

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGEMENT

Case Title: The State and Imene Erick 1 st Accused Imene Fellep 2 nd Accused	Case no: CR 48/2023 Division of Court: Northern Local Division
Heard before: Honourable Mr. Justice Munsu, J <i>et</i> Honourable Mr. Justice Kessler J	Delivered on: 05 December 2023
Neutral citation: <i>S v Erick and Another</i> (CR 48/2023) [2023] NAHCNLD 135 (05 December 2023)	
The order: 1. The conviction is set aside and substituted with a conviction of assault with intent to do grievous bodily harm. 2. The sentence is confirmed.	
Reasons for the order:	
MUNSU, J (KESSLAU, J concurring): [1] This is a review matter in terms of section 302 of the Criminal Procedure Act 51 of 1977 (the CPA). The accused were arraigned before the Okahao Periodical Court on a charge of assault with intent to do grievous bodily harm read with the provisions of the Combating of	

Domestic Violence Act, 4 of 2003 (the Act). It was alleged that upon or about the 9th day of September 2022 at or near likango ya Namwandi Village in the district of Outapi the accused did wrongfully and unlawfully and maliciously assault Samuel Homateni limene by cutting him with a panga and beat him with a hammer on his head and right side ribs with intent to do the said Samuel Homateni limene grievous bodily harm. It was further alleged that the accused and the complainant are cousins, and therefore fall within the definition of domestic relationship in terms of the Act.

[2] The accused pleaded guilty to the charge and the court questioned them in terms of section 112 (1) (b) of the CPA. Having been satisfied that the accused admitted to the allegations and essential elements of the offence, the court convicted them and sentenced each to 18 months imprisonment.

[3] When the matter came on review, I enquired from the learned magistrate as follows:

'Is the mere assertion that the accused and the complainant are cousins, without a further connection e.g. sharing of a residence or one of them being financially or otherwise dependent on the other, sufficient to establish a 'domestic relationship' in terms of section 3 of the Combating of Domestic Violence Act 4/2003?'

[4] The learned Magistrate conceded that it was an oversight to convict the accused of assault with intent to do grievous bodily harm read with the provisions of the Act as the complainant and the accused do not fall within a domestic relationship. The concession was properly made. In *Joseph v S*¹ this court held that:

"[18] The Act did not contemplate including family members related by consanguinity, affinity, or adoption into the definition of a domestic relationship if they are not sharing a residence or are not financially or otherwise dependant on the other.

[19] Before a Court can thus conclude that they are in a domestic relationship for purposes of the Act, an accused must either admit that the parties fall within the aforesaid prescribed definition of a domestic relationship or the State must present evidence to prove such relationship. There is simply no evidence on record in the present matter that the appellant and

¹ *Joseph v S* (HC-NLD-CRI-APP-CAL-2020/00056) [2021] NAHCNLD 48 (26 May 2021).

his aunt were in a domestic relationship for purposes of the Act. A mere statement that she is his aunt and his mother's sister is not enough to place the relationship within the definition.

[20] The court a quo's conviction of the appellant of assault with the intent to do grievous bodily harm read with the provisions of section 21 of Act 4 of 2003 is thus wrong."

[5] Similarly in this matter, there was no other allegation made other than that the accused and the complainant are cousins. It follows that the conviction cannot be allowed to stand.

[6] In the result, it is ordered as follows:

1. The conviction is set aside and substituted with a conviction of assault with intent to do grievous bodily harm.
2. The sentence is confirmed.

Judge(s) signature	Comments:
MUNSU, J.	NONE
KESSLAU, J.	NONE