



CASE NO.: CR 20/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

vs

VICTOR JOSEF

(HIGH COURT REVIEW CASE NO.: 1671/2008)

CORAM: PARKER, J et SILUNGWE, AJ

Delivered on: 2009 March 18

REVIEW JUDGMENT

SILUNGWE, AJ [1] On his own plea of guilty, the accused was convicted by the Eenhana Magistrate's Court of unlawfully and intentionally attempting to commit a sexual act with a child under the age of sixteen years, in contravention of section 14(b) read with sections 1 and 12 of the Combating of Immoral Practices Act, 1980 (Act No. 21 of 1980) as amended by (Act No. 7 of 2000). He was thereafter sentenced to N\$4000-00 or two years

imprisonment, N\$2000-00 or one year of which was suspended on condition the accused was not convicted of contravening section 14(a) or 14(b) of Act 21 of 1980 as amended by Act 7 of 2000.

[2] When the matter came on review, Siboleka, AJ., addressed the following query to the presiding Magistrate:

1. After the court was satisfied that the accused had admitted all the elements of the offence, why was he not convicted before he was invited to address the court in mitigation of sentence?
2. Is the sentence of N\$4000-00 or two years imprisonment, half of which was suspended on the usual conditions perhaps not too severe, given the fact that:
 - The accused had only attempted to commit the offence.
 - He was a first offender who was 17 years old at the time of the commission of the offence.
 - He was unemployed and he told the court he was unable to pay a fine.

[3] In his response, the presiding Magistrate states that the accused was convicted before he was invited to address the court in mitigation. He continues thus:

The sentence of N\$4000-00 or two years imprisonment half of which was suspended on the usual conditions was found to be the appropriate sentence under the circumstances to deter the accused and other would be offenders. However, if the reviewing judge is of the opinion that the sentence is too severe, he may set aside such sentence and impose a lesser sentence.

[4] As can be seen from the learned Magistrate's response with regard to sentence, no attempt whatsoever was made to answer the queries that the learned reviewing judge had drawn to his attention in clear and specific terms! In my view, this is a manifestation of a cavalier attitude on the part of the presiding Magistrate towards this Court's query. Such attitude is not only unacceptable but also despicable. Besides, the presiding Magistrate's response does not even make any reference to the accused's personal circumstances! In such a situation, how can a judge on review or on appeal gauge whether the sentencer exercised his or her discretion judicially?

[5] In *casu*, the intervention of the accused's own conscience stopped him from consummating the crime; he pleaded guilty to the charge; he was a first offender and was aged 17 years at the time that the crime was committed. It is trite that youthfulness of an offender is, as a matter of course, a mitigating factor. Indeed, irresponsibility is more often a characteristic of the youth than it is of adults. This is so because a youthful person often lacks maturity, insight, discernment and experience and, therefore, acts in a foolish manner more readily than a mature person (*S v Erickson* 2007(1) NR 164 at 166E-G). Further, he was an unemployed youth who had attained Grade 5 education. In the absence of any reference by the sentencer to the foregoing mitigating factors, it would be safe to presume in favour of the accused that such factors were not taken into account (or that, if they were considered, then due weight was not accorded to them) for purposes of sentencing.

[6] On the facts of this case, it is inescapable to come to the conclusion that the presiding Magistrate fatally misdirected himself in respect of sentencing with the result that the sentence passed ought to be interfered with.

[7] Accordingly, the following order is made:

1. The accused' conviction is confirmed.
- 2.1 The sentence is set aside; and in substitution therefor, the accused is sentenced to a fine of N\$2000-00 or 12 months' imprisonment, in default of payment.
- 2.2 In the event that the accused is serving the alternative custodial sentence, the current alternative sentence of 12 months imprisonment takes effect from December 11, 2008, when he was initially sentenced.

SILUNGWE, AJ

I agree.

PARKER, J