CASE NO.: CR 25/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

THERESIA GEORGE

(HIGH COURT REVIEW CASE NO.: 199/2010)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: October 12, 2010.

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused appeared in the Magistrate's Court, Ruacana in the district of Outapi, on a charge of contravening s 18 (2) of Act 33 of 1960 (Ill-treatment or neglect of children). The accused is the grandmother of the six year old complainant, whom she allegedly assaulted by hitting her with a stick all over the body. Although the accused pleaded guilty, she merely admitted to hitting the

complainant with a stick twice on the hand, for having drunk cooking oil. This caused the magistrate to note a plea of not guilty in terms of s 113 of the Criminal Procedure Act 51 of 1977; and after the State presented evidence, the accused was convicted of ill-treatment or child neglect. The conviction is in order and will be confirmed.

[2] I regress to observe that the accused did not challenge the evidence put before the court and elected not to give evidence herself; despite the right to cross-examine and the right to give evidence, duly explained to her. Regarding the injuries inflicted, a medical report was received into evidence from which it is evident that the child was medically examined by a doctor on March 2, 2009 (nine days after the incident) and at that stage lacerations and bruis(es) on both hands were observed. Old scars were also observed on the child's body. On the evidence, there had been previous (similar) incidents of ill-treatment of the complainant and which resulted in police intervention and a warning extended to the accused, not to assault or ill-treat the complainant. Charging the accused on the last occasion, obviously, is a consequence of the accused's persisted ill-treatment of the complainant.

[3] In his reasons on sentence the magistrate had regard to the accused being a first offender and that she had her own family to care for; whilst on the other hand, that he viewed the crime as serious in nature and which was prevalent in that district. He found aggravation in the fact that there was a history of ill-treatment in which conduct the accused persisted, despite earlier warnings from the police. The accused was sentenced to a fine of N$3500-00 or 18 months imprisonment.

[4] When the matter came before me on review I realised that the fine imposed exceeds the maximum sentence prescribed by the Act and requested the magistrate to justify the sentence imposed.

[5] In his reply the learned magistrate concedes that the fine imposed exceeds the maximum prescribed by the Act; but, submits that when regard is had to the circumstances of this case, the maximum fine that may be imposed is disproportionate to the gravity of the crime committed and therefore he was of the view that the Court should amend the sentence by striking out the fine. The effect thereof would then be

that the accused no longer has an option of paying a fine, but instead, would now be sentenced to direct imprisonment of eighteen months. By so doing the Court would in effect make the sentence more onerous and impose a much heavier sentence than what the trial court intended; which by law, is not permitted on review.

[6] Section 304 of the Criminal Procedure Act, 1977 governs the procedure on review and the relevant portions read:

> *"2 (a)* …
>
> *(b)* …
>
> *(c) Such court, whether or not it has heard evidence, may, subject to the provisions section 312-*
>
> *(i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on on of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;*
>
> *(ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;"* (My emphasis)

In *S v Arebeb* 1997 NR 1 (HC) the full Bench, after considering the powers of the Court given to it under s 309(3) of the Criminal Procedure Act 51 of 1977, at 7G-H said the following:

> *"By virtue of the provisions of this section, it is clear that the Legislature did not consider that a court deriving its powers from s 304(2) had the power to increase a sentence."*

[7] However, where the conviction is set aside on review and substituted by a *conviction* of a more serious nature, the sentence may be altered and the reviewing Court may *increase* the sentence, or, return the matter to the trial court to sentence afresh. In *Arebeb* (supra) at 8A-D the Court said the following:

> *"The Courts have drawn a distinction between sentences which are competent and those which are incompetent and have declined to increase on review*

> *sentences which are competent but too light. However, in respect of incompetent sentences by reason of its power to 'alter' sentences, it has imposed different sentences which in effect have amounted to making sentences more onerous. However, it is wrong to regard this as increasing a sentence. The sentence having been incompetent in the first place, there was no sentence. The reviewing Court therefore had to impose a sentence afresh. Where justice requires it, even though the sentence is incompetent the matter would be returned to the magistrate's court for sentencing afresh.*

