

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 32/2016

In the matter between

THE STATE

And

ANTON KATIVA

HIGH COURT MD REVIEW CASE NO 463/2016

Neutral citation: State v Kativa (CR 32/2016) [2016] NAHCMD 95 (06 April 2016)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 06 April 2016

Flynote: Criminal procedure – Sentence – Accused charged with assault with intent to do grievous bodily harm – Offence committed in domestic setting – Complainant struck with axe-handle at the back of the head causing a mild swelling – Accused a first offender, self-employed and supports his family – Sentence of 3 years' imprisonment inappropriate – Court gave insufficient weight to accused's personal circumstances and circumstances surrounding the offence – Sentence set aside and substituted.

ORDER

1. The conviction is confirmed.
2. The sentence imposed is set aside and substituted with the following: 18 months' imprisonment of which 9 months' imprisonment is suspended for a period of 5 years, on condition that the accused is not convicted of assault, committed during the period of suspension.
3. The sentence is antedated to 19.02.2016

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused pleaded not guilty 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. After evidence was heard he was convicted and sentenced to three (3) years' imprisonment. The conviction is in order and will be confirmed.

[2] On review a query was directed enquiring from the presiding magistrate whether the sentence, in view of the circumstances of the case, was not unwarranted. Though emphasising the serious of the offence, the magistrate in her reply seems to agree with the view taken by the review court and proposes a substitution of the sentence, with a fine of N\$3 000 or 2 years' imprisonment. The concession that the sentence imposed should not be permitted to stand, is properly made because, in my opinion, it is in the circumstances of the case startlingly inappropriate as there is a striking disparity between the sentence imposed by the court *a quo* and that which would have been imposed by this court, had it sat as court of first instance.¹

[3] In sentencing, the court took account of the accused's personal circumstances namely, him being 28 years of age and a first offender, self-employed and from the testimony of his mother in mitigation of sentence, it would appear that he financially supports her and his siblings. Unfortunately this important aspect had not been properly explored by either the prosecution in cross-examination, or the court. That the accused at the time was in no position to pay a fine is evident from his testimony, something the magistrate clearly lost sight of when proposing that the sentence must be substituted with a fine. If the accused, back then, was unable to pay any amount of money, the chances of him being able to do so after his incarceration, seem faint. In these circumstances it would actually result in the imposition of a custodial sentence where it is clear that the accused is not financially in any position of paying a fine, or can rely on any assistance from friends and family. I am therefore of the view that the imposition of a fine is not a sentencing option.

¹S v *Tjiho* 1991 NR 361 (HC) at 366A

[4] Aggravating factors taken into account by the sentencing court were the lack of remorse, the domestic setting in which the offence was committed,² and the prevalence of the particular offence. Nothing in the court's judgment on sentence suggests that it was of the view that the assault was of a serious nature or had scarred, or inflicted permanent injury to the complainant. This is probably because the medical report (J-88), received into evidence, shows that the complainant merely had a mild swelling at the back of his head.

[5] Though the offence is indeed serious, especially when committed in a domestic setting, and the court having been entitled to give sufficient weight thereto, it seems to me that the court over-emphasised these factors and failed to accord the necessary weight to equally important factors such as the accused's personal circumstances, and the nature of the offence committed – in particular, the fact that no serious injury had been inflicted. Though the imposition of a custodial sentence appears to me appropriate in the circumstances of the case, a term of three years' direct imprisonment induces a sense of shock, and I am of the view that the appropriate sentence should be substantially less.

[6] In the result, it is ordered:

1. The conviction is confirmed.
2. The sentence imposed is set aside and substituted with the following: 18 months' imprisonment of which 9 months' imprisonment is suspended for a period of 5 years, on condition that the accused is not convicted of assault, committed during the period of suspension.
3. The sentence is antedated to 19.02.2016

²The complainant was the accused's stepfather.

J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE