



CASE NO.: CR 07/09

**IN THE HIGH COURT OF NAMIBIA HELD
IN OSHAKATI**

In the matter between:

THE STATE

and

SIMON KAMBONDE

(HIGH COURT REVIEW CASE NO.: 36/2009)

CORAM: LIEBENBERG, AJ *et* SHIVUTE, AJ

Delivered on: 20 March 2009

REVIEW JUDGMENT

LIEBENBERG, AJ.: [1] The accused in this matter was charged with the offence of Housebreaking with intent to steal and theft. He pleaded guilty and was subsequently convicted and sentenced:

“18 (Eighteen) months imprisonment- of which 8 (eight) months is suspended for a period of 5 (five) years on condition:

1. Accused not convicted of any offence of which Housebreaking or theft is an element committed within the period of suspension”.

[2] A query was directed to the magistrate regarding the framing of the conditions of suspension as it would include offences like housebreaking with the intent to assault /rape/ or to commit an offence unknown, and whether that was intended.

[3] The magistrate in her reply proposed an amendment to the sentence in the following terms:

“18 (Eighteen) month’s imprisonment – of which 8 (eight) months is suspended for a period of 5 (five) years on condition:

Accused is not convicted of any offence of which Housebreaking with intent to steal, and or theft is an element committed within the period of suspension”.(Emphasis provided.)

[4] The essence of a suspended sentence is that the accused must for a determined period behave in a certain manner which is set out in the sentence and is generally referred to as a condition of sentence. It then seems obvious that in order for the accused to behave in compliance with the conditions of the suspended sentence imposed; that these conditions must be clear and precisely formulated. The accused must understand what he or she has to do or avoid in order to ensure that the suspended sentence is not put into operation.

[5] Another reason why the conditions of suspension must be clear, is so that the court which later has to consider the possible putting into operation, must be able to determine the ambit of the condition.

[6] It is trite that the offences mentioned in the condition must be connected to the offence for which sentence was imposed and if other offences are specified which the accused may not commit without being disposed to the putting into operation of the

suspended sentence, then there has to be a measure of kinship between such offences and the one the accused is convicted of.

[7] In the present case the offences specified by the magistrate are those “*of which Housebreaking or theft is an element*”. From the manner it is framed it would appear that housebreaking constitutes an offence which it does not. It requires from the offender to have a specific intent to commit an offence at the stage of breaking in otherwise it would only constitute the offence of malicious damage to property.

Furthermore, without clearly specifying the offences from which the accused had to steer clear, he is at risk of having the suspended sentence put into operation for having committed a crime unrelated to what he was convicted of i.e. housebreaking with the intent to assault. Obviously, that is not what the learned magistrate had in mind.

[8] The proposed amendment by the magistrate is proper except for the word “*and*” as it creates ambiguity. The suspended sentence should be put into operation upon a conviction of either housebreaking with the intent to steal or theft, not both.

[9] In the result:

1. The conviction is confirmed.
2. The sentence is amended to read:

18 (Eighteen) months imprisonment of which 8 (eight) months imprisonment is suspended for a period of 5 (five) years on condition that the accused is not convicted of Housebreaking with intent to steal or Theft, committed during the period of suspension.

LIEBENBERG, AJ

I Concur

SHIVUTE, AJ