

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CR 03/2014

In the matter between:

THE STATE

and

- 1. CARLOS ALUTALE**
- 2. TOMAS ABSALOM KIIGA**

High Court NLD Review Case Ref No.: 430/2013

Neutral citation: *S v Alutale* (CR 03/2014) [2014] NAHCNLD 06 (04 February 2014)

Coram: HOFF J and LIEBENBERG J

Delivered: 04 February 2014

Flynote: **Criminal procedure** – Sentence – Conviction in terms of s 112 (1)(a) – Sentence of imprisonment without the option of a fine imposed – Sentence wholly suspended – Community service as condition of suspension ordered.

Summary: The accused were summarily convicted following their pleas of guilty and each sentenced to eight months' imprisonment, wholly suspended on the usual condition of good conduct, coupled with the performance of community service. The sentence is incompetent only as far as it concerns the imprisonment imposed without the option of a fine. The sentencing court intended keeping the accused out of prison and decided they had to render community service. Options open to the sentencing court discussed. The court pointed out that community service in itself is not a competent sentence but is merely a condition for the release of the accused where the passing of sentence is postponed, or a condition of suspension where the sentence is wholly or partly suspended.

ORDER

1. The convictions of both accused are confirmed.
2. The sentences imposed in respect of both accused are set aside.
3. The magistrate is directed to sentence the accused persons afresh, regard being had to the guidelines set out herein.
4. In sentencing the magistrate must take into account that the accused persons have already served the community service.

JUDGMENT

LIEBENBERG J (HOFF J concurring):

[1] Following their pleas of guilty on a charge of theft of cash in the amount of N\$320, both accused were convicted in terms of s 112 (1)(a) of the Criminal Procedure Act, 51 of 1977 (the Act) and each sentenced to 8 (eight) months imprisonment, wholly suspended on condition of good behaviour and ordered to render 280 hours of community service at Ondangwa Magistrate's Court within the period of 10 weeks. Whereas the accused were sentenced on 10 September 2013, they would have completed the community service by now.

[2] In response to a query directed to the magistrate pertaining to the sentence imposed, he concedes that he erred when sentencing the accused persons to a term of imprisonment without the option of a fine in view of him having convicted in terms of s 112 (1)(a) of the Act. He further explained that he never intended incarcerating the accused persons and that they instead should serve community service.

[3] When the court convicts in terms of s 112 (1)(a) it has very limited powers in sentencing and is confined to –

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding N\$6 000; or

(ii) deal with the accused otherwise in accordance with law;'

(Emphasis provided)

[4] A competent sentence would be any of those sentences set out in s 276 of the Act save for the death sentence and whipping which have become obsolete since the advent of the Namibian Constitution in that these sentences encroach on the fundamental right to life¹ and furthermore violates the right to human dignity².

¹Article 6.

²Article 8.

[5] Subsection (i) above makes plain that the sentencing court may not impose a sentence of imprisonment or any other form of detention. This includes committal to a rehabilitation centre in terms of s 296 of the Act which is construed to be a form of detention without the option of a fine (*S v Tolmay*³). The sentence of eight months imprisonment imposed in the present instance is therefore incompetent and cannot be permitted to stand.

[6] The magistrate pointed out that his overall intention was to strive to ensure that both accused persons are not incarcerated but was of the view that they had to render community service. The magistrate had several sentencing options as set out in s 297 of the Act. Under subsection (1)(a) the passing of sentence could be postponed and the accused persons released on certain conditions. The relevant part of the subsections reads:

- '(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned-
 - (i) on one or more conditions, whether as to-
 -
 - (cc) the rendering of some service for the benefit of the community;
- and order such person to appear before the court at the expiration of the relevant period; ...'

In this instance the accused is *not* sentenced because the passing of sentence is *postponed* for a period not exceeding five years, and the accused is ordered to appear before the court upon completion of the community service. The reason why the accused must appear before the court is to ensure that the accused rendered the service as he or she was ordered.

[7] If any condition imposed under s 297 is not complied with, the court may order the arrest and detention of the accused, and where the passing of

³1980 (1) SA 182 (NC).

sentence was postponed on certain conditions, the court may impose any competent sentence (subsection 9 (a)).

[8] The second option open to the court would be to pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years. This is clearly the sentence the magistrate in this instance had in mind. Whereas the accused persons were convicted in terms of s 112 (1)(a) on their pleas of guilty, a fine, wholly suspended on condition of good conduct coupled with the further condition of both rendering community service should have been imposed.

[9] If the accused in the latter instance breaches any of these conditions, the court may put into operation the suspended part of the sentence (subsection 9 (a)). The State, on application and in view of the accused's breach of any of the conditions of suspension imposed, requests the court to put the suspended sentence into operation, during which the accused must be afforded the opportunity to oppose the application.

[10] Finally, it seems necessary to point out that the mere ordering of an accused to serve community service in itself, is not a competent sentence. It is clear from the provisions of s 297 (1)(a) that the rendering of community service is merely a condition for the accused person's release where the passing of sentence has been postponed. In turn, subsection (1)(b) provides for the passing of sentence but the operation of sentence suspended on certain conditions ie that the accused renders community service.

[11] In the result, it is ordered:

1. The convictions of both accused are confirmed.
2. The sentences imposed in respect of both accused are set aside.

3. The magistrate is directed to sentence the accused persons afresh, regard being had to the guidelines set out herein.
4. In sentencing the magistrate must take into account that the accused persons have already served the community service.

JC LIEBENBERG
JUDGE

EB HOFF
JUDGE