



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

Case no: CR 49 /2013

**THE STATE**

Versus

**IMMANUEL NAKALE**

**(HIGH COURT MAIN DIVISION REF. NO 744/2013)**

**(MAGISTRATE SERIAL NO. : 11/2011)**

**Neutral citation:** *S v Nakale* (CR 49/2013) [2013] NAHCMD 217 (26 July 2013)

**Coram:** SHIVUTE, J *et* PARKER, AJ

**Delivered:** 26 July 2013

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**ORDER**

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The sentence of three months' imprisonment without the option of a fine is set aside and substituted by the following sentence:

N\$600.00 fine or 3 months' imprisonment suspended as a whole for 3 years on condition that the accused is not convicted of theft committed during the period of suspension. The sentence is antedated to 15 March 2013.

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## REVIEW JUDGMENT

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SHIVUTE J (PARKER, A J concurring):

[1] The accused person pleaded guilty to one count of theft.

[2] The accused was sentenced as follows:

“Three months imprisonment without the option of a fine.”

[3] I directed the following query to the magistrate:

1. Which section was invoked by the court?
2. If the court invoked s 112 (1) (a) of the Criminal Procedure Act 51 of 1977, is the sentence imposed competent?

[4] The magistrate responded in the following terms.

1. “Section 112 (1) (a) was invoked in these proceedings.”
2. “In hindsight I came to notice that I impose a sentence of a term of imprisonment without the option of a fine which then becomes incompetent as I proceeded to finalize the matter in terms of s 112 (1) (a). The error is regretted and I humbly request the Honourable Review Judge to review as set aside the sentence and impose an appropriate sentence herein.”

[5] The magistrate rightly conceded that the sentence imposed is incompetent.

[6] Section 112 (1) (a) of Act 51 of 1977 as amended by s 7 of Act 13 of 2010 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 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 law;*

[7] In light of the above-mentioned provision the sentence imposed cannot be allowed to stand. The accused will have to be sentenced afresh. Since the accused has already served part of the sentence. I do not think I should remit the matter to the magistrate for purpose of sentence.

[8] In the result the following order is made:

The sentence of three months' imprisonment without the option of a fine is set aside and substituted by the following sentence:

N\$600.00 fine or 3 months' imprisonment suspended as a whole for 3 years on condition that the accused is not convicted of theft committed during the period of suspension. The sentence is antedated to 15 March 2013.

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N N Shivute  
Judge

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C PARKER  
Acting Judge



