

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 23/2017

In the matter between

THE STATE

and

DAWID LAURENTIUS JAHRS

HIGH COURT MD REVIEW CASE NO 408/2017

Neutral citation: S v Jahrs (CR 23/2017) [2017] NAHCMD 88 (16 March 2017)

CORAM: NDAUENDAPO J et LIEBENBERG J

DELIVERED: 16 March 2017

Flynote: Criminal procedure – Sentence – Previous convictions – Weight accorded – Court has discretion – Petty offences – Remains such despite number of previous convictions.

ORDER

1. The conviction and sentence on count 1 is confirmed.
2. The conviction on count 2 is confirmed but the sentence is set aside and substituted with: 18 months' imprisonment of which 6 months is suspended for 5 years on condition that the accused is not convicted of an offence involving assault, committed during the period of suspension.
3. The sentence on count 2 is antedated to 14.02.2017.

JUDGMENT

LIEBENBERG J: (Concurring NDAUENDAPO J)

[1] The accused pleaded guilty and was subsequently convicted on counts of malicious damage to property (count 1) and assault (count 2), both counts read with the provisions of the Combating of Domestic Violence Act 4 of 2003. On count 1 he was sentenced to six (6) months' imprisonment and on count 2, to three (3) years' imprisonment.

[2] When the matter came before me on review I directed a query to the presiding magistrate enquiring whether a sentence of three years' imprisonment on a charge of assault was not disproportionate to the crime committed; furthermore, in sentencing the accused, the weight the court accorded to the accused's previous convictions.

[3] In her replying statement the magistrate concedes that the sentence passed on the assault count 'is a bit harsh', but immediately points out that domestic violence has become a daily occurrence in that court which arouses strong indignation from society and one way of dealing with this scourge, is to send a clear message to those making themselves guilty of offences involving violence, that harsher sentences will be imposed. As for the weight accorded to the accused's previous convictions, it was said that much weight was accorded thereto as the accused has three previous convictions, two being relevant namely that of assault. In addition, the complainant testified in aggravation of sentence that the accused in the past had threatened her and that she was scared of him. The court considered the complainant's fear legitimate and concluded that the accused was not deterred by the sentences imposed in the past.

[4] As for the accused's criminal record, he was convicted in 2012 of possession of a dependence producing drug and given a fine. Two days later he was convicted of assault with intent to do grievous bodily harm and sentenced to a term of 24 months' imprisonment. In September 2015 he was convicted of assault by threat and sentenced to payment of a fine. For purpose of sentence the last two convictions are indeed relevant and likely to have had some bearing on the punishment meted out. The question is how much weight should the trial court have accorded to these previous convictions?

[5] This court in a recent judgement dealt with a similar situation and it will suffice to restate what was said in *State v Muchaka*¹ at p3 par. 5:

[5] Previous convictions will invariably be regarded as aggravating when it comes to sentencing and more over where the subsequent offence is committed shortly after the previous one. In the present instance these offences were all committed within the same year. Earlier convictions impact on the character of the offender, especially where he or she was not deterred by the experience of previous convictions and sentences. In this instance that seems to be the position with the accused who, despite having been convicted and sentenced to the payment of fines in the past, has neither reformed himself, nor does he seem to have been deterred by the earlier sentences imposed. Against this background, a more deterrent sentence seems justified. In determining what sentence in the circumstances of the case would be suitable, the court must still have regard to all those principles applicable to sentence. The court is still required to consider the accused's personal circumstances (of which his previous convictions is but one factor) against the seriousness of the offence committed, and the interests of society. What weight should be accorded to this factor, lies within the discretion of the court.

[6] It has been said that the accused should primarily be punished for the offence he committed and not so much for his previous convictions for which he has already been sentenced. In *S v Baartman*² at 305b-e it is stated thus:

'But the period of imprisonment must be reasonable in relation to the seriousness of the offence. Otherwise it inevitably overemphasises the interests of society at the expense of the interests of justice and the interest of the offender. If it does this, it cannot be a just sentence.

In a case as this it is necessary to be aware of three considerations:

- (a) The accused should be sentenced for the offence charged and not for his previous record;
- (b) The public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and

¹ CR 20/2017 [2017] NAHCMD 69 delivered on 10 March 2017.

² 1997(1) SACR 304 (E).

(c) While it might be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased.'

[6] The accused in the present instance, despite having served a sentence of two years' imprisonment, clearly did not reform and the magistrate's reasoning that a deterrent sentence was called for seems justified. However, I do not believe that the only way to deter the accused from reoffending was to impose a lengthy sentence of direct imprisonment. Contrary to the previous conviction of assault with intent to do grievous bodily harm, the accused on the last occasion was convicted of assault only, having slapped the complainant twice in the face. The offence for which the accused must be punished is therefore of less serious nature and although his previous convictions do play a role in sentencing, it does not *per se* elevate the offence of assault to something more serious, deserving of harsher punishment. To this end, the trial court misdirected itself when imposing a sentence of three years' direct imprisonment.

[7] In conclusion, although a deterrent sentence is called for, it need not be in the form of direct imprisonment and, in my view, the same sentencing objective could be achieved by a suspended or partly suspended sentence.

[8] In the result, it is ordered:

1. The conviction and sentence on count 1 is confirmed.
2. The conviction on count 2 is confirmed but the sentence is set aside and substituted with: 18 months' imprisonment of which 6 months is suspended for 5 years on condition that the accused is not convicted of an offence involving assault, committed during the period of suspension.
3. The sentence on count 2 is antedated to 14.02.2017.

J C LIEBENBERG

JUDGE

N NDAUENDAPO

JUDGE