CASE NO.: CR 07/2012

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

DAVID AMUKUSHU

(HIGH COURT REVIEW CASE NO.: 316/2011)

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

Delivered on: 02 March 2012

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused was convicted in the Magistrate's Court Opuwo on a plea of guilty to a charge of theft (from a motor vehicle) and sentenced to a fine of N$3 000 or 3 years' imprisonment, partly suspended on condition of good conduct.

[2] The accused was questioned pursuant to the provisions of s 112 (1)(b) of the Criminal Procedure Act, 1977[1] during which he admitted his unlawful taking of goods from a truck parked at a house with the intention of selling it. When questioned on the goods alleged to have been stolen, the following appears from the record of proceedings:

"Q: It is alleged that you took 3 [charge sheet reads 32] pair (sic) of Adidas shoes, 3 jackets, 6 T-shirts, 2 pairs of shoes and a panga all valued at N$10 069. Do you agree with the value or dispute it?

A: I took 4 T-shirts, 3 jackets, 4 pairs of shoes, 3 trousers. That's all.

Q: Do you agree with the value?

A: Yes, as I don't know how much each item costs."

……

……

Q: What happened to the goods you took?

A: I sold some and some were recovered.

PP: No record against accused person."

The accused and the prosecutor thereafter addressed the court on sentence, whereafter the court imposed sentence. The accused was unable to pay the fine; hence the matter being subject to review.

[3] When the matter came before me on review I directed a query to the magistrate as regards (i) the admission made by the accused concerning the value of the goods actually taken by him, compared to the total value of the

[1] Act No 51 of 1977

goods as reflected in the charge and which the court apparently relied on when sentencing; and (ii) the alternative imprisonment to the fine imposed, being disproportionate.

[4] Gleaning from the record it would appear that, despite the accused only admitting theft of *some* of the items listed in the charge, the court asked him whether he agreed with the value being N$10 069 as stated in the charge; and because he had no knowledge of its value, he replied that he had no option other than to agree with the value reflected in the charge. Although the value of goods, forming the subject matter of a charge of theft, is not an element of the offence, it could (and in this instance it certainly does), impact severely on the sentence to be imposed. Although charged with theft of 32 pairs of Adidas shoes valued at N$8 000, the accused admitted to have stolen only four pairs, the value of which is about N$1 000 (N$250 each). The court could therefore not have been satisfied that the accused admitted the value of the goods actually stolen to remain at N$10 069, and now concedes having misdirected itself in that regard.

[5] There is however something else that needs to be addressed, and that is, that although judgment is reflected on the charge sheet, it does not form part of the proceedings itself. The record merely reflects that immediately after questioning the accused, the prosecutor informs the court that the State does not prove any previous convictions against the accused. Furthermore, in her reply the magistrate says that the State *accepted* the plea, but this is not borne out by the excerpt from the record (*supra*). The accused pleaded guilty

to theft of goods substantially less than charged with and the court could only have convicted the accused after the prosecutor had informed the court that it would accept the plea on that basis; which clearly was not done.[2] In the absence of the State's acceptance of the lesser plea, the court could not have been satisfied *"that the accused is guilty of the offence to which he has pleaded guilty"*[3] and should first have enquired from the prosecutor whether or not the lesser plea would be accepted by the State; and if not, to have entered a plea of not guilty in terms of s 113. The conviction thus, is not in accordance with justice and must be set aside.

[6] The magistrate's reply relating to the alternative sentence of imprisonment to the fine is not entirely clear to me and I am not sure whether or not it is conceded that it is indeed disproportionate to the fine imposed. Be that as it may, it has been said that the alternative imprisonment must not be disproportionate to the fine imposed and *"The imprisonment should therefore be just severe enough to make failure to pay the fine problematical"*[4]. I have already in the case of *The State v Benjamin Mbwale*[5] extensively dealt with the approach to be followed when the court decides to impose a fine, and in respect of the alternative imprisonment, the following appears at p. 4 para [7]:

> "Having decided what an appropriate fine would be, the court next has to decide what alternative sentence it must impose should the accused be unable or unwilling to pay the fine; and this is where judicial officers often go

[2] See s 112 (1) which reads: "*Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-*"
[3] Ss (1)(b)
[4] *S v Smith*, 1990 (2) SACR 363 (C); *S v Bokbbard*, 1991 (2) SACR 622 (C)
[5] Unreported Case No CR 31/2010 delivered on 19.11.2010

> wrong. When deciding on the term of imprisonment in the alternative to the fine, the court need not concern itself with deciding what *punishment* would be appropriate, for that has already been determined when the court decided to impose a specific fine. What needs to be determined is the sanction to be applied when the fine is *not* paid. As the court had to decide what impact the fine would have on the accused and whether it would adequately censure his misdemeanour, it now equally applies to the alternative imprisonment. Thus, the purpose of the alternative imprisonment is not to punish the accused *per se,* but rather to induce him pay the fine. If for some reason he fails to do so, then he must serve his sentence of imprisonment."

[7] Alternative imprisonment of three years to a fine of N$3 000, in my view, is severe and disproportionate to the fine imposed; and can hardly be seen to *"induce him to pay a fine"* or *"to make failure to pay the fine problematical".* The court has already decided that a fine in the circumstances would suffice; however, by imposing a term of imprisonment of three years as alternative is to punish the accused more severely than what the court initially intended and cannot be seen as inducement to pay the fine.

[8] In the result, the Court makes the following order:

1. The conviction and sentence are set aside.
2. The matter is remitted to the Magistrate's Court, Opuwo in terms of s 312 (1) of Act 51 of 1977 with the direction to comply with the provisions of s 112 (1)(b) or to act in terms of s 113, as the case may be.

3. In the event of a subsequent conviction the court in sentencing, must take cognisance of the guidelines provided herein, whilst also taking into account the sentence already served by the accused.
4. If in the mean time a part-fine has been paid, the accused must be refunded.

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LIEBENBERG, J

I concur.

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TOMMASI, J