REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 146/2013

In the matter between:

THE STATE **APPELLANT**

and

ASSER ASHIPALA **RESPONDENT**

Neutral citation: *S v Asser Ashipala* (CA 146/2013) [2017] NAHCMD 92 (17 March 2017)

Coram: LIEBENBERG J and SIBOLEKA J

Heard: **30 January 2017**

Delivered: **17 March 2017**

Flynote: Criminal procedure – Appeal – Sentence – Counts taken together for sentence – Convicted of two counts of assault with intent to do grievous bodily harm – Circumstances differ significantly – By imposing one sentence conviction on serious offence committed ignored – Court not exercising discretion judiciously.

Summary: The State appealed against the sentence of 12 months' imprisonment imposed after the court for purpose of sentence took together two counts of assault with intent to do grievous bodily harm. The aggravating circumstances in respect of the counts differ significantly and the counts should not have been taken together for purpose of sentence. It is apparent from the record of the proceedings that the trial court did not properly apply its mind when sentencing. Court of appeal set aside the order that counts are taken together for sentence and passed sentence on count 2.

ORDER

1. The appeal against sentence is upheld.
2. The order for taking counts 1 and 2 together for purpose of sentence is hereby set aside.
3. The sentence of 12 months' imprisonment on count 1 is confirmed.
4. On count 2 the respondent (accused) is sentenced to three (3) years' imprisonment of which one (1) year is suspended for five (5) years on condition that the accused is not convicted of assault with intent to do grievous bodily harm, committed during the period of suspension.

JUDGMENT

LIEBENBERG J (SIBOLEKA J concurring):

[1] This appeal is the aftermath of the successful application by the State to appeal against the sentence imposed on the respondent in the Windhoek Magistrate's Court, on two charges of assault with intent to do grievous bodily harm. Both counts were taken together for purpose of sentence and the respondent was sentenced to 12 month's imprisonment. He has already fully served his sentence and was released in 2014.

[2] Leave to appeal was granted in this court on grounds that the sentence imposed is extraordinary lenient to the extent that it induces a sense of shock when regard is had to the circumstances; that insufficient weight was given to the deterrent and preventative objectives of punishment; the counts should not have been taken together for purpose of sentence; and lastly, that the seriousness of the offences committed was underemphasised.

[3] Two counts of assault with intent to do grievous bodily harm were preferred against the respondent to which he pleaded not guilty, claiming to have acted in self-defence. The trial court after hearing evidence rejected the respondent's defence and convicted him as charged. On count 1 he was convicted of stabbing the complainant in the back with a knife, and on count 2, for having stabbed the complainant in the neck. From the two medical reports received into evidence it is clear that an open wound was inflicted on the back of first complainant while the other had a laceration on the right side of the neck with tracheal injury. Upon the medical examination the latter was in shock and critically ill. He was admitted to hospital for two months during which he had undergone an operation and according to his testimony, a further operation was pending.

[4] It is common cause that these injuries were inflicted with a knife by the respondent and when regard is had to the medical reports handed into evidence, considered together with the testimonies of the two complainants, it is evident that the injury inflicted on complainant in count 2 was extremely serious and life threatening.

[5] The trial court in sentencing acknowledged the seriousness of the injuries inflicted and that the second complainant was fortunate not to have lost his life. Also that there were other ways and means to have resolved the altercation between respondent and the complainants, instead of him having to resort to violence and the use of a knife to stab the complainants. The court found the respondent's personal circumstances to have been outweighed by the seriousness of the offences committed and its prevalence, also that a

deterrent sentence was called for. On its pronouncement of a sentence of 12 months' direct imprisonment, the court did not indicate to which count the sentence applied and it was only after the court had explained the rights of review and appeal that respondent was informed that both counts were taken together for purpose of sentence.

[6] Mr *Siyomunji*, appearing for the respondent, argued that the sentence imposed in respect of both counts must be substituted with a sentence of 12 months' imprisonment on each count, ordered to run concurrently. It was contended that this had been the trial court's intention all along. Though the concession is proper as far as it concerns interference by the appeal court, I am, from what is apparent from the record of the proceedings, unable to agree that the trial court intended passing a sentence of 12 months' imprisonment in respect of each count as it is not borne out by the record of the proceedings. Had that been the case, there would have been no need for the court to have informed the respondent in the end that 'the two (2) counts have been combined for the purpose of sentencing' (*sic*). There is a significant difference between multiple counts being taken together for purpose of sentence and only one sentence imposed, and sentences imposed on each count, but ordered to be served concurrently.

[7] It has become common practice in the lower courts to take multiple counts together for the purpose of imposing one sentence thereon. Though the procedure is neither sanctioned nor prohibited by the Criminal Procedure Act 51 of 1977, the practice is undesirable and should only be resorted to by lower courts in exceptional circumstances. The main reason for frowning upon this practice is the difficulty it might create on appeal or review, especially if the convictions on some but not all of the offences were set aside.[1]

[8] The rule of practice that punishment predominantly falls within the ambit and discretion of the sentencing court is well settled and this discretion may only be interfered with on appeal when it is evident that the court did not exercise its discretion judiciously in that the sentence is either vitiated by an

[1] *S v Akonda* 2009 (1) NR 17 (HC).

irregularity or misdirection, or that it is disturbingly inappropriate and induces a sense of shock.[2] In determining whether a sentence is manifestly not in accordance with justice, the court of appeal may look at other similar cases and be guided by sentences imposed in other cases, obviously due regard being had to factual differences.

