

PRACTICE DIRECTION 61

REPUBLIC OF NAMIBIA



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

Case Title: <i>The State v Mildred Sharika Damon</i>	Case No: CR 13/2022
High Court MD Review No: 244/2022	Division of Court: High court Main Division
Heard before: Honourable Mr. Justice Liebenberg <i>et</i> Honourable Lady Justice Claasen	Delivered on: 24 March 2022
Neutral citation: <i>S v Damon</i> (CR 13/2022) [2022] NAHCMD 132 (24 March 2022)	
The order: <ol style="list-style-type: none">1. The conviction is confirmed.2. The sentence is altered to read as follows: N\$ 4 000 or 8 months' imprisonment, of which N\$ 2 000 or 4 months' imprisonment is suspended for 5 years on condition that the accused is not convicted of contravening section 34(3), read with section 34(1) of the Immigration Control Act 7 of 1993, committed during the period of suspension.	
Liebenberg, J (Claasen, J concurring)	

[1] The accused appeared in the magistrate's court in the district of Karasburg on a charge of contravening s 34 (1) read with s 34 (3) of the Immigration Control Act, 7 of 1993 – Found in Namibia without a valid permit and failing to report to an Immigration Officer. She was convicted on her plea of guilty and sentenced as follows:

'A FINE OF FOUR THOUSAND NAMIBIAN DOLLARS (N\$ 4000-00) OR EIGHT (8) MONTHS IMPRISONMENT OF WHICH TWO THOUSAND NAMIBIAN DOLLARS (N\$ 2 000-00) OR FOUR (4) MONTHS IS SUSPENDED FOR A PERIOD OF FIVE (5) YEARS ON CONDITION THAT THE ACCUSED IS NOT CONVICTED OF THE SAME TYPE OF OFFENCE COMMITTED DURING THE PRIOD OF SUSPENSION.'

[2] The accused was correctly convicted. The anomaly lies with the sentence imposed. The conditions attached that the accused should not be convicted of the same offence appears to be too vague. Therefore, when this matter came before me on automatic review, a query was directed to the magistrate in the following terms:

'Despite ample case law on the formulation of suspended sentences, the magistrate still imposed a sentence of which the condition of suspension is considered to be too wide and vague. Is the sentence imposed proper?'

[3] In response to the query, the magistrate explained that the condition imposed was to 'deter the accused not only from committing an offence of being found in Namibia without a valid permit and failing to report to an Immigration Officer, but rather any other immigration offence specific to entry into Namibia' because these offences are very prevalent in the district. She however conceded that the suspended condition imposed was too wide and vague.

[4] Section 297(1)(b) of the Criminal Procedure Act, 51 of 1977 (the CPA) confers upon a court the discretion to suspend an imposed sentence on certain specified conditions. It is thus permissible to suspend the imposed sentence partially or wholly.

[5] However, it is an essential requirement of a suspensive condition that it must be formulated in such a way that it does not cause future unfairness or injustice; neither must it be too wide or vague. This court in *S v Basson*¹ explained that:

'The words "same offence" is difficult to construe because it is uncertain. It may mean "exactly the one referred to" or "mentioned", "not different" or "likeness" or "similar". Therefore, it should be avoided when imposing a condition of sentence.'

[6] The reason for the required unequivocal formulation of a suspensive condition is because the non-compliance with a condition of a suspended sentence has grave consequences for an accused. The primary object is, after all, that the accused must understand what he or she has to do or avoid in order to ensure that the sentence is not put into operation and, if the condition of suspension is too wide, it is bound to lead to uncertainty and misinterpretation.²

[7] For the foregoing reasons, the sentence as it now reads cannot be allowed to stand.

[8] In the result the following order is made:

1. The conviction is confirmed.
2. The sentence is altered to read as follows:

N\$ 4 000 or 8 months' imprisonment, of which N\$ 2 000 or 4 months' imprisonment is suspended for 5 years on condition that the accused is not convicted of contravening section 34(3), read with section 34(1) of the Immigration Control Act 7 of 1993, committed during the period of suspension.

J C Liebenberg JUDGE	CM Claasen JUDGE

¹ *S v Basson* (CR 69 /2014) [2014] NAHCMD 335 (10 November 2014).

² *S v Simon* 1991 NR 104 (HC); *Hiemstra's Criminal Procedure*, Issue 2 at 28-79 to 28-80.