



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 47/2017

In the matter between:

THE STATE

And

COLLIN DOMINGO

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1026/2017)

Neutral citation: *S v Domingo* (CR 47/2017) [2017] NAHCMD 231 (17 August 2017)

Coram: USIKU, J and UNENGU, AJ

Delivered: 17 August 2017

Flynote: Criminal Procedure – Review in the terms of s 302 of the Criminal Procedure Act, 51 of 1977 – Condition of suspension of sentence omitting the word “not” – condition of suspension corrected by inserting the word “not” into the sentence to give effect to the intention of the magistrate.

Summary: Criminal Procedure: The magistrate sentenced the accused on a charge of theft to 12 months imprisonment of which six months imprisonment was suspended for a period of three years on condition that the accused “is convicted” of theft committed during the period of suspension, omitting the word “not” from the sentence. When queried to explain whether the suspended part of the sentence of count two reflected the condition of suspension the learned magistrate had in mind or whether the phrase “not” was accidentally omitted from the sentence, the learned magistrate replied that the correct sentence handed down should read “suspended for a period of three years, on condition that the accused is “not” convicted of theft committed during the period of suspension.” In the result therefore, the court confirmed the convictions of counts one and two and the sentence for count one as well as amended the sentence imposed on count two to include the word “not”.

ORDER

- (i) The convictions on counts one and two and the sentence imposed in count one are in accordance with justice and are hereby confirmed.
- (ii) The sentence imposed in count two is hereby amended to read as follows:

‘Count Two: 12 months imprisonment of which six months is suspended for a period of three years, on condition that the accused is not convicted of theft committed during the period of suspension.’

REVIEW JUDGMENT

UNENGU, AJ (USIKU, J concurring):

[1] This is a review matter sent on automatic review in terms of s 302 of the Criminal procedure Act¹ (the CPA).

¹ Act 51 of 1977.

[2] The accused who conducted his own defence during the trial, was charged with and convicted of count one: House breaking with intention to commit a crime unknown to the State and theft as count two.

[3] On count one, he was sentenced to six months imprisonment and for count two, the accused was sentenced as follows:

‘12 months imprisonment of which six is suspended for a period of three years on condition that the accused is convicted of theft committed during the period of suspension’. (Emphasis added).

[4] On review, I found the convictions on counts one and two plus the sentence for count one to be in accordance with justice, therefore, could be confirmed but not the sentence imposed on count two. That being the case, I addressed a query², to the magistrate and received the following response on behalf of the sentencing magistrate who is absent on compassionate leave:

‘Please be advised that Magistrate Kamboua is currently on compassionate leave. I have contacted her for her input on the attached case. She confirms that the observation of the learned Judge is indeed correct. The recording of sentence on the charge sheet erroneously omits the word “not”. The correct sentence handed down as per page five of the proceedings of 13 June 2017 should read:

‘Count two: 12 months imprisonment of which six months is suspended for a period of three years, on condition that the accused is not convicted of theft committed during the period of suspension”. Yours understanding is appreciated.’

[5] I agree with the sentence proposed in the response letter dated 25 July 2017 as the sentence handed down on 13 July 2017, and that the sentence recorded on the charge sheet erroneously omitted the word “not”. Accordingly, the following order is made:

- (i) The convictions on counts one and two and the sentence imposed in count one are in accordance with justice and are hereby confirmed.

² Does the suspended part of the sentence of count two reflect the condition of suspension the learned magistrate had in mind or the phrase “not” was accidentally omitted from the sentence?

Your urgent response is appreciated.

(ii) The sentence imposed in count two is hereby amended to read as follows:

'Count two: 12 months imprisonment of which six months is suspended for a period of three years, on condition that the accused is not convicted of theft committed during the period of suspension.'

P E UNENGU
Acting Judge

D USIKU
Judge