

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 37/2016

In the matter between

THE STATE

And

MBURU ANSELM HAIRWA

HIGH COURT MD REVIEW CASE NO 464/2016

Neutral citation: State v Hairwa (CR 37/2016) [2016] NAHCMD 108 (11 April 2016)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 11 April 2016

Flynote: Criminal procedure – Sentence – Conviction in terms of s 112 (1)(a) – Two counts taken as one for sentence – Sentence of imprisonment without the option of a fine imposed – Sentence wholly suspended – Imposition of a custodial sentence under s 112 (1)(a) not competent.

ORDER

1. The convictions on both counts are confirmed.
2. The sentence imposed is set aside.
3. The matter is remitted to the same court with the direction to sentence the accused afresh, regard being had to the provisions of s 112 (1)(a) of Act 51 of 1977.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] In the present case the accused was convicted in terms of s 112 (1)(a) of the Criminal Procedure Act, 51 of 1977¹ on charges of assault (common) and malicious damage to property. The convictions are in order and will be confirmed. The court, for

¹Hereinafter 'the Act'.

purposes of sentence, took both counts together and sentenced the accused to five (5) months' imprisonment, wholly suspended on condition of good conduct.

[2] In reply to a query directed to the presiding magistrate in which I enquired whether the imposition of a custodial sentence was permitted where the accused had been convicted in terms of s 112 (1)(a) of the Act, the magistrate concedes that a custodial sentence was not a competent sentence when the provisions of the said section had been invoked. The concession is correctly made.

[3] When the court convicts in terms of s 112 (1)(a) it has very limited powers in sentencing and is confined to –

- '(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\$6 000; or
- (ii) deal with the accused otherwise in accordance with law;'

(Emphasis provided)

[4] Subsection (i) above makes plain that the sentencing court may not impose a sentence of imprisonment or any other form of detention. The sentence of five months imprisonment, wholly suspended, imposed in the present instance, is therefore incompetent as the court was obliged to impose a fine. The custodial sentence imposed, therefore, cannot be permitted to stand.

[5] The court's objective in sentencing the accused was clearly to keep him out of prison, but at the same time to ensure that the sentence imposed must deter the accused from reoffending. This objective can still be achieved by imposing a wholly suspended fine.

[6] In the result, it is ordered:

1. The convictions on both counts are confirmed.
2. The sentence imposed is set aside.
3. The matter is remitted to the same court with the direction to sentence the accused afresh, regard being had to the provisions of s 112 (1)(a) of Act 51 of 1977.

J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE