CASE NO.: CR 03/2009

IN THE HIGH COURT OF NAMIBIA HELD
IN OSHAKATI

In the matter between:

THE STATE

and

PAULO NDALA

(High court Review no 2013/08)

***CORAM*: LIEBENBERG, AJ *et* SHIVUTE, AJ**

Delivered on: 11 March 2009

Review Judgment:

LIEBENBERG, A.J.: [1] The accused appeared in the Ohangwena Magistrate's Court on a charge of overstaying or remaining in Namibia after

the expiration of a visitor's entry permit, or temporary residence permit, in contravention of section 29(1)(5) of the Immigration Control Act, Act 7 of 1993. Subsequent to his plea of guilty the accused was convicted and sentenced to a fine of N$3000-00 or 30 months imprisonment.

[2] The conviction is in order and will be confirmed. Regarding the sentence imposed, I directed the following query to the learned magistrate:

"When regard is had to the penalty clause which provides for a maximum of N$12000 or 3 years imprisonment (or both), the legislature's intention seems to have been that the ratio between a fine and the alternative of imprisonment, should be N$4000 for every one year imprisonment imposed in the alternative. Using this as a guideline is the term of imprisonment imposed in the alternative not disproportionate to the fine imposed, bearing in mind that the accused said that he had no money to pay a fine?"

[3] The magistrate replied in the following terms: *"I have been not aware of the mentioned guideline. Should it be a mandatory guideline I request the honourable reviewing judge to interfere with the sentence imposed and impose an appropriate sentence using the said guideline."*

[4] Although sentence pre-eminently lies with the trial court, which has a discretion regarding the sentence to be imposed, it is incumbent upon the sentencer to adopt a balanced approach in the exercise of that discretion. In sentencing, the court takes into consideration all the relevant factors, including the personal circumstances of the accused. The ability of the accused to pay a fine is, amongst others, a factor to be taken into consideration. See: *The State v Romeo Wasserfall,* Case No. CR 8/2006 (unreported).

[5] It has since *R v Frans* 1924 TPD 419 been accepted that there must be some relation between the fine and the term of alternative imprisonment and in *S v Tsatsinyana* 1986(2) SA 504 (T) at 510 C-D it has been said that the court, when deciding what the relation must be in statutory crimes, *must* have regard to the relation determined by statute. In other words, the fine must

commensurate with the alternative punishment. It however does not mean that the sentencing process, when it comes to fines, is governed by fixed "tariffs" or scales, as punishment must be individualised and should not only fit the crime, but also the offender.

[6] There are no mandatory guidelines when considering the alternate prison sentence and I find it apposite to refer to *S v Juta* 1988 (4) SA 926 (Tk) where the court stated the following:

> *"When deciding on sentence, the court should first consider whether the case is one* which *calls for a prison sentence or not. Should it decide that the accused should have the option of a fine, he must then determine what the magnitude of the fine must be, having regard to the usual factors which apply. Having decided on the amount of the fine, the court has to consider what should happen if it appears that the accused is unable or unwilling to pay the fine. The court has two options: firstly, he can abide by the fine, in which case the fine can be recovered, if needs be, by civil execution against the accused, or, and this is the usual course, he can decide to impose a prison sentence which is to be enforced if the fine is not paid.*
>
> *But, and this is where magistrates often go wrong, in the deciding on the term of imprisonment ,the court is now not concerned with a punishment for the crime. Decision on that punishment has already been made. What the court must decide is what sanction is to be applied should the punishment which has been determined, fails.*
>
> *When deciding upon the amount of the fine, the court has regard to the financial circumstances of the accused and whether the impact of the fine in these circumstances would be an adequate censure for the accused's misdemeanour.*
>
> *The same considerations also apply when considering the alternate prison sentence. In addition, regard should be had to the special impact which a prison sentence would probably have upon the accused, having regard to his personal circumstances, employment, social status and so on."* (Emphasis provided)

[7] In the present case the accused in mitigation said that he has no money to pay a court fine. This notwithstanding, the magistrate imposed a stiff fine

and in effect, sentenced the accused to a term of 30 months direct imprisonment, which is 6 months short of the maximum sentence that may be imposed under that section. The learned magistrate already decided to afford the accused the opportunity of paying a fine of N$3000 and all that remained to consider is what sanction had to apply, should the fine not be paid. The alternative prison term of 30 months is, in the circumstances of this case, excessive and does not satisfy the requirements of justice. I endorse the remarks made by Feetham, J in *R v Frans* (supra) where the following was said:

> *"Where a fine is imposed as an alternative to imprisonment it should, I think, bear some relation to the probable sources and earnings of the person on whom it is imposed and to the number of months imprisonment which are considered sufficient as an alternative punishment"* (Emphasis provided)

[8] In consequence, the following order is made:

1. The conviction is confirmed.
2. The sentence is altered to the extent that the alternative prison sentence is reduced to 18 months.

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LIEBENBERG, AJ

I concur.

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SHIVUTE, AJ