

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CR No: 85/2018

In the matter between

THE STATE

v

JOSEF NDIMULUNDE

(HIGH COURT MD REVIEW CASE NO 1655/2018)

Neutral citation: *S v Ndimulunde* (CR 85/2018) [2018] NAHCMD 340 (29 October 2018)

CORAM: NDAUENDAPO J et LIEBENBERG J

DELIVERED: 29 October 2018

Flynote: Criminal Procedure – Review – Fact that accused cannot pay a fine does not mean court should not consider imposition of a fine – Court must enquire into financial resources available to accused – Failure to do so result in court imposing a fine beyond accused’s means – Sentences imposed startlingly inappropriate and inducing a sense of shock in the present circumstances.

ORDER

1. The convictions on counts 1 and 2 are confirmed.
2. The sentences imposed on counts 1 and 2 are set aside and substituted with the following: Count 1: N\$2 000 or 6 months’ imprisonment.

Count 2: N\$1 000 or 3 months’ imprisonment.

3. The sentences are antedated to 15 October 2018.
4. The accused must be brought before court and informed of the above sentences.
5. Fines already paid which exceed the sentences now imposed, must be refunded to the accused.

JUDGMENT

LIEBENBERG J: (Concurring NDAUENDAPO J)

[1] The matter came on automatic review subsequent to the accused's conviction and sentence on charges of indecent assault and assault, for which he was respectively sentenced to N\$5 000 or 30 months' imprisonment, and N\$3 000 or 18 months' imprisonment. Whereas the fines could not be paid, the accused must serve the alternative imprisonment of 48 months.

[2] For the reasons to follow, I am of the opinion that the sentences imposed are clearly not in accordance with justice and that the accused may be prejudiced if the record of the proceedings is not forthwith placed before the review court without first obtaining a statement from the presiding magistrate as required by s 302(2)(a) of the Criminal Procedure Act 51 of 1977, as amended (the Act).

[3] Both charges emanate from an incident that took place when the complainant was with a friend at a shebeen waiting for a friend. The accused and one Johnny turned up when the accused approached the complainant and unexpectedly started touching and squeezing her breasts. When she told him to stop, Johnny also approached and started fondling her breasts where after he began 'beating' her, apparently for no reason. The accused joined in and punched the complainant three times in the head and also pulled her hair. The bar lady came to her rescue and took her inside. Complainant said she felt pain when punched by the accused and that her ear was swollen. That was the extent of the injuries inflicted.

[4] The accused's defence was a complete denial and implicated Johnny as the only person who attacked the complainant. According to him he intervened only to stop Johnny from attacking the complainant. Whereas this was new evidence which the accused had not raised before in his defence, the court *a quo* considered that to have

been an after-thought and rejected his explanation. The complainant's evidence was virtually left unchallenged and even though she gave single evidence, she appeared credible and the trial court was entitled to convict on the complainant's evidence. The convictions therefore seem to be order and will be confirmed.

[5] Turning to sentence, the accused is a first offender, 20 years of age and single. He makes a living from washing cars and earns about N\$1 500 per month. In mitigation he said that, with help, he would be able to raise N\$3 000 if a fine were to be imposed.

[6] The court identified a number of aggravating factors such as the accused's conduct having been 'intentional, premeditated and persistent'; that the complainant was unarmed and that the blows were directed at her head, resulting in a swollen ear 'as a reminder of the accused's conduct'; that he violated her body and that his conduct was unjustified and unnecessary. Reference was also made to those cases in which the courts took the view that violence against women and children in society could no longer be tolerated and that the courts would take a stronger view at sentencing towards the protection afforded to the vulnerable members of society (*S v Bohitile*¹; *S v Mushishi*²). A host of other cases and the sentences imposed therein were further cited and although these cases could serve as guidance to the sentencing court, one must not lose sight of the fact that the circumstances of each case is unique and that it is the person before the court that must be punished in his or her own unique circumstances. I pause to observe that the circumstances of the cases cited above involve serious crimes, unlike what the court was faced with in the present instance.

[7] In the court's closing remarks it was said that the sentence will be 'a reflection of his persistent and grave conduct and therefore his actions were senseless and uncalled for' and that he only has himself to blame for such 'unfavourable sentence'. He was

¹ 2007 (1) NR 137 (HC).

² 2010 (2) NR 559 (HC).

then sentenced to a total fine of N\$8 000 or in default, 48 months' imprisonment. The fines so imposed was clearly far beyond the accused's means, a fact the court at the time must have appreciated, and therefore, effectively, sentenced the accused to imprisonment for a period of 48 months.

[8] The mere fact that an accused cannot pay a fine does not necessarily mean that the court should not at all consider the imposition of a fine. However, the accused's financial means must feature in the determination of a fine and the court must enquire into the resources available to the accused, otherwise it risks imposing a fine beyond the accused's means. This is clearly what happened in the present instance.

[9] Although the offences committed constituted an attack on the person and dignity of the complainant, it does not appear to me to have been of such serious nature as it was made out to be by the trial court. It certainly falls short from the serious gender based violence cases experienced in our courts on a daily basis, and on which the courts have taken a stern view. The trial court clearly overemphasised the seriousness of the offences and the interests of society, while merely paying lip-service to the personal circumstances of the accused. The accused must be punished for his wrongdoing, but it would equally be wrong to sacrifice him on the proverbial altar of deterrence as an example to other likeminded offenders.

[10] Taking into account the circumstances under which the two offences were committed which are clearly of a less serious nature, I find the sentences imposed startlingly inappropriate, inducing a sense of shock. It therefore falls to be set aside and substituted with more appropriate fines.

[11] I am in agreement with the trial court's view that the accused should be afforded the opportunity to pay a fine, moreover where he indicated that he would be able to

raise an amount of N\$3 000. In deciding what the alternative imprisonment to a fine should be, the purpose thereof is not to punish the accused, but rather to induce him to pay the fine.

[12] In the result, it is ordered:

1. The convictions on counts 1 and 2 are confirmed.
2. The sentences imposed on counts 1 and 2 are set aside and substituted with the following:
Count 1: N\$2 000 or 6 months' imprisonment.
Count 2: N\$1 000 or 3 months' imprisonment.
3. The sentences are antedated to 15 October 2018.
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J C LIEBENBERG

JUDGE

G N NDAUENDAPO

JUDGE

