

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA, MAIN DIVISION**

**JUDGMENT**

**CR No: 21/2017**

In the matter between

**THE STATE**

and

**NYAMBE SIMASIKU**

**HIGH COURT MD REVIEW CASE NO 108/2017**

*Neutral citation: S v Simasiku (CR 21/2017) [2017] NAHCMD 68 (10 March 2017)*

**CORAM: LIEBENBERG J et SHIVUTE J**

**DELIVERED: 10 March 2017**

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**ORDER**

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1. The conviction is confirmed.
2. The sentence is set aside and is substituted with the following: N\$1 500 or 10 months' imprisonment.
3. The sentence is antedated to 28.12.2016.

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**JUDGMENT**

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LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused was convicted on his plea of guilty of the offence of assault with the intent to do grievous bodily harm and was sentenced to two years' direct imprisonment.

[2] When the matter came on review I directed a query to the presiding magistrate to enquire from him whether the court, in sentencing, considered the accused's personal circumstances and how much weight was accorded to the fact that the accused was a first offender and, as it would appear from the record, that the complainant was not seriously injured.

[3] In his replying statement the magistrate says that, although no mention of the accused's personal circumstances had been made at the stage of sentencing, the court did take into account those circumstances what he had stated in mitigation of sentence. It was equally acknowledged that the accused was a first offender and that the State had led no medical evidence as to the injuries sustained by the complainant. As regards the latter, the only information pertaining to any injuries sustained by the complainant when struck in the face with a bottle, is that he sustained 'a small scratch' on the face.

[4] In sentencing the accused the court quite rightly had regard to the fact that the accused had the intention to cause serious injury to the complainant when hitting him in the face with an empty bottle, the face being a vulnerable part of the human body. Whereas the bottle did not break and a scratch mark being the only injury inflicted, this seems to suggest that not much force was applied when striking the complainant. Another factor the court took into account is that the accused took the law into his own hands after the complainant had assaulted a family member of his. The court's reasoning that the accused and the complainant are distant relatives and therefore may have led to the charge being read with the provisions of the Combating of Domestic Violence Act 4 of 2003, is not supported by the facts and, had there been any basis for such charge, then it was for the State to have prosecuted under the said Act or lead evidence in aggravation of sentence. In sentencing, it was not for the court to speculate on circumstances that could be deemed aggravating and weighing against the accused. Without evidence to that effect, the court was not entitled to rely on circumstances not placed before the court.

[5] It was further reasoned that because the accused became angry after the complainant assaulted his sister, the accused's actions were premeditated. When the accused was questioned by the court, it had not been established how long after the assault on his sister did the accused attack the complainant, information which was crucial before the court could infer that the accused premeditated his actions. The preceding incident could have taken place immediately before the accused's attack on

the complainant and committed on the spur of the moment. In the court's *ex tempore* sentence the court held a different view when it said that the accused *should have stopped the fight* and reported the matter to the police. The court having come to this conclusion, it certainly begs the question when the accused then would have had the time to premeditate his actions? There was accordingly no justification for the court's view that the accused's actions were premeditated and the court misdirected itself when coming to such conclusion.

[6] In sentencing the accused the trial court had to consider the nature of the crime and the interests of society against the interests of the accused. Irrespective of the nature of the crime, it is the accused who committed the crime for which he must be punished and to this end, his personal circumstances play an important role in deciding what sentence will be fair and just to both the accused as well as society, considered in the circumstances of the case. Law and order must prevail and society expects the court's protection against lawlessness. This will mainly be achieved by imposing sentences that would not only deter the accused person, but also other likeminded criminals.

[7] Accused in the present instance is 27 years of age, a student and first offender. He informed the court that he is the father of a newly born baby and implored the court to impose a fine. This was the extent of the accused's personal circumstances which the magistrate relied on for purposes of sentence. Whereas the accused was unrepresented the magistrate had the duty to elicit as much as possible information from the accused to put the court in the best position to decide what sentence would be justified in the circumstances of the case. The court's remark when passing sentence that the accused failed to state in what grade he was is therefore misplaced, as it was for the magistrate to get that information from the unrepresented accused. Information that would have been crucial for purposes of sentence is whether the accused, being a student, was able to pay a fine and whether he would rely on financial assistance from elsewhere; also what effect would a custodial sentence have on his studies and dependants. The lack of information pertaining to the accused's personal circumstances

probably explains why the court made no mention thereof, or discussed what would be in the best interest of the accused.

[8] First and foremost, the accused is a first offender, a fact that should have weighed favourably with the court and which ought to have reflected in the sentence imposed. The magistrate's assertion that all mitigating circumstances had been taken into account, unfortunately, amounts to nothing more than paying lip-service.

[9] The court mainly concerned itself with the seriousness of the offence, that the accused had no reason to get involved in the fight between complainant and his sister, and the prevalence of the offence in that district. From a reading of the court's reasons on sentence and subsequent statement, it is evident that the seriousness of the offence committed is exaggerated and taken out of context. Though the offence of assault with intent to do grievous bodily harm is deemed serious by the courts, the facts of the case before the court cannot be ignored. There was a single blow to the head with an empty bottle and the only injury being a scratch mark on the cheek which does not appear to have required any medical attention (though the complainant visited the hospital the following day). The court clearly misdirected itself by overemphasising the nature of the offence at the expense of the accused's interests, this ultimately resulted in an unjustified sentence. There is nothing on record showing that deterrence, being the objective of punishment, could not have been achieved by the imposition of a fine; moreover where the accused intimated to the court that he would be able to pay a fine.

[10] I have therefore come to the conclusion that the trial court did not exercise its discretion in sentencing judiciously, resulting in a warped and unjustifiably severe sentence. Accordingly, the sentence cannot be permitted to stand.

[11] In the result, it is ordered:

1. The conviction is confirmed.
2. The sentence is set aside and is substituted with the following: N\$1 500 or 10 months' imprisonment.
3. The sentence is antedated to 28.12.2016.

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**J C LIEBENBERG**

**JUDGE**

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**N N SHIVUTE  
JUDGE**