[9] We were in argument referred to several cases where the accused were charged with assault with intent to do grievous bodily harm, all of which direct imprisonment of one year and more, were deemed an appropriate sentence. I pause here to observe that the facts of two of the three cases cited by Mr *Siyomunji* in his heads of argument are clearly distinguishable from the present facts, and do not support the argument put forward by counsel.

[10] There can be no doubt that the imposition of sentences of direct imprisonment have become the norm where the use of deadly weapons such as knives, broken bottles and other sharp objects were used to inflict injuries on others. There is accordingly no reason why the same approach should not be followed in this instance. This much has been conceded by counsel for the respondent in the proposed imposition of a sentence of 12 months' imprisonment in respect of count 2.

[11] Whereas the commission of the two offences are closely linked in time and place, it was submitted on respondent's behalf, that he should not be punished twice for the same offence (double jeopardy). The argument clearly loses sight of the fact that two distinct offences were committed which required separate intentions, despite it arising from one incident. Moreover, the circumstances in respect of each differ significantly with varying degrees of aggravation. For the trial court to have taken both counts together for purpose of sentence, effectively resulted in ignoring one of the offences for which the respondent was convicted. The correct approach would have been to pass individual sentences and to ameliorate the cumulative effect of the sentences by ordering part thereof to be served concurrently.[3]

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[2] *S v Tjiho* 1991 NR 361 (HC) at 366A-B.
[3] *S v Alexander* 2006(1) NR 1 (SC).

[12] Although the respondent in respect of both counts acted with intent to do grievous bodily harm when stabbing his victims, it is evident that count 2 had more aggravating features compared to count 1. Complainant in count 1 sustained an open wound in his back whereas the second complainant (count 2) sustained a laceration on the neck with tracheal injury, the latter much more serious. Without medical intervention there appears to have been a real likelihood that it would have resulted in death. The trial court's failure to appreciate the need to impose substantially different sentences on counts 1 and 2, in my view, significantly shows that the court did not exercise its discretion judiciously, thereby constituting an irregularity vitiating the sentence imposed.

[13] From a reading of the court's reasons it would appear that the court throughout mistakenly referred to 'the offence' which was followed by only one sentence being imposed. It was only after explaining the rights to review and appeal that the magistrate realised that a single sentence had been imposed and then belatedly informed the respondent that both counts were taken together for purpose of sentence. Taking into account the stage at which the court decided to take both counts as one for purpose of sentence, it is indicative that the court did not properly apply its mind when passing sentence.

[14] By taking together both counts for purpose of sentence the court undoubtedly underemphasised the seriousness of the offences committed in circumstances where both attacks were unprovoked; the offences were perpetrated with a lethal weapon (knife); and where serious injuries were inflicted which, in respect of the second complainant, was life threatening. Add thereto the prevalence of this type of offence, and the need to impose deterrent sentences in an attempt to bring an end to this scourge. In my opinion, a sentence of 12 months' imprisonment would have been appropriate in respect of count 1, but not for both counts. The trial court ought to have applied its mind separately as to sentence on count 2.

[15] The conclusion reached by the trial court that the personal circumstances of the respondent do not measure up to the seriousness of the offence (and the interests of society), cannot be faulted. In the present circumstances a sentence of direct imprisonment in respect of each count seems justified. In view of the varying degrees of aggravating circumstances between the two counts, this must be borne out by the difference in sentences imposed on each count.

[16] It was further contended on the respondent's behalf that, whereas the respondent has fully served his sentence of 12 months' imprisonment, he paid his dues to society for upsetting the natural order, and therefore it would not be in the interest of justice for the appeal court to interfere with the sentence imposed by the court *a quo*.

[17] For reasons already stated, there can be no doubt that the single sentence imposed cannot be permitted to stand, and has to be interfered with. Though the fact that the respondent by now has already served his sentence is a circumstance the court must take into consideration, I am unable to see how it could defeat the interests of justice if he, on appeal, were to receive a sentence (on count 2), the trial court ought to have imposed on him during the trial. On the contrary, to allow the respondent to go scot-free after being convicted of committing a serious offence as a result of an irregularity committed in the trial, would undeniably not be in the interest of the administration of justice.

[18] The misdirection committed concerns more the order of both counts being taken together for the purpose of imposing one sentence, than the sentence itself. The appropriate way forward would be to pass a suitable sentence on count 2, which could be done by either remitting the matter to the trial court with the direction to sentence on count 2, or for the appeal court to impose such sentence the trial court ought to have imposed. In circumstances where the respondent has already served his sentence and is in attendance at this court, it seems convenient and appropriate to follow the latter course and to pass sentence in respect of count 2.

[19] In the result, it is ordered:

1. The appeal against sentence is upheld.
2. The order for taking counts 1 and 2 together for purpose of sentence is hereby set aside.
3. The sentence of 12 months' imprisonment on count 1 is confirmed.
4. On count 2 the respondent (accused) is sentenced to three (3) years' imprisonment of which one (1) year is suspended for five (5) years on condition that the accused is not convicted of assault with intent to do grievous bodily harm, committed during the period of suspension.

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JC LIEBENBERG

JUDGE

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A SIBOLEKA

JUDGE

APPEARANCES

APPELLANT	D Lisulo Of the Office of the Prosecutor-General, Windhoek.
RESPONDENT	M Siyomunji Siyomunji Law Chambers, Windhoek.