 566 (SCA) at 568 f), for example, where crimes of disparate gravity are involved, but also because a global sentence might present difficulties if some of the convictions are, for one reason or another, set aside, as it would then be difficult to ascertain on what basis the sentence reached the global sentence. It is thus undesirable to take divergent counts together for the purpose of sentence."

[12] It was stated in *Young (supra)* by Trollip JA that it induces to clearer thinking in determining the appropriate sentences to treat each offence separatetly.

[13] In my view the two counts the accused had been convicted of are of disparate gravity if one has regard to their respective penalty clauses.

In respect of a conviction for reckless driving the maximum sentence which may be imposed is a fine of N$8 000.00 or imprisonment of 2 years or to both such fine and imprisonment and the maximum sentence which may be imposed for driving without a driver's licence is a fine of N$2 000.00 or imprisonment of six months or to both such fine and imprisonment. I am of the view that for this reason alone the magistrate acted irregularly by taking the counts together for purpose of sentence.

[14] It is further noteworthy that the magistrate imposed the maximum fine in respect of the conviction for driving without driver's licence in respect of a first offender which may be considered a harsh sentence.

[15] The difficulty one is confronted with in a situation where two statutory offences are taken together for purpose of sentence, which sentence is then in part suspended, is to formulate the conditions of suspension.

[16] In this case the magistrate took the counts together for purpose of sentence but in his conditions of sentence referred only to the prohibition of committing the offence of reckless or negligent driving but is silent about the conviction in respect of driving a motor vehicle without a driver's licence. The sentence is incomplete.

[17] The sentence imposed is also irregular and *de jure* a nullity.

In *S v Hayman* 1988 (1) SA 831 (NC) it was held that although a magistrate or a judge can, for the purposes of sentence, take charges together her or she is not authorised to impose a sentence which is competent in respect of one offence, and incompetent in respect of

another offence, for the two together. Where it is done the sentence is a nullity and should be corrected.

See also *S v S* 1981 (3) SA 377 (A).

[18] It has been stated that when one comprehensive sentence is imposed in respect of two or more charges, it essentially means that the single sentence is to be regarded as the punishment for each of the separate offences and for that reason it is not competent to impose such a sentence when its severity exceeds the jurisdiction of the court in regard to one or more of the charges. (Hiemstra's Criminal Procedure 4th Issue par. 28 – 41).

[19] In this regard the Court in *S v Van Zyl* 1974 (1) SA 113 (TPD) held (with reference to the circumstances of that case) that although offences are created by one and the same Ordinance and, broadly speaking, belong to the same *genus*, it is preferable to impose separate sentences.

It was further held that even if it would be permissible to take counts together for purpose of sentence, no court is competent to impose a sentence which is higher than the sentence prescribed for a single offence.

[20] If this principle is applied to the matter under review then it should be apparent that a sentence of N$2 000.00 or *12 months imprisonment* was imposed in respect of the charge of driving without a driver's licence which carries a maximum sentence of N$2 000.00 or *six months imprisonment.*

(Emphasis added).

This sentence is a nullity.

[21] This Court held in *S v Visagie* 2010 NR 271 at 272 G in the case where separate sentences are imposed in respect of two or more convictions, that the cumulative effect of sentences may be ameliorated by ordering the running together of sentences or part of sentences.

[22] In my view, for the reasons mentioned, the comprehensive sentence imposed cannot stand and needs to be set aside.

[23] In the result the following orders are made:

1. The convictions in respect of both counts are confirmed.
2. The sentence imposed is set aside.
3. The matter is referred back to the magistrate who is ordered to sentence the accused afresh along the guidelines expressed in this judgment.

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HOFF, J

I agree

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MILLER, AJ