

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: CR 22/2013

In the matter between:

THE STATE

and

MUTHATO NICOLAUS LUSH

(HIGH COURT MAIN DIVISION REVIEW REF NO 182/2013)

Neutral citation: *S v Lush* (CR 22-2013) [2013] NAHCMD 79 (27 March 2013)

Coram: SHIVUTE, J and UNENGU, AJ

Delivered: March 2013

Flynote: Criminal procedure – sentence of – a fine beyond the ability of the accused to pay or to generate – not proper and inappropriate – on review – sentence substituted for a short sentence of imprisonment.

Summary: The accused was charged with and convicted of assault with the intent to do grievous bodily harm – read with the provisions of the Domestic Violence Act, 4 of 2003 – The magistrate imposed a fine beyond the ability of the accused to pay or to generate, therefore, the accused, inevitably has to go to jail to serve the alternative sentence – sentence no proper and inappropriate – on review, sentence

imposed by magistrate set aside and substituted for a short sentence of imprisonment.

ORDER

In the result, I make the following order:

- (i) The conviction is confirmed.
- (ii) The sentence of a fine of N\$4000.00 (Four thousand Namibia dollars) or two (2) years imprisonment by the magistrate is set aside and substituted for the sentence of four (4) months imprisonment. The sentence is backdated to 7 December 2012.

REVIEW JUDGMENT

UNENGU, AJ (SHIVUTE, J concurring):

- [1] The accused in the matter was charged with the crime of assault with the intent to do grievous bodily harm – read with the provisions of Act 4 of 2003 (Domestic Violence Act).
- [2] He pleaded not guilty to the charge but was, after leading evidence, convicted as charged and sentenced to pay a fine of four thousand Namibia dollars (N\$4000.00) or two (2) years imprisonment.
- [3] When the matter was submitted before me for review following the provisions of section 302 of the Criminal procedure Act¹, I directed the following query to the presiding magistrate:

¹ Act 51 of 1977

“REVIEW CASE NO.: 303/2011

HIGH COURT REF. NO.: 182/2013

MAGISTRATE SERIAL NO.: 41/2012

THE STATE vs MUTHATO NICOLAUS LUSH

The Honourable Reviewing Judge remarked as follows:

1. Kindly provide reasons for the sentence imposed considering that:
 - (i) Complainant did not want to go ahead with the charge against her boyfriend; and
 - (ii) The accused is unemployed and a first offender.
2. Your urgent reply is appreciated.”

[4] The magistrate replied to my query as follows:

“REVIEW CASE NO.: 303/2011

HIGH COURT REF. NO.: 182/2013

MAGISTRATE SERIAL NO.: 41/2012

The state vs **Muthako Niclaus Lush**

The presiding officer remarks as follows:

The crime of Assault with intent to do grievous bodily harm is a prevalent crime in the District of Rundu. It is without any doubt a serious crime. The attack was uncalled for. It is true that the complainant and the mother wanted to withdraw the case.

Though there is no evidence to prove that they were labouring under threat such possibility cannot be ruled out. The purpose of withdrawing the matter was not absolute. The mother of the complainant told the court that they were withdrawing the case for the accused to go and sacrifice a chicken, or a goat

even a cattle to redeem the blood that flew from the complainant. She further informed court that the two families are not at peace with each other, owing to the assault of the complainant.

The accused acted out of jealousy. He suspected that there was a man in the complainant's room. Even when the complainant tried to explain or deny the allegation, accused could not understand it so he went ahead and beat her with a Sjambok inflicted an (sic) injuries which rendered her unconsciousness (sic).

This is a domestic violence case.

The judge president had this to say about violence cases: (sic)

'Just as it is a judge's duty to show mercy to a convicted prisoner, it is equally important duty of judges to protect society from the scourge of violence. The fact that sentences we impose do not seem to deter would-be-criminals should not make us shrink from that responsibility. In my view, in order to maintain a balance between the High violence against the vulnerable, especially women and children, and society's demand for justice, very long terms of imprisonment for such crimes must be then a norm. Only to be deviated from in exceptional circumstances. If that were not the case there is, I apprehend a real risk of vigilantism and lynch-justice if one listens to the chorus of public despair at the incidence of violent crimes in Namibia.'

