



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 127/2016

JERALDO EISEB

APPELLANT

versus

**THE
RESPONDENT**

STATE

Neutral citation: *Eiseb v S* (CA 127/2016) [2017] NAHCMD 190 (17 July 2017)

Coram: NDAUENDAPO J et SHIVUTE J

Heard: 15 May 2017

Delivered: 17 July 2017

ORDER

The appeal against sentence is dismissed.

APPEAL JUDGMENT

SHIVUTE, J (NDAUENDAPO J CONCURRING)

[1] The Appellant was convicted of assault with intent to do grievous bodily harm read with the provisions of the Domestic Violence Act 4 of 2003 in the Magistrate's court sitting at Otjinene following a plea of guilty. The Appellant was sentenced to 36 months' imprisonment of which 12 months were suspended on usual conditions. The accused is aggrieved by the sentence imposed hence this appeal.

[2] Initially there were two grounds of appeal but the first ground has been abandoned and only one ground remained namely:

That the learned magistrate failed to take into account the mitigating factors of the Appellant.

[3] Counsel for the Appellant had also lodged an application for condonation for the late filing of his heads of argument. The Application was not opposed. In support of the application for condonation counsel explained that he received a notice of set down very late and the time frame within which he was supposed to file the heads of argument had already lapsed. The explanation given by counsel is reasonable in the circumstances and I am satisfied that counsel did not willfully fail to comply with Rule 118 (6) of the Rules of Court. Therefore the application for condonation is granted.

[4] I will now proceed to deal with the ground of appeal. It has been argued on behalf of the Appellant that the learned magistrate paid lip service to the mitigating factors of the Appellant placed before her and that the court overemphasized the seriousness of the offence and the interests of society. That the Appellant is not a candidate for imprisonment as he was not a violent person.

[5] Counsel for the Respondent on the other hand, argued that the magistrate gave sufficient consideration and weight to the Appellant's personal circumstances as well as the seriousness of the offence the Appellant has been convicted of. He further argued that the sentence imposed does not induce a sense of shock and does not present any irregularity. The learned magistrate had considered both the

mitigating factors as well as the aggravating factors. Both counsel referred us to authorities which we have considered.

[6] Sentencing is a matter for the discretion of the court. Levy J in *S v Tjiho* 1991 NR 361 at 364G –H (HC) described the discretion as follows:

‘This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial Court fail to do so, the appeal Court is entitled to not oblige to interfere with the sentence. Where justice requires it, Appeal Court will interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial Court as such erosion could undermine the administration of justice. Conscious of the duty to respect the trial Court’s discretion, appeal Courts have over the years laid down guidelines which will justify such interferences.’

[7] The Appellant committed a domestic violence act by brutally’ assaulting the mother of his child with a bottle neck on the hand. According to the medical report the complainant suffered a larger, deep, laceration on the left parietal–scalp and aberration on back and left cheek. It is an undisputed fact that offences regarding domestic violence are rampant in Namibia and are mostly directed against the vulnerable members of our society namely women and children. Although the Appellant pleaded guilty to the charge, it is difficult to determine how remorseful he was because he did not testify in mitigation. He failed to take the Court into its confidence by not testifying about his remorsefulness. Instead, his counsel addressed the Court from the Bar. Although pleading guilty may be regarded as a sign of remorsefulness, the opposite may not be true in some cases. Accused persons may plead guilty because there is overwhelming evidence against them and no justified reasons are available for their actions. However, the court needs to attach some weight in favour of the accused as a mitigating factor but, this weight should not be overemphasized unless accompanied by a genuine expression of remorse when the accused testifies under oath.

[8] Having given due consideration to the learned magistrate’s judgment on sentencing, the learned magistrate considered the personal circumstances of the Appellant, the seriousness of the offence, its prevalence and the interests of society.

The Appellant being a member of the Namibia Defence Force is supposed to defend the territory of Namibia and its people but instead he violated the bodily integrity of the complainant. The Appellant has no respect for the Constitution of Namibia. The Appellant by committing a domestic violence act, is an aggravating factor which is even made worse by the fact that he is a soldier who was supposed to uphold the law and protect society. Although he is a first offender who pleaded guilty according to the learned magistrate, his personal circumstances had been outweighed by the interests of society. It is also this court's view that there is an escalation of crimes involving domestic violence. Therefore, it was justified for the magistrate to have emphasised the deterrence aim of sentencing.

[9] Applying the dictum indicated earlier on we do not find any misdirection on the part of the learned magistrate which warrants our interference with the sentence. We are of the view that the sentence imposed befits the crime, and it serves the interests of the administration of justice.

[10] In the result the following order is made.

The appeal against sentence is dismissed.

N N SHIVUTE
Judge

G N NDAUENDAPO
Judge

APPEARANCES:

THE APPELLANT: Mr Isaacks (Isaacks & Benz Inc)
Instructed by Legal Aid

THE RESPONDENT: Mr Moyo

Of Office of the Prosecutor General