

Case Title: <i>The State v Turitjo Mavetarakune</i>	Case No: CR 37/2019
High Court MD Review No: 165/2019	Division of Court: Main Division
Heard before: Mr Justice Liebenberg <i>et</i> Mr Justice Miller (Acting)	Delivered on: 13 May 2019
Neutral citation: <i>S v Mavetarakunei</i> (CR 37/2019) [2019] NAHCMD 144 (13 May 2019)	
The order: <ol style="list-style-type: none"> a) The conviction is confirmed. b) Sentence is set aside and substituted with the following: The accused is sentenced to a fine of N\$ 1 500 or, in default of payment, to four (4) months' imprisonment. c) Sentence is antedated to 30/04/2019. 	
Reasons for order:	
LIEBENBERG J (concurring MILLER AJ) <ol style="list-style-type: none"> 1. This is a review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (the Act). 2. The accused was charged with one count of theft in the magistrate's court for the district of Okakarara in that the accused unlawfully and intentionally stole items from Pep Stores valued at N\$ 169.97. The accused pleaded guilty and the accused was convicted on his bare plea by invoking the provisions of s 112(1) (a) of the Act. 3. The State proved one previous conviction of theft, which was admitted by the accused. Subsequently thereto, the accused was sentenced to a fine of N\$5 000 or, in default of payment, to 4 (four) months' imprisonment. Though, the conviction is in order and will be confirmed, this court takes issue with the sentence imposed in the circumstances. 	

4. Notwithstanding the fact that in terms of s 304(2) of the Act a query *shall* be delivered to the trial magistrate to furnish reasons for convicting, or for imposing a certain sentence if it appears to the Judge that the proceedings are not in accordance with justice, or doubt thereto exists, this requisite may be dispensed with where the Judge concerned is of the view that the conviction and sentence is clearly not in accordance with justice and the court is of the opinion that the convicted person may be prejudiced by requesting a statement from the presiding officer.
5. For reasons to follow, a statement from the magistrate will not be required.
6. The procedure adopted by the trial court was the invoking of s 112(1) (a) of the Act. It is trite law that such a procedure is invoked for purposes of the speedy disposal of minor offences where the accused pleaded guilty and the accused is not exposed to any serious form of punishment.¹ In *S v Onemus*² the court predicted the implications that the amendment to s 112(1)(a) has:

‘ . . . because of the amendment of s 112 of the Act . . . the maximum fine has been increased to N\$6000. This ultimately brought about an increased risk that an accused could now be fined far beyond his means, resulting in him having to serve the alternative imprisonment; which often are lengthy terms. The reason for this is because of the legal principle that there should be a relation between the fine imposed and the alternative imprisonment. In other words, an increase in fines would impact on the alternative imprisonment as there should be a relation between the two. . .

The presiding officer therefore has a discretion which must be exercised judiciously. This discretion will mainly be influenced and determined by the circumstances of any particular case and the information available to the presiding officer, allowing him or her to form an opinion. It seems to me that in order to make a judicial discretion at all possible, there has to be sufficient information before the court to rely on, which would enable it to reach a decision as to the procedure to be followed.’

(Emphasis provided)

¹ *S v Aniseb and Another* 1991 NR 203 (HC) (1991 (2) SACR 413) at 415g – i)

² *S v Onemus; S v Amukoto; S v Mweshipange* 2011 (2) NR 461 (HC).

7. I hasten to mention that it is not only the magistrate who should exercise its duty judiciously but so too does the State Prosecutor bear a duty to guide the court and place all necessary information before it so that the provision of section 112 (1)(a) is not utilised for serious offences or circumstances.
8. The State Prosecutor should in circumstances, as the present, where the State intends on proving a previous conviction on the same or similar offence to that which the accused had pleaded guilty to, the State ought to have requested the court to invoke the provisions of section 112 (1)(b) of the Act.
9. Furthermore in an unreported judgment *S v Luish*,³ it was said that when a presiding magistrate decides to impose a fine, then, as a general rule, the offender must either be capable of paying the fine or getting the fine paid on his or her behalf. Thus, the court must purposefully inquire into the accused's ability to pay a fine,⁴ failure of which a review court may remit the matter to the trial court for this inquiry. The imposition of an alternative punishment of imprisonment is just there to induce the accused to pay the fine. (See *S v Smith* 1990 (2) SACR 363).
10. The record in this instance is silent on any enquiry made on whether the accused can afford a fine and what amount. The court when dealing with the stage before sentence is imposed, should assist an unrepresented accused and establish his ability to pay a fine as provided for in section 112 (1) (a), even more so when in this matter the record reflects that the accused indicated in mitigation that he is unemployed. The magistrate having not done this cannot be said to have applied his discretion judiciously in arriving at the amount of N\$5 000 and therefore the sentence imposed cannot be said to be in accordance with justice
11. Not only does the amount of N\$5000-00 bear diminutive relation to the corresponding imprisonment term of 4 months, it is tantamount in the circumstances of this matter, to a terms of direct imprisonment. As a result, this offends the purpose behind section 112 (1) (a) of the Act.

³ *S v Luish* (CR 22-2013) [2013] NAHCMD 79 (27 March 2013) at para 11.

⁴ *S v Sithole* 1979 (2) SA 67 (A).

12. For the aforesaid reasons, albeit the accused being a second offender, the fine imposed of N\$5 000 is too harsh and shockingly inappropriate under the circumstances.

13. In the result the following order is made:

- a) The conviction is confirmed.
- b) Sentence is set aside and substituted with the following: The accused is sentenced to a fine of N\$ 1 500 or, in default of payment, to four (4) months' imprisonment.
- c) Sentence is antedated to 30/04/2019.

J C LIEBENBERG JUDGE	K MILLER ACTING JUDGE