

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CR No: 74/2018

In the matter between:

THE STATE

v

LUCKY SETHIE

(HIGH COURT MD REVIEW CASE NO 727/2018)

Neutral citation: S v Sethie (CR 74/2018) [2018] NAHCMD 303 (26 September 2018)

CORAM: NDAUENDAPO J et LIEBENBERG J

DELIVERED: 26 September 2018

Flynote: Criminal Procedure – Accused was acquitted on a charge of assault with intent to do grievous bodily harm, r/w the provisions of the Combating of Domestic

Violence Act 4 of 2003 – State conceding that offence not proved and accused to be convicted on competent verdict of assault – Court *a quo* reasoned that this not allowed as the crime was a statutory offence – The common law offence of assault GBH is not substituted by the Act – Act merely supplements the ambit of the common law offence.

ORDER

1. On count 1 the accused is convicted as charged and sentenced to 8 months' imprisonment, wholly suspended for five years on condition that the accused is not convicted of the offence of assault with intent to do grievous bodily harm, committed during the period of suspension.
 2. The sentence is antedated to 24 April 2018.
 3. The conviction and sentence on count 2 are confirmed.
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JUDGMENT

LIEBENBERG J: (Concurring NDAUENDAPO J)

[1] The accused appeared in the Magistrate's Court Swakopmund on two counts of assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. After evidence was heard the prosecutor in his/her closing submissions conceded that on count 1 it had not been proved that the accused had acted with intent to do grievous bodily harm, and asked for a conviction on the competent verdict of assault (common). The magistrate however reasoned that as the offence was coupled with Act 4 of 2003 it was regarded as a statutory offence for which there was no competent verdict. Further, in the absence of an alternative count charged (common assault), the accused could not be convicted on count 1. He was accordingly acquitted on that count but convicted on count 2.

[2] On review a query was directed to the magistrate in which she was required to explain in view of the complainant's evidence whether (a) the prosecutor's concession was properly made; and (b) the magistrate's reasoning as regards the acquittal on count 1 was sound in law.

[3] The magistrate correctly set out the law as regards the intent required by the accused when perpetrating an assault for a conviction on a charge of assault with intent to do grievous bodily harm. In *S v Tazama*¹ it was found that the offence did not require actual causing of grievous bodily harm and the essential element is the *intention* to cause serious harm. Thus, slight injury – or no injury at all – would still satisfy the elements of the offence of assault *with intent to do grievous bodily harm*.

[4] In its assessment of the evidence adduced the court found the complainant a reliable witness as she was consistent in her testimony, despite being a single witness. Notwithstanding, the judgment reads that the State did not prove the accused's guilt beyond reasonable doubt on the available evidence, 'the court's rationale is due to the fact that the state indicated that they did not proof (sic) the offence of Assault GBH but rather that of Assault common'. It would thus appear that the only reason why the court did not convict on count 1 is because of the concession made by the State.

[5] The complainant's undisputed evidence was that the accused approached her from behind and forcefully grabbed her by the hair (braids), causing her to fall down. He then pulled her up by the hair and pulled her into his vehicle. When asked about the extent of force exerted by the accused, she responded by saying that it was 'a lot of force' as she had fallen down and was again pulled up by the hair. Although the accused elected to remain silent he made formal admissions in terms of s 220 of Act 51 of 1977² which confirmed the complainant's evidence in material respects, moreover, that he 'assaulted her knowing that and or having foreseen that he could cause her serious injuries'.

[6] In view thereof, there was no basis for the prosecutor's submission that the offence was not proved against the accused and the concession finding favour with the

¹ 1992 NR 190 (HC).

² The Criminal Procedure Act, 1977 (CPA).

court without an independent and proper evaluation of the evidence adduced. That the accused had acted with intent to cause grievous bodily harm was duly proved through the complainant's evidence which was confirmed by the accused in his formal admissions. To have acquitted the accused on count 1 was inconsistent with the proven facts before court and clearly constituted a misdirection as the accused should have been convicted of the offence charged in count 1.

[7] As regards the second part of the query relating to the common law offence of assault being regarded as a statutory offence when read with the provisions of Act 4 of 2003, the magistrate in her replying statement now concedes that it was an oversight on her part to have come to the conclusion as she did. The concession is properly made, as the common law offence has not been substituted by statute but, as the charge reads, must be *read with* the said Act and merely augments the ambit or extent of the common law offence.

[8] In terms of s 304(1)(c)(iv) of the CPA this court may give such judgment or impose such sentence as the trial court ought to have given or imposed. Whereas the court below should have convicted and sentenced the accused on count 1, it is now up to this court to correct the trial court's judgment and to bring it in accordance with the dictates of justice. As for the sentence to be imposed, the court will be guided by the trial court's approach and impose a sentence that does not offend the sentence imposed on count 2, which it seems to have been of a more serious nature.

[9] In the result, it is ordered:

1. On count 1 the accused is convicted as charged and sentenced to 8 months' imprisonment, wholly suspended for five years on condition that the accused is not convicted of the offence of assault with intent to do grievous bodily harm, committed during the period of suspension.
2. The sentence is antedated to 24 April 2018.
3. The conviction and sentence on count 2 are confirmed.

J C LIEBENBERG

JUDGE

G N NDAUENDAPO

JUDGE