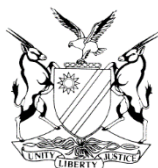


REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: S v Dion !Karab and Elvin Jossob	Case No: CR 69/2023
High Court MD Review No:	Division of Court: Main Division
Heard before: Claasen J et Christiaan AJ	Delivered on: 22 June 2023
Neutral citation: <i>S v Dion !Karab and Elvin Jossob</i> (CR 69/2023) [2023] NAHCMD 350 (22 June 2023)	
The order: 1. Each accused's conviction and sentence are set aside. 2. The matter is remitted to the magistrate with a direction that count 4 be dealt with afresh from the stage of plea. 3. In the event of a conviction the sentencing magistrate must have regard to the sentence that has already been served.	
Reasons for order: CLAASEN J (CONCURRING CHRISTIAAN AJ): [1] The accused persons were convicted in the Magistrate's Court in the district of Keetmanshoop on a charge of contravening s 2 of the Stock Theft Act 22 of 1990 –	

Possession of suspected stolen stock, to wit 2 carcasses. Each of them was sentenced to N\$ 2000 or 8 months' imprisonment.

[2] The case was sent on automatic review and the court addressed three questions to the court *a quo*. The first two issues centred around the conviction, which was done in terms of s 112(1)(a) of the Criminal Procedure Act 51 of 1977 as amended (the CPA). The concerns dealt with whether this particular offence can be regarded as a minor offence and secondly, given that no questioning took place, how could the court *a quo* be satisfied that the accused persons did not have a satisfactory account for being in possession of the carcasses. As regards sentencing, the issue was whether the ratio between the fine and imprisonment is proportional to each other.

[3] I will paraphrase the reply, which indicates that the court *a quo* is familiar with the relevant case law.¹ The magistrate explained that she considered it a trivial offence as the carcasses were 'unvalued'. (sic) She motivated her stance that s 112(1)(a) of the CPA applies because the sentence would not exceed N\$ 6 000 and that even the prosecutor requested disposal of the case in terms of that provision. She furthermore reasoned that the charge was explained to the accused persons in a language they understood, and that '... had they had a satisfactory account I trust the Accused would have pleaded not guilty because they don't agree to the content of the charge just read and interpreted to them.' (sic).

[4] It remains a common misconception amongst many magistrates to use the penalty clause as the only determining factor in considering the application of s 112(1)(a) or s 112(1)(b) of the CPA, despite being cautioned against that in *S v Onesmus*, *S v Amukoto*, *S v Shipange* at para 11:

'It seems to me that since the amendment became operative, the particulars of the offences allegedly committed, are now largely ignored; or given insufficient consideration by presiding officers when exercising their discretion whether or not to invoke the provisions of s 112(1)(a); and that the emphasis is only on the fine that could be imposed to a maximum of N\$6 000. In other words, the reasoning seems to be that, irrespective of the nature and particulars of the alleged offence, a severe fine, would be justified, even though the accused would be unable to

¹ *S v Aniseb and another* 1991 NR 203(HC) and *S v Onesmus*, *S v Amukoto*, *S v Shipange* 2011(2) NR 461.

pay the fine and therefore has to serve a custodial sentence. It is because of this approach that cases involving crimes such as housebreaking with intent to steal; theft; assault with intent to cause grievous bodily harm; and, even arson, are lately finalised in terms of s 112(1)(a) of the Act. As earlier stated, the provisions of s 112(1)(a) apply only to those cases involving offences considered to be minor; where the accused can be taken on his word to have committed the crime - without the court having to satisfy itself by questioning the accused in terms of s 112(1)(b) that an offence was committed and that it was the accused who committed it. Specific provision is made in the Act to deal with guilty pleas involving serious offences in terms of s 112 (1) (b) and presiding officers should fully understand the distinction between the two subsections and the ambit of each, when exercising their judicial discretion during a plea of guilty.' My emphasis.

[5] Since that time, many review judgments had seen the light on the same topic, but magistrates continue to fail to exercise their discretion to invoke s 112(1)(a) of the CPA judiciously,² which usually result in anomaly in sentencing as will be seen below.

[6] I move to the other concern about the conviction. The same subject matter arose in *Goagoseb and 4 others*,³ and it was stated that the magistrate, in the absence of questioning the accused persons, could not have been satisfied that they do not have a valid defense in the sense that they could have a justified explanation for the possession of the donkey meat in question. In *Goagoseb*, the review court set aside the conviction on account of the misdirection by the magistrate to have applied s 112(1)(a) of the CPA for the said offence. This court is in agreement with that sentiment and the same result follows herein on account of the same mistake. The justification given by the magistrate does nothing to cure the irregularity.

[7] In turning to the sentence, it also stands to be set aside, as once again the accused was slapped with a relatively heavy alternative period of imprisonment in the sentence, yet the magistrate regarded the offence as a minor one during the plea stage. This untenable situation was also referred to in the *Onesmus* matter at para 8 and 10.⁴ In *Nyumba*, the court stated at para 8 that eight months, even though imposed as an alternative to a sentence of a fine, was too harsh and it induced a sense of shock where

² *S v Skrywer* (CR 22/2015)[2015] NAHCMD 258 (30 October 2015), *S v Michael* (CR 1/2017) [2017] NAHCNLD 17 (3 March 2017), *S v Frederick* (CR 14/2019)[2019] NAHCNLD 23 (28 February 2019), *S v Jona* (39/2021) [2021] NAHCMD 255 (12 May 2021).

³ *S v Goagoseb and 4 others* (CR 60/2022) [2022] NAHCMD 33 (8 July 2022).

⁴ *S v Kanyenge* (CR 83/2021) [2021] NAHCMD 447 (01 October 2021), *S v Zauisomwe* (CR 10/2020) [2020] NAHCMD 44 (11 February 2020).

s 112(1)(a) of the CPA was applied. We are of the same view about the imprisonment term which was imposed as an alternative to the fine.

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

1. Each accused's conviction and sentence are set aside.
2. The matter is remitted to the magistrate with a direction that count 4 be dealt with afresh from the stage of plea.
3. In the event of a conviction, the sentencing magistrate must have regard to the sentence that has already been served.

C CLAASEN
JUDGE

CHRISTIAAN P
ACTING JUDGE