

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

Case No: CR 25/2016

In the matter between:

THE STATE

And

NGATHA DUNCAN

**(HIGH COURT MAIN DIVISION REVIEW REF NO. 1382/2015)
(MAGISTRATE'S REVIEW NO.: 55/2015)**

Neutral citation: *S v Ngatha* (CR 25/2016) [2016] NAHCMD 90 (4 April 2016)**Coram:** SHIVUTE, J *et* PARKER, AJ**Delivered:** 4 April 2016

ORDER

- (a) The sentence imposed by the learned magistrate is set aside and substituted by the following:
- (b) N\$1200 (one thousand two hundred) fine or 4 months' imprisonment wholly suspended for five years on condition that the accused is not convicted of

entering Namibia without unexpired passport bearing a valid visa or authority – Contravening s 12(1), read with ss 1, 2 and 12(4), of the Immigration Control Act 7 of 1977 committed within the suspension period.

- (c) The sentence is antedated to 19 June 2015.

REVIEW JUDGMENT

SHIVUTE J (PARKER, AJ concurring):

[1] The accused person was convicted of entering Namibia without an unexpired passport bearing a valid visa or authority – Contravening s 12(1), read with ss 1, 2 and 12(4), of the Immigration Control Act 7 of 1993 after the court invoked the provisions of s112(1)(a) of the Criminal Procedure Act 51 of 1977.

[2] He was sentenced to four months' imprisonment wholly suspended for five years on condition that accused is not convicted of contravening ss 1, 2(1) of Act 7 of 1993 committed within the period of suspension.

[3] The learned magistrate realised that she made an error and sent the matter for special review with a covering letter that she was not supposed to impose a custodial sentence without the option of a fine as it is not a competent sentence.

[4] What the learned magistrate submitted is indeed correct. Section 112(1) as amended reads as follows:

'(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 a fine exceeding N\$6000, convict the accused in respect of the offence to which he or she has pleaded 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) deal with the accused otherwise in accordance with the law.'

[5] From the reading of the section a Court cannot impose a term of imprisonment or any other form of detention without the option of a fine. Therefore, the above sentence imposed is not a competent one. Furthermore, it is undesirable for a magistrate to deal with cases of a serious nature in terms of s 112(1)(a). This section should be restricted to minor offences only.

[6] In the result:

- (a) The sentence imposed by the learned magistrate is set aside and substituted by the following:
- (b) N\$1200 (one thousand two hundred) fine or 4 months' imprisonment wholly suspended for 5 years on condition that the accused is not convicted of entering Namibia without an unexpired passport bearing a valid visa or authority – Contravening s 12(1), read with ss 1, 2 and 12(4), of the Immigration Control Act 7 of 1993 committed within the suspension period.
- (c) The sentence is antedated to 19 June 2015.

N N Shivute
Judge

C Parker
Acting Judge

