



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 90/2016

In the matter between:

BLACKY KANDJII DARIUS**APPELLANT**

And

THE STATE.....RESPONDANT

Neutral citation: *Darius v State* (CA 90/2016) [2017] NAHCMD 94 (20 March 2017)

Coram: SIBOLEKA J and USIKU J

Heard: 2 March 2017

Delivered: 20 March 2017

Flynote: Criminal Procedure – Sentence appeal against – Interference by court of appeal – Court justified to interfere with sentence imposed by trial court where latter committing serious misdirection – Sentence set aside and substituted with a different sentence.

Summary: The Appellant was convicted of assault of a police officer in the execution of his duties in contravention of section 35 (1) of the Police Act. He was sentenced to pay a fine of N\$8000 or 24 months imprisonment and on appeal contends that the trial court misdirected itself as the sentence is too harsh under the circumstances.

ORDER

- (1) The sentence of N\$8000 or 24 months imprisonment is set aside and substituted with the following sentence:

N\$4000 or 12 months imprisonment.

- (2) The sentence is ante dated to 20 April 2016.

APPEAL JUDGMENT

USIKU J, (SIBOLEKA J concurring)

[1] Appellant was arraigned in the magistrate's court for the district of Grootfontein on a charge of assault of a police officer in the execution of his duties in contravention of section 35 (1) of the Police Act 19 of 1990. He was convicted and sentenced to N\$8000 or 24 months imprisonment. He now appeals against the sentence imposed.

[2] In his notice of appeal the appellant cited the following grounds:

- a) That the magistrate misdirected himself or herself by sentencing him to a fine of N\$8000 or 24 months imprisonment which is extremely harsh;
- b) That the magistrate erred in law and or in fact by failing to take into account his personal circumstances and imposed the sentence of N\$8000 or 24 months whilst he could have considered the purposes of punishment and imposed another form of punishment; and
- c) That the magistrate misdirected himself by failing to consider that he was a single man who was taking care of his three minor children and further that he was in custody for five months prior to him being sentenced.

[3] Ms Shikerete appearing on behalf of the respondent conceded that the trial court had misdirected itself in law by imposing a sentence in excess of the prescribed maximum sentence.

[4] In terms of the Act, section 35 (1) a court is obliged to impose a maximum sentence of N\$4000 or 12 months imprisonment and nothing more.

[5] Section 35 (1) of the Act provides: "Any person who assaults any member in the exercise of his/her powers or the performance of his/her duties or functions, shall be guilty of an offence and liable on conviction to a fine not exceeding N\$4000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment". That provision is mandatory.

[6] In my view, the imposition of a sentence of N\$8000 or 24 months imprisonment in the circumstances of this case was a serious misdirection by the court a quo warranting an interfere by this Court.

[7] In the result the following order is made:

- a) The sentence of N\$8000 or 24 months imprisonment is set aside and substituted with the following sentence:

N\$4000 or 12 months imprisonment.

- b) The sentence is ante dated to 20 April 2016.

DN USIKU
Judge

A SIBOLEKA
Judge

APPEARANCES

APPELLANTS: In Person

RESPONDENT: Ms Shikerete

Of the Office of the Prosecutor-General, Windhoek