



CASE NO.: CR 22/2011

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

In the matter between:

THE STATE

and

ELIA AMUNYELA

(HIGH COURT REVIEW CASE NO.: 102/2011)

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

Delivered on: 27.07.2011

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused was arraigned in the Magistrate's Court, Oshakati, on charges of malicious damage to property; crimen injuria; and assault by threat, all of which read with the Domestic Violence Act, 2003

(Act 4 of 2003). He pleaded guilty to the charges and upon conviction, with the charges taken together, sentenced to twelve (12) months imprisonment.

[2] On review a query was directed to the trial magistrate requesting reasons for the sentence imposed and whether the court, in view of the accused's personal circumstances, considered imposing a fine; secondly, which objective(s) of punishment the court had in mind when imposing the sentence.

[3] In her response the magistrate stated that *“escalating crimes committed against woman (sic) in Namibia, poses a serious threat to the basic fabric of Namibia (sic) society...”* and that offences of the kind present in this case, are prevalent in her district and *“has reached alarming and astronomical proportions”*. She went on to say that the current situation is considered to be *“completely unacceptable, not to mention totally out of control”*. Because of constant appeals from members of society to impose severe sentences for crimes of this nature, it was essential for the court to emphasise general deterrence, which should serve as a warning to others. A factor that weighed heavily with the court was that the offences were committed against the accused's elderly mother; which the court found to be a lack of respect, not only to the mother, but to society in general. Furthermore, despite the accused earning N\$7 000 per month, he only offered to pay a fine in the amount of N\$200 which the court interpreted as a lack on his part to appreciate the seriousness of the offences he committed. Hence, it was said, the sentence imposed was justifiable and fair.

[4] No evidence was adduced during the trial or during the stage of mitigation and the information the court had before it came from the accused; either in response to the section 112 (1)(b) questioning or during his address in mitigation. I pause here to observe that whereas the accused was convicted of the offences mentioned herein, read with the provisions of the Combating of Domestic Violence Act, the court, in terms of section 25, was obliged to notify the complainant of the time and place of sentencing (ss 1); and afford her the opportunity *“to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation”* (ss 2).

[5] This provision was not complied with and had the complainant, who is the mother to the accused, been given the opportunity to express her views on the crimes committed against her and what punishment she considered to be suitable, then the sentencing court might have come to a different conclusion as to the sentence found to be “fair and justifiable”. A factor that the complainant would have considered is that the accused supported her and a sister and although the extent thereof was not determined, the consequences of a custodial sentence imposed on the accused, in all probability, would have adversely affected the complainant’s position. In these circumstances the trial court misdirected itself by not affording the complainant the opportunity to express her views to the court and how the crime impacted on her circumstances. The court would furthermore have been in the position to know whether this incident was a once-off incident or something that

happened regularly; and what effect it had on the complainant and the family structure they were living in.

[6] These are all crucial factors which could have assisted the court in determining punishment that would be suitable to the specific accused in the circumstances of this case, *whilst at the same time having regard to the interests of the accused* and not only of society's interests, as it would appear from the record.

[7] The accused is thirty (30) years of age and the father of one child. He earns N\$7 000 per month and it was not established by the court what the source of his income was. He supports his family and owns property in Windhoek, the extent of which also being unknown. Accused is a first offender and submitted in mitigation that he would be able to pay a fine of N\$200. It was not clarified by the court whether this was the amount in cash he had on him at the time or whether this was the only amount he could afford to pay towards a fine subsequent to him being sentenced. The court also failed to explore the possibility whether the accused, in view of his healthy monthly income, would have been able to pay a deferred fine or make down payments on a fine so imposed. Instead, the court came to the conclusion that the *“Accused did not show any real signs of remorse and upon being questioned about (a) fine he suggested a mere N\$200 (which) in itself indicates that the accused does not regard his actions as of a serious nature”*. The conclusion reached is certainly not borne out by the record, for at no stage did the accused *propose* (suggest) a fine of N\$200, but merely said that

he was *able* to pay a fine of that amount – a material difference. Hence, the magistrate was not entitled to draw the adverse inference from this statement by the accused in mitigation as she did, and by so doing, the trial court committed a misdirection.

[8] Regarding the circumstances under which the respective offences were committed, the following emerged from the section 112 questioning: The accused kicked open the door of his mother's home when someone refused to open the door for him at night. The lock on the door broke and the damage to the door amounted to N\$600. When his mother complained about it he swore at her and thereafter said he would burn down the house. When asked why he uttered these words he explained that it was in order to stop his accusers who had been going on about the door until 02:00 am.

[9] The court *a quo* in its *ex tempore* judgment viewed the offences as being serious, particularly where it was committed against the accused's elderly mother, to whom he had showed no respect through his actions. This raised the question in the court's mind as to what respect the accused has for society in general if he treats his mother in this way. In the additional reasons the magistrate addressed the escalating crimes committed against women which threatens the basic fabric of the Namibian society and heeded to society's appeals to the courts to impose severe sentences for crimes of this nature.

[10] Crimes committed against vulnerable persons in society are generally viewed in a serious light by the courts and would therefore attract harsher punishment. However, it does not mean to say that in those cases the interests of society would always outweigh the interests of the accused person, justifying a custodial sentence. Where the offence is committed within a domestic relationship, this is only *one* factor that has to be considered together with all the other factors relevant to sentencing and the weight to be given thereto will largely depend on the circumstances of the particular case. Without derogating from the courts' general view of offences committed against vulnerable persons, I do not consider the circumstances under which the present offences were committed to be such that it justifies the removal of the accused from society. It seems to me that the accused was placed on the proverbial "altar of deterrence" and that his personal circumstances were completely ignored or given insufficient consideration. The personal circumstances of the accused play an important role in sentencing and must not be overlooked, as it ultimately is the accused that must be punished for the offence committed.

[11] A deterrent sentence was undoubtedly called for, but that could have been achieved in another way, for instance, by imposing a suspended sentence or periodical imprisonment if the accused's personal circumstances were such that he could serve his sentence over week-ends in a nearby prison. This would have kept the accused gainfully employed and in a position to continue maintaining his dependants. Although society demands that accused persons be duly punished for the crimes they commit, it is not in

its interest that a productive member is incarcerated in circumstances where another form of punishment would have achieved the same objective. Hence, I do not consider the imposition of direct imprisonment for a period of twelve months in the circumstances of this case, to be suitable and in the interest of justice.

[12] This Court is mindful that sentence predominantly lies within the discretion of the sentencing court and only where justice requires interference by this Court, would such interference be justified. This would normally be where it is evident that the trial court did not exercise its discretion in accordance with judicial principles and that it misdirected itself on facts material to sentencing or, where the sentence imposed is found to be unreasonable and disproportionate to the one this Court would have imposed, had it sat as court of first instance. The accused has already served almost four months of the sentence and there is no need to serve the sentence beyond that.

[13] For the reasons set out above, I am satisfied that justice requires interference by this Court as far as it concerns the sentence imposed on the accused.

[14] In the premises, the Court makes the following order:

1. The convictions on counts 1 – 3 are confirmed.

2. The sentence imposed is set aside and substituted with the following: Counts 1 – 3 taken together for sentence:-

Twelve (12) months' imprisonment of which eight (8) months' imprisonment is suspended for a period of five (5) years on condition that the accused is not convicted of malicious damage to property; crimen injuria; or assault for which a sentence of imprisonment without the option of a fine is imposed, committed during the period of suspension.

The sentence is antedated to 15 April 2011.

LIEBENBERG, J

I concur.

TOMMASI, J