



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 42/2013

In the matter between:

**THE STATE**

and

**ELINA MBIMBI**

**ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 671/2013)

**Neutral citation:** *State v Mbimbi* (CR 42/2013) [2013] NAHCMD 209 (24 July 2013)

**Coram:** HOFF J and UNENGU AJ

**Delivered:** 24 July 2013

**Flynote:** Criminal Procedure – sentence – Case disposed of in terms of section 112(1)a of the Criminal Procedure Act 51 of 1977 as amended – sentence of six months imprisonment without an option of a fine – incompetent – set aside.

**Summary:** The accused pleaded guilty to a charge of common assault, convicted on own plea of guilty following the provisions of section 112(1)a of the Criminal Procedure Act 51 of 1977 as amended. The sentence of six months direct imprisonment imposed by the magistrate is incompetent and is set aside.

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## ORDER

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- (i) The conviction is in order and confirmed;
- (ii) The sentence of 'six (6) months direct imprisonment wholly suspended for 3 years on condition that accused is not convicted of the offence of common assault within the period of suspension', imposed by the magistrate, is set aside and substituted with the following sentence: The accused is sentenced to pay a fine of five hundred Namibian Dollars (N\$500) or five (5) months imprisonment wholly suspended for a period of 3 years on the condition that accused is not found guilty of common assault committed during the period of suspension.

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## JUDGMENT

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UNENGU AJ (HOFF J concurring):

[1] The accused was charged with and convicted of the offence of common assault on her own plea of guilty following the provisions of section 112(1)(a) of the Criminal Procedure Act, 1977 (The CPA)<sup>1</sup>, and thereafter sentenced to six (6) months imprisonment wholly suspended for 3 years on condition that the accused is not convicted of the offence of common assault within (sic) the period of suspension.

[2] The sentence is incompetent, therefore, I requested the learned magistrate to give reasons for the sentence imposed. The magistrate replied and indicated that as the matter was disposed of in terms of section 112(1)(a) of the CPA, the sentence was supposed to be of a fine coupled with a term of imprisonment for less than 3 months.

[3] The magistrate conceded the omission on her part and requested that the sentence be set aside. She is correct and I agree. However, the mistake made by the learned magistrate is one of the many elementary mistakes regularly made by magistrates, which, in my view, are attributable to remissness on their part.

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<sup>1</sup> Act 51 of 1977

[4] Magistrates and public prosecutors are supposed to know the provisions of section 112 of the CPA as amended, by heart to know in what circumstances to apply section 112(1)(a) or section 112(1)(b).

[5] Hereunder, is a reproduction of section 112(1) of the CPA:

‘112(1) where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea –

(a) The presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N\$6000, convict the accused in respect of the offence to which he or she has plead guilty on his or her plea of guilty only and –

(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\$6000

or

(ii) .....

(emphasis added)

(b) The section does not speak of a sentence of a fine coupled with a term of imprisonment for less than 3 months as stated by the magistrate in her response to the query. Where the magistrate got the term of imprisonment for less than 3 months, is only known to her. Section 112(1)(a) of the Criminal Procedure Amendment Act, 2010<sup>2</sup>, does not provide for a term of imprisonment.

[6] I urge magistrates who are not aware of the Criminal Procedure Amendment Act of 2010, to obtain copies from those who have and study the amendments to the Act by heart.

[7] As already pointed out, the sentence imposed by the magistrate is incompetent, as it is not in accordance with the provisions of section 112(1)(a) of the CPA, as amended, so it cannot be allowed to stand.

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<sup>2</sup> Act 13 of 2010

[8] Section 304(1)(c)(iv) of the CPA empowers this court to impose such a sentence as the magistrate's court ought to have imposed which, in my view, is the course to follow in the present matter.

[9] In the result I make the following order:

- (iii) The conviction is in order and confirmed;
- (iv) The sentence of 'six (6) months direct imprisonment wholly suspended for 3 years on condition that accused is not convicted of the offence of common assault within the period of suspension', imposed by the magistrate, is set aside and substituted with the following sentence: The accused is sentenced to pay a fine of five hundred Namibian Dollars (N\$500) or five (5) months imprisonment wholly suspended for a period of 3 years on the condition that accused is not found guilty of common assault committed during the period of suspension.

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PE Unengu  
Acting

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E Hoff  
Judge