

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: <i>The State v Elrico Hartzenberg</i>	Case No: CR 72/2020
High Court MD Review No: 798/2018	Division of Court: Main Division
Heard before: Mrs Justice Shivute <i>et</i> Mr Justice Sibeya	Delivered on: 25 September 2020
Neutral citation: <i>S v Hartzenberg</i> (CR 72/2020) [2020] NAHCMD 441 (25 September 2020)	
The order: <ol style="list-style-type: none">The conviction is confirmed.The sentence is set aside and substituted for: 5 years' imprisonment.The sentence is antedated to 10 April 2018.	
Reasons for order:	
Shivute J (concurring Sibeya J) <ol style="list-style-type: none">This is a review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (the Act).The accused was charged in the magistrate's court for the district of Bethanie, on a count of housebreaking with intent to steal and theft. He pleaded guilty and the court invoked the provisions of s 112(1) (b) of the Act.	

3. He was subsequently found guilty as charged and sentenced to 6 years' imprisonment of which 1 year was suspended on the condition that the accused is not convicted of housebreaking with intent to steal and theft or housebreaking with intent to commit a crime unknown to the state, committed during the period of suspension.

4. The conviction is in order and shall be confirmed. However, the only issue we have is with regards to the sentence.

5. On review, I addressed the following query to the learned magistrate:

'1. The accused was sentenced to 6 years' imprisonment, 1 year of which is suspended on the usual condition after he was convicted of housebreaking with intent to steal and theft.

2. Does the magistrate have jurisdiction to impose a sentence of 6 years?'

6. In reply , the learned magistrate stated the following :

'The district court does not have jurisdiction to impose such sentence and hence I pray that the sentence be altered to read as follows: " Five (5) years' imprisonment ". I however stand to be guided. I leave it in the capable hands of the Honourable Reviewing Judge.'

7. Section 92(1)(a) of the Magistrate's Court Act¹ provides that a magistrate of the district court, may sentence an offender to imprisonment for a period not exceeding five years. The accused in this case was however, sentenced to 6 years' imprisonment by a district magistrate court.

8. It follows that, the accused was sentenced to a period which is in excess of the

¹ Magistrate's Court Act 32 of 1944.

prescribed jurisdictional limit of the District court of Bethanie. The concession by the learned magistrate was therefore properly made.

9. The court *a quo* exceeded its sentencing powers, thereby rendering the sentence imposed null and void. It then lies with this court to sentence the accused afresh.

10. In the result it is ordered that:

- a. The conviction is confirmed.
- b. The sentence is set aside and substituted for: 5 years' imprisonment.
- c. The sentence is antedated to 10 April 2018.

NN SHIVUTE JUDGE	O S SIBEYA JUDGE