

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

CASE NO: CR 224/2016

In the matter between:

THE STATE

and

NANGHONDA SIMON

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO.: **224/2016**

Neutral citation: *The State v Simon* (CR 224/2016) [2016] NAHCNLD 99 (1 December 2016)

Coram: **JANUARY, J and TOMMASI, J**

Delivered: 1 December 2016

Flynote: Criminal procedure - Compensatory order - Criminal Procedure Act 51 of 1977 section 300 - Such compensation not to be confused with payment of an amount as a condition of suspension.

Summary: The payment of an amount can be made a condition of suspension of sentence, this should not be confused with an order in terms of s 300 the Criminal Procedure Act 51 of 1977 (The CPA). An order in terms of s 300 has the effect of a civil judgment and it is enforced as is any civil judgment. This is, *inter alia*, why the amount of damages must be proved by evidence, which was done in the present matter as the accused admitted the value of the items stolen. The accused was not given the opportunity to address the Court in this regard as he should have been. Furthermore, unlike a condition of suspension no date may be laid down as to when payment is to be made. Sentences set aside and replaced with a sentence suspended on condition that accused pays the amounts of N\$5000.00 to complainant.

ORDER

1. The convictions and sentence on count 2 of the accused is confirmed.
2. The sentence in respect of count 1 of the accused is set aside and substituted with the following. The accused is sentenced to 12 months' imprisonment which is suspended for three years on the following conditions namely, that the accused is not convicted of theft committed within the period of suspension and that the accused pays N\$5000 to Mr Andreas Israel on or before 31 December 2016.
3. The sentence is backdated to 10 May 2016.
4. The accused is to be brought before Court if the compensation has not yet been paid and be informed that his failure to do so by 31 December 2016 will have the effect of them having to serve the period of imprisonment.

JUDGMENT

JANUARY, J and TOMMASI, J (concurring)

[1] The accused in this matter was convicted in terms of section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977 for theft of poles and a plough valued N\$5000.00 and malicious injury of a fence. The accused pleaded guilty to both charges. The convictions are in accordance with justice. The accused was sentenced as follows;

“Count 1. Theft – Compensation for complainant N\$5000.00 or 12 months imprisonment.

Count 2. Fine N\$1000 or 6 months imprisonment”

[2] The sentence in respect of count 1 is not in accordance with justice. The record reflects in the address on aggravation before sentence *inter alia* the following from the public prosecutor; “Proposing a compensation to the complainant in terms of section 300 of the Criminal Procedure Act (the CPA) or 12 months imprisonment.” It seems the magistrate simply followed the proposal and imposed the sentence as he did. Submissions by a prosecutor or legal practitioners must be considered by a presiding officer but this case shows that these officers may not always be right with their submissions. Presiding officers must be vigilant and not simply follow what is submitted. The sentencing is in their discretion but it must be in accordance with justice. In this case it is not clear what the intention of the magistrate was as the sentence does not indicate if it is an order for compensation in terms of section 300 of the CPA or compensation as a condition of suspension. The sentence is not phrased in accordance with justice.

[3] I interpret the sentence on count one that the accused must compensate the complainant otherwise serve 12 months imprisonment. The order for compensation in my view is not in terms of section 300 of the CPA but a condition to pay otherwise to serve 12 months imprisonment.

[4] I agree with Frank J (as he then was) where he states in S v Useb and Another 1994 NR 81 (HC) at p 81 F-H;

“Whereas the payment of an amount can certainly be made a condition of suspension this should not be confused with an order in terms of s 300. An order in terms of s 300 has the effect of a civil judgment and it is enforced as is any civil judgment. This is, inter alia, why the amount of damages must be proved by evidence which was not done in the present matter. Neither were the accused given the opportunity to address the Court in this regard as they should have been. Furthermore, unlike a condition of suspension no date may be laid down as to when payment is to be made.

In short where an amount is to be paid as a condition of suspension this is normally to be paid on or before a certain date and the consequence of failure to pay will normally lead to imprisonment. There is thus a very real inducement to pay. An order in terms of s 300 does not have this effect at all and as pointed out is regarded as a civil judgment.”

[5] As it is clear that the magistrate intended the compensation to be part of the conditions of suspension there can be no prejudice to the accused if this is rectified and brought to his attention. The accused in this matter was not given the opportunity to address the magistrate on compensation.

[6] In the result;

1. 1. The conviction and sentence on count 2 of the accused is confirmed.
2. The sentence in respect of count 1 of the accused is set aside and substituted with the following sentence. The accused is sentenced to 12 months' imprisonment which is suspended for three years on the following conditions namely, that the accused is not convicted of theft committed within the period of suspension and that the accused pays N\$5000 to Mr Andreas Israel on or before 31 December 2016.
3. The sentence is backdated to 10 May 2016.

4. The accused is to be brought before Court if the compensation has not yet been paid and be informed that his failure to do so by 31 December 2016 will have the effect of him having to serve the period of imprisonment.

HC JANUARY, J

MA TOMMASI, J