REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: *The State v Linus Gaeseb*	**Case No: CR 138 /2023**
High Court MD Review No: 1755/2023	**Division of Court:** High Court, Main Division
Coram: Shivute J *et* Christiaan AJ	**Delivered on:** 01 December 2023
Neutral citation: *S v Gaeseb* (CR 138/2023) [2023] NAHCMD 777 (01 December 2023)	
ORDER: 1. The conviction is confirmed. 2. The sentence is set aside and substituted with a sentence of 6 months' imprisonment. 3. The sentence is antedated to 25 September 2023.	
REASONS FOR ORDERS:	
SHIVUTE J (CHRISTIAAN AJ concurring):	

[1] This is a review matter which came before me in terms of section 302(1) of the Criminal Procedure Act 51 of 1977.

[2] The accused, unrepresented, appeared in the Magistrate's Court for the district of Grootfontein on a charge of theft of two bottles of Mitchen roll on valued at N$163. On his first appearance, the accused tendered a plea of guilty and the magistrate proceeded to question him in terms of s 112(1)(*b*) of the Criminal Procedure Act 51 of 1977 (the CPA). After questioning the accused, the court was satisfied that the accused admitted all the allegations set out in the charge. The accused was convicted as charged.

[3] The State then proceeded to hand up to the court the accused's previous convictions extract. The accused confirmed the previous convictions, and the extracts were admitted into evidence. The accused was previously convicted of theft on 11 January 2023 and 23 January 2023 and was sentenced to fines of N$1 000 or 3 months imprisonment and to N$500 or 1 months' imprisonment, respectively.

[4] The court in the present matter, after mitigation and aggravation of sentence, sentenced the accused to 20 months' imprisonment without the option of a fine.

[5] I queried the magistrate on whether the sentence of 20 months' imprisonment is not shockingly inappropriate under the circumstances, to which the magistrate responded in a nutshell that he does not consider it shockingly inappropriate because the accused's previous convictions indicate that he makes a habit of committing the crimes, which spurred the court to choose deterrence as the best suited form of punishment in the circumstances.

[6] In *Katukundu v S* the appeal court stated, regarding the appropriateness of sentence, that the test is not whether the court sitting as the trial court would have imposed a different sentence, but rather whether the court a quo committed a misdirection by imposing the sentence it did.[1] In my view, this position applies equally to

[1] *Katukundu v State* (HC-MD-CRI-APP-CAL-2022/00087) [2023] NAHCMD 164 (3 April 2023).

review matters.

[7] As is apparent from the record and from the magistrate's response to the query, the magistrate in imposing the sentence, placed more weight on deterrence as a form of punishment because in his view, the similar previous convictions did not deter the accused from committing the offence.

[8] It has been held that one of the factors that may persuade a court to interfere with a sentence is where a trial court has failed to consider a material fact or has overemphasized the importance of one factor at the expense of another.[2]

[9] In *S v Gowaseb*[3], the court rightly quoted *S v Stuurman*[4] in which *Silungwe J* laid down guidelines in deciding what weight should be accorded to the accused's previous convictions. These guidelines are stated as follows:

'Previous convictions are invariably regarded as aggravating factors, provided, of course, adequate weight can be attached to them. Such weight must be determined by the sentencer, taking into account such factors as: the nature, the number and the extent of similar previous convictions, as well as the lapse of time between them and the present offence. Hence, although it may, in an appropriate case, be justifiable to impose a heavier sentence on a repeat offender than on a first offender, such sentence should be reasonable in relation to the seriousness or otherwise of the present crime and the circumstances of the case. Compare *S v Muggel* 1998 (2) SACR 414 (C) at 419d-f. The accused should generally be punished for the crime committed, and not so much for his previous convictions. After all, it is settled law that the punishment should fit the crime. *S v Baartman* 1997 (1) SACR 304 (E) is a case in point.'

[10] Considering the above guidelines, this court is of the opinion that the magistrate, although having outlined the correct approach, attached too much weight to the accused's previous convictions, losing sight of the seriousness of the present crime committed. In this case, although a custodial sentence is reasonable when considering

[2] *S v Tjiho* 1991 NR 361 (H) at page 366A-B.
[3] S v Gowaseb (CC 2/2019) [2020] NAHCMD 423 (21 September 2020).
[4] *S v Stuurman* 2005 NR 396 (HC).

the previous convictions, the punishment is harsh and shockingly inappropriate because it does not fit the crime.

[11] For the foregoing reasons, the sentence is not in accordance with justice and falls to be set aside and substituted with a lesser sentence.

[12] In the result, it is ordered:

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following: 6 months' imprisonment.
3. The sentence is antedated to 25 September 2023.

N N SHIVUTE **JUDGE**	**P CHRISTIAAN** **ACTING JUDGE**