[7] Unlike a situation where the sentence imposed is "hopelessly inadequate' and as such not in accordance with justice, the fine imposed in the present case exceeded the maximum that may be imposed by statute and is as such an *incompetent sentence*; and therefore, no sentence at all. Sentence has to be imposed afresh and this Court has the power to 'alter' the sentence, or where justice requires it, return the matter to the court *a quo* to sentence afresh. In my view, the present circumstances do not require the matter to be remitted to the magistrate's court for sentencing as this Court, on the evidence and the facts presented to the trial court, is in the position to impose sentence afresh.

[8] Section 18 (5) of the Children's Act, 1960 (Act No. 33 of 1960) reads:

> "*(5) Any person convicted of an offence under this section shall be liable to a fine not exceeding two hundred pounds or in default of payment of such fine to imprisonment for a period not exceeding two years or to such imprisonment without the option of a fine or to both such fine and such imprisonment;"*

The legal conversion of the aforementioned fine that may be imposed under s 18 of the Act is N$400-00.

[9] The frustration of the magistrate regarding the inadequate maximum sentence applicable to crimes committed in contravention of s 18 is quite understandable; because the prescribed maximum fine is indeed disproportionate to the maximum alternative sentence that may be imposed i.e. two years imprisonment. This

notwithstanding, the prescribed sentence is still applicable until such time that it is amended by legislation.

[10] Although the magistrate is now of the view that a sentence of direct imprisonment would in the circumstances be suitable, this is in sharp contrast with his earlier view that the accused need not be given a sentence of direct imprisonment, but that a fine would be appropriate; thereby giving the accused the opportunity of avoiding imprisonment by paying the fine. In my view, the magistrate's initial approach to sentencing appears to be well-balanced; and although the seriousness of the crime was acknowledged, the personal circumstances of the accused were given due consideration. Bearing in mind that the accused at the age of 51 years is a first offender; that she pleaded guilty and did not dispute the evidence given against her; that the injuries on the complainant's hands were not serious; that she had a family to care for; and that the complainant had in the mean time been removed from her custody, I am of the view that her conviction in itself would probably have the necessary deterrent effect and when sentencing in this case, the emphasis need not fall on retribution. Although the maximum fine that may be imposed has become completely out of touch with current monetary values, a maximum fine in the present circumstances, coupled with a suspended sentence of imprisonment would be a suitable sentence.

[11] On inquiry whether the accused had possibly paid the fine later, it turned out that on 5 April 2009 a part-fine in the amount of N$3 198-71 was paid. Whereas the sentence imposed must be set aside, it would bring about that the accused has to be refunded by Treasury in the said amount; therefore, the accused should be assisted to submit a claim form with the clerk of the court and attach thereto, a copy of this judgment and forward same to the Ministry of Justice. Once the claim is approved Treasury will refund the accused. Due to this cumbersome process the accused would not have been refunded by the time she is again brought before court and might not be in the position to pay an additional amount to what she already has paid; and is therefore at risk of being imprisoned. This should be avoided at all cost and in the event where the accused is unable to pay a fine, the court, when pronouncing the sentence, must enquire whether the accused is in the financial position to pay the fine

and if she is not, the accused should be afforded the opportunity of paying a deferred fine.

[12] In the result, the Court makes the following order:

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following:
   N$400-00 or 6 months imprisonment plus 6 months imprisonment, which imprisonment is suspended for a period of three years on condition that the accused is not convicted of c/s 18 (2) of Act 33 of 1960; or assault with intent to do grievous bodily harm, committed during the period of suspension.
3. The State is directed to arraign the accused before the court *a quo*, which must pronounce the sentence now imposed upon the accused; and thereafter deal with the matter in accordance with the guidelines set out in this judgment.

_____

LIEBENBERG, J

I concur.

_____

TOMMASI, J