The manner in which the accused person conducted himself does not support any deviation in this mater (sic). Although unemployed and a first offender he deserved to be punished harder in order to come to the realization that anger, short temper or jealousy does not pay and the courts will not hesitate to impose severe sentences upon conviction.

I am of the opinion that the sentence is in order and request that the proceedings be confirmed.

I rest my submissions."

- [5] Briefly the facts of the matter are that complainant and the accused are boyfriend and girlfriend having together one child. On the fateful day, the accused who was visiting his village earlier on, returned to the village of complainant where he stays with her. On arrival at his home, he noticed a male person going out from his house. He entered the house and found the complainant lying on the bed. The accused wanted to know from complainant who the male person was, she denied knowledge thereof. She became angry, probably because of the accusation by the accused, regarding this male person he saw coming out of his house and started throwing his belongings out of the house so that he could go away from her. The accused also became angry and assaulted the complainant by whipping her with a sjambok over her body. Complainant sustained injuries for which she had received treatment at the hospital, and laid a charge of assault with the intent to do grievous bodily harm at the police. However, she wanted to withdraw the charge against the accused but was not allowed to do so by the police and the state. She had forgiven the accused for what he had done to her.
- [6] In mitigation the accused told the court that he was unemployed but was doing casual work here and there to maintain the complainant and his two children. He indicated that he was paying school fees of the complainant and their child. The complainant, when called by the state to testify in aggravation of sentence, she asked the court to impose community service as a sentence for the accused. Nevertheless, the magistrate proceeded and imposed the sentence indicated above.
- [7] In her reply to my query, the learned magistrate said that 'although unemployed and a first offender he (the accused) deserved to be punished harder in order to come to the realization that anger, short temper or jealousy does not pay and the courts will not hesitate to impose severe sentences upon conviction'.
- [8] If the intention of the magistrate was to punish the accused harder – why then did she impose a fine instead of an imprisonment sentence without an option

of a fine? Is a fine not intended to keep the accused person out of jail upon payment? It is not what happened in this matter though.

- [9] In this matter, a fine was imposed well knowing that the accused, who was unemployed, would not be able to pay and would also not be able to generate the money somewhere, therefore, inevitably would have to go to jail to serve the alternative sentence of 2 (two) years imprisonment. In *S v Kamu*², Strydom, JP (as he then was) stated the following:

“Judging from reviews coming before the High Court it seems that there is now a tendency to impose fines, even in serious cases, where the only appropriate sentence would be imprisonment. The fine is usually imposed well knowing that the accused would not be able to pay and would not be able to generate money from the assets. Such fines are then coupled with long periods of imprisonment which must then be served by the accused. I must sound a note of warning. This method of sentencing is in my opinion not a proper exercise of the Court’s discretion. It creates the wrong and misleading impression that the Court endeavoured to keep the accused out of prison. This can boomerang, especially in those cases where a fine is not a proper and appropriate sentence. It further creates the impression that those with money who can pay have the advantage that they can buy their freedom, whereas those with no money will have to go to prison”. (Emphasis added).

- [10] I agree. It is what happened in the present matter. The accused, having no money to buy his freedom, was obliged to go to prison to serve the two (2) years imprisonment. In my view, the learned magistrate did not exercise her discretion properly, thereby creating the wrong and misleading impression that she endeavoured to keep the accused out of prison.

² 1998 NR 194 at 196 E-H

[11] When a presiding magistrate decided to impose a fine, then, as a general rule, the offender must either be capable of paying the fine or getting the fine paid on his or her behalf. (See *S v Vekueminina and others*³).

[12] Further, I am of the view that the learned magistrate failed or did not consider the personal interest of the accused adequately but over-emphasised the interest of the society and the seriousness of the crime he was convicted of. That being so, it is my further view that the sentence imposed on the accused is not proper and is inappropriate in the circumstances, therefore, it cannot be allowed to stand. The conviction is in order and will be confirmed.

[13] In the result, I make the following order:

- (i) The conviction is confirmed.
- (ii) The sentence of a fine of N\$4000.00 (Four thousand Namibia dollars) or two (2) years imprisonment imposed by the magistrate is set aside and substituted for the sentence of four (4) months imprisonment. The sentence is backdated to 7 December 2012.

E P Unengu
Acting Judge

N Shivute
Judge

³ 1992 NR 255 at 257