



CASE NO.: CR 04/2012
CR 05/2012

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**1. THE STATE
69/2009**

CASE NO.

and

SAMUEL NANUB

**2. THE STATE
18713/2009**

CASE NO.

and

DONALD MAOVA

HIGH COURT REVIEW CASE NO.: (1) 252/2009
HIGH COURT REVIEW CASE NO.: (2) 977/2009

CORAM: HOFF, J *et* SWANEPOEL, J

Delivered on: 20 January 2012

REVIEW JUDGMENT

HOFF, J: [1] The accused in State v Nanub was convicted of the crime of theft of a cellphone in the magistrate's court and sentenced as follows:

"A fine of N\$2 000.00 of which N\$1 000.00 is suspended for a period of 14 months on condition that the accused is not convicted of theft committed during the period of suspension.

OR

Twenty months imprisonment of which 7 months is suspended for a period of 14 months on condition that the accused is not convicted of theft committed during the period of suspension."

[2] In State v Donald Maova the accused was convicted of theft of denim jeans and sentenced as follows:

"N\$2 000.00 of which N\$ 1 200.00 is suspended for a period of 2 years on the following conditions:

Accused is not convicted of theft committed during the period of suspension.

OR

20 months imprisonment of which 8 months is suspended for a period of 2 years on condition that the accused is not convicted of theft committed during the period of suspension."

[3] The magistrate was asked in both instances to provide reasons why an alternative sentence was imposed and whether the accused has had a choice which sentence to serve.

[4] The magistrate replied as follows:

“It is my respectful submission that the alternative sentence should follow if the intention of the sentencing officer is not intend to sentence the accused to direct imprisonment without the option of a fine.

I further humbly submit that I don't think the accused can choose to go to prison if he can afford a fine unless if he is serving already a direct imprisonment.”

[5] It is clear from this reply that the magistrate wished to impose a fine with imprisonment as an alternative punishment.

However the manner in which the sentences were constructed was highly unusual and irregular. I must confess that in my experience I have never ever seen a sentence constructed in this manner.

[6] Section 287 of Act 51 of 1977 reads as follows:

“Imprisonment in default of payment

287(1) Whenever a court convicts a person of any offence punishable by a fine (whether with or without any other direct or alternative punishment), it may in imposing a fine upon such person, impose a punishment as alternative to such fine, a sentence of imprisonment of any period within the limits of its jurisdiction: Provided that ...”

[7] The proviso in the section referred to is not applicable in this instance.

[8] A fine is always imposed *with imprisonment as an alternative* in the event of the non-payment of the fine.

[9] It is therefore desirable to impose an alternative imprisonment when imposing a fine, since failure to pay (if only a fine is imposed) may lead to inconvenience and unnecessary proceedings.

(See the provisions of section 287(2) in this regard).

[10] In terms of the provisions of section 304 of Act 51 of 1977 the Reviewing Judge may *inter alia* set aside or correct the proceedings in the magistrate's court or generally give such judgment or impose such sentence as the magistrate's court ought to have given or ought to have imposed.

[11] I may add that the period of suspension namely 14 months is another uncommon feature of the sentence. Sentences are normally suspended for periods of 3, 4 or 5 years.

[12] It is therefore necessary in order to give effect to the intention of the magistrate to set aside the sentences imposed and substitute it with the following sentences:

In respect of State v Samuel Nanub:

A fine of N\$2 000.00 or 20 months imprisonment of which N\$1 000.00 or 7 months imprisonment are suspended for a period of 14 months on condition that the accused is not convicted of the crime of theft committed during the period of suspension.

In respect of State v Donald Maova:

A fine of N\$2 000.00 or 20 months imprisonment of which N\$1 200.00 or 8 months imprisonment are suspended for a period of 2 years on condition that the accused is not convicted of the crime of theft committed during the period of suspension.

HOFF, J

I agree

SWANEPOEL, J