

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK****REVIEW JUDGMENT**

Case no: CR 30/2019

In the matter between:

THE STATE

v

JESAYA KHOMOB**ACCUSED****(HIGH COURT MAIN DIVISION REVIEW REF NO. 270/2019)****Neutral citation:** *S v Khomob* (CR 30/2019) [2019] NAHCMD 90 (8 April 2019)**Coram:** USIKU J and UNENGU AJ**Delivered:** 8 April 2019

Flynote: Criminal law – Escaping from lawful custody – Court *mero motu* putting suspended sentence into operation – Such order not competent – Court committing an irregularity – Order putting the suspended sentence into operation set aside.

Summary: The accused appeared before court charged with escaping from lawful custody. He was questioned in terms of section 112 (1) (b). Court not having satisfied itself recorded a plea of not guilty in terms of section 113 and the trial proceeded. Accused subsequently found guilty and convicted as charged. Court

without application by the prosecutor ordered the suspended sentence to be put in to operation. Such order not competent.

ORDER

1. The conviction and sentence of the accused is in accordance with justice and is hereby confirmed.
 2. The order putting the suspended sentence into operation is set aside.
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REVIEW JUDGMENT

USIKU J, (UNENGU AJ concurring)

[1] The accused was charged with a crime of escaping from lawful custody. He pleaded guilty and was questioned in terms of section 112 (1) (b) whereafter the court invoked the provisions of section 113 and the trial proceeded. The accused was subsequently found guilty as charged.

[2] The state prosecutor handed in accused's record of previous convictions of escaping from lawful custody.

[3] The records of previous convictions were accepted by the accused whereafter the magistrate on her own informed the accused that the suspended sentence will take effect on the same date.

[4] When the matter came before me on review in terms of section 302 of the Criminal Procedure Act, I directed a query to the learned magistrate; what did the learned magistrate mean by suspended sentence taking effect? Did the learned magistrate follow the right procedure with regard to the putting into operation of a

suspended sentence? Firstly there was no application by the state prosecutor to have the suspended sentence put into operation. The record of previous convictions were merely produced for the purposes of sentence and to be considered when imposing sentence.

[5] The magistrate must explain which sentence is to take effect, is it the six months suspended sentence? What about the sentence of 24 months direct imprisonment imposed by the magistrate? There is no record attached to the case for the suspended sentence which have to take effect as per magistrate's pronouncement."

[6] The learned magistrate responded to the query as follows:

'I concede that it was erroneous to have made an order putting the suspended sentence into operation without an application by the state. As a result I pray that the order putting the suspended sentence into operation be set aside or as the honourable Judge deems fit.'

[7] The procedure governing the suspension of sentences is provided for under section 297 of the Criminal Procedure Act, Act 51 of 1977 as amended. Previous convictions falls under section 271 of the same Act.

[8] Section 297 allows Courts to suspend the whole of the sentence or suspending a part thereof. However, the manner in which the suspended sentence in this case was brought into operation was procedurally wrong. The magistrate did not follow the prescribed procedure; she did not warn the accused that she was considering imposing the previously suspended sentence, neither was the accused afforded the opportunity to say anything before the suspended sentence was put into operation.

[9] In fact, it is for the state and not the magistrate, to apply to the Court for a suspended sentence to be brought into operation. It needs to be pointed out that the reasons for bringing the suspended sentence into operation are dealt with on the case record where the accused's suspended sentence was imposed and not on the record of the latest case.

[10] Furthermore, the application should not be brought until the latest case proceedings have been confirmed or reviewed or until the time for the accused to lodge an appeal against the latest conviction or sentence has expired.

[11] The procedure to be followed when a magistrate wishes to put the suspended sentence into operation were stated in the case of *S v Hoffman*¹ 'A Court whether or not when considers to put a suspended sentence into operation, it is required to exercise a judicial discretion. The accused has to be appraised of his right to lead evidence and to advance argument to the Court with a view to resisting the putting into operation of the suspended sentence or to advance reasons for its further suspension of sentence ... In the exercise of its discretion the Court is engaged in a sentencing process and must consider and apply all the necessary principles which it would apply if it was imposing an original sentence. If the Court is asked to put a sentence into operation where the breach has resulted in a subsequent conviction, the Court hearing the application ought, in my view, to know what sentence has been imposed in the latter trial before it orders that the earlier and suspended sentence be put into operation. Furthermore, it is both impractical and potentially prejudicial to the accused to put the suspended sentence into operation in a case which is subject to automatic review in terms of section 302 or even section 304 of the Criminal Procedure Act until conviction and sentence have been confirmed.'

[12] I am satisfied that the conviction and sentence of the accused is in accordance with justice and is hereby confirmed. However, the order putting the suspended sentence into operation is set aside.

D N USIKU
Judge

E P Unengu

¹ *S v Hoffman* 1992 2 SACR 55 at 63.

