REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: CR 9/2013

THE STATE

Versus

WILLEM KAUARIA

HIGH COURT MAIN DIVISION REF. NO 1874/2012

Neutral citation: *State v Kauaria* (CR 9/2013) [2013] NAHCMD 35 (12 February 2013)

Coram: SHIVUTE, J *et* PARKER, AJ

Delivered: **12 February 2013**

Flynote: Sentence – court cannot impose a term of imprisonment without option of a fine if the matter is dealt with and finalised in terms of s 112 (1) (a) of Act 51 of 1977 as amended by s 7 of Act 13 of 2010.
Sentence – accused charged with two counts dealt with in terms of section 112 (1) (a) and section 112 (1) (b) respectively - Court cannot take the two counts together for purpose of sentence and impose a single sentence without the option of a fine – Such sentence incompetent.

Summary: The accused pleaded guilty to two counts of theft. The first count was finalised in terms of section 112 (1) (b) whilst the second count was finalised in terms of section 112 (1) (a) of Act 51 of 1977 as amended by Act 13 of 2010. The court *a quo* took the two counts together for purpose of sentence and imposed a term of imprisonment wholly suspended without the option of a fine in respect of the 2nd count which was dealt with in terms of s112 (1) (a) because the court cannot impose

a term of imprisonment without the option of a fine in terms of this provision. Sentence accordingly set aside.

ORDER

In the result the following order is made:

The sentence of six (6) months' imprisonment wholly suspended for three (3) years on certain conditions imposed in respect of both counts is set aside and replaced by the following sentence:

N$1000 fine or (6) months' imprisonment suspended as a whole for three (3) years on condition that accused is not convicted of theft committed during the period of suspension. The two counts are taken together for purpose of sentence and the sentence is antedated to 23 August 2012.

REVIEW JUDGMENT

SHIVUTE J (PARKER, A J concurring):

[1] The accused person pleaded guilty to two counts of theft. The first count was disposed of in terms of section 112 1 (b) and the second count was disposed of in terms of section 112 (1) (a) of Act 51 of 1977.

[2] The accused was sentenced as follows:

"Both counts taken together: six (6) months imprisonment wholly suspended for a period of three years on condition that accused is not convicted of theft committed during the period of suspension."

[3] The following query was directed to the magistrate:
'Is the sentence imposed competent in respect of the 2nd count which was dealt with in terms of section 112 (1) (a) of the Act?'

[4] The learned magistrate rightly pointed out that as far the matter which is finalised in terms of s 112 (1) (a) is concerned the sentence should be one with an option of a fine. However, he appeared to have lost track when he argued that "in the present case, two common law counts were taken together for purposes of sentencing and as such no distinction was made as to how the counts were finalised." For matters finalised in terms of s 112 (1) (a) of the CPA as amended by s 7 of Act 13 of 2010, the imprisonment term remains unchanged at 3 months' imprisonment, although the fine should now not exceed N$6000.00 (six thousand dollars). Whereas, for matters finalised in terms of section 112 (1) (b) the court can impose an appropriate sentence in terms of this provision.

[5] Section 112 (1) (a) of Act 51 of 1977 as amended by s 7 of Act 13 of 2010 reads as follows:

"(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or a fine a not exceeding N$6000; convict the accused in respect of the offence to which he or she pleaded guilty on his or her plea of guilty only and –

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding N$6000; or
(ii) deal with accused otherwise in accordance with law."

[6] It is not correct that the term of imprisonment in respect of matters finalised in terms of section 112 (1) (a) remains unchanged by the amendment as the learned magistrate is suggesting. Section 112 of the principal Act was amended by the substitution of paragraphs (a) and (b) of subsection 1. Therefore the term of 3 months' imprisonment was affected by the amendment. Although the amendment did not state specifically the term of imprisonment to be imposed, it states that the magistrate may impose any competent sentence other than imprisonment or other form of detention without the option of a fine or a fine exceeding N$6000. Therefore, the magistrate may impose any competent term of imprisonment coupled with a fine not exceeding N$6000.

[7] Furthermore the learned magistrate went on to suggest that the question should be: "Is the sentence imposed on both counts competent?"

[8] Again I do not agree with the learned magistrate's suggestion as to how the question should be. I posed the question as it is because the learned magistrate took the two counts together for purposes of sentence and imposed (6) six months' imprisonment wholly suspended. The suspended sentence was not coupled with a fine. It was for this reason I posed the question whether the sentence imposed is competent in respect of count 2 that was dealt with in terms of section 112 (1) (a). The learned magistrate misdirected himself by taking the two counts together for purposes of sentence and imposed a term of imprisonment without the option of a fine as required by the provisions of section 112 (1) (a).

[9] The learned magistrate argued that where one matter is finalised in terms of section 112 (1) (a) and section 112 1 (b) and a single sentence is imposed for both counts, there should be no room as to how the sentence is imposed, unless the charges were created by statute and not the common law or the sentence for both counts is *ultra vires*. This argument is, with respect, misplaced and it has no basis in law. Therefore the sentence imposed is incompetent and it cannot be allowed to stand.

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[10] The learned magistrate further suggested that in case the reviewing court finds the sentence imposed in respect of count 2 to be incompetent the sentence imposed on count 1 which was finalised in terms of section 112 (1) (b) should be left as it is. With respect, I find the magistrate's request to be absurd because there is no sentence imposed in respect of count 2 alone as the two counts were taken together for purposes of sentence. The sentence imposed in respect of both counts cannot be allowed to stand in respect of one count. This court will have to sentence the accused afresh.

In the result the following order is made:

The sentence of six (6) months' imprisonment wholly suspended for three (3) years on certain conditions imposed in respect of both counts is set aside and replaced by the following sentence:

N$1000 fine or (6) months' imprisonment suspended as a whole for three (3) years on condition that the accused is not convicted of theft committed during the period of suspension. The two counts are taken together for purpose of sentence and the sentence is antedated to 23 August 2012.

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N N Shivute

Judge

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C Parker

Acting Judge

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