

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT
PRACTICE DIRECTIVE 61

Case Title: The State v Luwelyn Newdelli Nandjebo The State v Ally Kaihiva & Justus Karyende The State v Misika Lyandavu	Case No: CR 130/2023
High Court MD Review No: (High Court Ref No: NAHCMD 1174/2023) (High Court Ref No: NAHCMD 817/2023) (High Court Ref No: NAHCMD 1177/2023)	Division of Court: Main Division
Heard before: Shivute J et Christiaan AJ	Delivered on: 16 November 2023
Neutral citation: <i>S v Nandjebo</i> (CR 130/2023) [2023] NAHCMD 747 (16 November 2023)	
The order: <ol style="list-style-type: none">1. The convictions and sentences are set aside.2. The matters are remitted to the same court in terms of s 312(1) of Criminal Procedure Act 51 of 1977 with the direction to further question the accused in terms of s 112(1)(b) of the Act.3. In the event of a conviction, regard must be had to the sentence already served and fines paid by the accused by the accused.	

Reasons for order:

CHRISTIAAN AJ (SHIVUTE J concurring)

[1] The above captioned cases came before this court on review in terms of s 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA). In each of these matters the accused persons were convicted and sentenced in terms of section 112(1)(a), which raised the question as to whether the discretion to apply section 112(1)(a) of the CPA was exercised judiciously, considering the periods of imprisonment imposed.

[2] The accused pleaded guilty to the charge and were convicted in terms of section 112(1)(a) CPA (the CPA). They were each sentenced as follows:

'The State v Luwelyn Newdelli Nandjebo

To a fine of N\$2000.00 or Ten (10) months imprisonment.

The State v Ally Kaihiva & Justus Karyende

To a fine of N\$4000.00 or Twelve (12) months imprisonment of which N\$2000.00 or Six (6) months is suspended for a period of Five (5) years on condition that the accused is not convicted of theft and or receiving stolen property committed during the period of suspension.

The State v Misika Lyandavu

To a fine of N\$3000.00 or Six (6) months imprisonment.'

[3] Once again, this court reiterates what was stated in numerous review matters that section 112(1)(a) of the CPA should only be applied where the crimes are "trivial", "minor" or not "serious¹". Notwithstanding the above, some magistrates in the lower courts are

still disposed serious cases by applying section 112(1) (a) of the CPA.

[4] In *S v Onesmus; S v Amukoto; S v Mweshipange* 2011 (2) NR 461 (HC) Liebenberg J, had this to say on page 463 paragraph 5:

'From the wording of s (1) of s 112 it is clear that the presiding officer is authorised to convict an accused on his bare plea of guilty where he or she is of the opinion that the offence in question does not merit certain kinds of punishment; or a fine exceeding N\$6000. 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.'

[5] It follows that although the amount of the fine provided for the offences falls within the ambit of section 112 (1)(a) of CPA, it is my conviction that the failure to pay a fine results in the accused serving the periods of imprisonment stipulated, which sentence is in excess of the sentence permitted if the section is applied. When regard is had to the periods of imprisonment imposed, such imprisonment and the purpose of section 112(1) (a), it cannot be said that the offences for which the accused are convicted are minor offences to be disposed of in terms of section 112(1) (a). Further to the aforementioned, in the matter of *S v Nandjebo*, the accused was charged with the offence of possession of suspected stolen property, where the accused must be afforded an opportunity to explain his possession up to the time that he appears in court. It is our view that the court misdirected itself, when it finalized these matters in terms of s 112 (1)(a), without affording the accused an opportunity to explain their possession.

[6] The provisions of section 112(1)(a) is intended not only for minor offences but also

¹ *S v Onesmus; S v Amukoto; S v Mweshipange* 2011 (2) NR 461 (HC); *S v Mostert* 1994 NR 83 (HC); *S v Aniseb and Another* 1991 NR 203 (HC); *S v Paulus Vilho*, CR09/2016 unreported, delivered, 08 august 2016; *S v Paulus Silas*, CR06/2016 delivered 11 August 2016; *The State v Kago* (156/2015); *The State v Johannes and Basson* (109/2015) [2015] NAHCNLD

for less complicated offences. It therefore suffice to say that section 112(1)(a) must be used sparingly and only where it is certain that no injustice will result from its application. In my view the magistrates wrongly applied section 112(1)(a) of the CPA in convicting the accused. On finding the convictions not in accordance with justice, the sentences imposed are a nullity and should be set aside.

[7] In the result, it is ordered:

1. The convictions and sentences are set aside.
2. The matters are remitted to the same court in terms of s 312(1) of Act 51 of 1977 with the direction to further question the accused in terms of s 112(1)(b) of the Act.
3. In the event of a conviction regard must be had to the sentence already served and fines paid by the accused.

P CHRISTIAAN ACTING JUDGE	N N SHIVUTE JUDGE