REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: *The State v Enrico Petrus Gebhard*	**Case No:** CR 37 /2021
High Court MD Review No: 606 / 2021	**Division of Court:** Main Division
Heard before: Mr Justice Liebenberg *et* Lady Justice Claasen	**Delivered on:** 10 May 2021
Neutral citation: *S v Gebhard* (CR 37 /2021) [2021] NAHCMD 220 (10 May 2021)	

It is hereby ordered that:

a) The conviction on a charge of assault with intent to do grievous bodily harm is set aside and substituted with a conviction of common assault.
b) The sentence imposed is set aside and the accused is sentenced to 7 month's imprisonment.
c) The sentence is antedated to 16 February 2021.

Reasons for the order:

[1] This is a review matter in terms of section 302 (1) of the Criminal Procedure Act 51 of 1977.

[2] The accused appeared in the Magistrate's Court for the district of Karibib, held at Usakos, on a charge of common assault, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The complainant is the girlfriend to the accused.

[3] The accused pleaded not guilty to the charge and the matter went to trial. He was convicted after evidence was heard and consequently sentenced to 24 months' imprisonment of which 12 months is suspended for a period of 4 years on condition of good behaviour.

[4] In a query directed to the magistrate an observation was noted that: Despite the accused having been charged with common assault, the court convicted him 'as charged' of assault with intent to do grievous bodily harm which clearly, was irregular. Another observation noted was that, somewhat surprisingly, at sentencing the magistrate reverted to the offence of 'assault' as the offence of which the accused was convicted. The learned magistrate was asked to furnish reasons as to whether the conviction of assault with intent to do grievous bodily harm is proper.

[5] In response the learned magistrate conceded that the conviction of the accused for assault with intent to do grievous bodily harm is not proper due to an oversight on his part and the correct conviction should have been common assault, read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

[6] The concessions by the learned magistrate are properly made. The court erred by finding the accused guilty of assault with intent to do grievous bodily harm, an offence

to which he did not plead. Though constituting an irregularity, I am satisfied that the accused suffered no prejudice as a result thereof. Neither do I consider it to be sufficiently material to vitiate the proceedings. In the circumstances the conviction will merely be corrected on review.

[7] I hasten to state that, taking into consideration the part of the complainant's body to which the force was directed and the nature of the injuries sustained, the appropriate charge which ought to have been preferred against the accused is that of assault with intent to do grievous bodily harm. The accused directed a fist blow to the complainant's mouth, thereby causing her injuries to the mouth. The J88 indicates an observation of laceration of lower lip, intra and extra orally, as well as luxation of anterior lower teeth as a result of the assault. This notwithstanding, the accused was convicted and sentenced of common assault.

[8] In light of the conviction, the learned magistrate was asked if a custodial sentence of 2 years' imprisonment of which half suspended is not excessive in the circumstances of the case, even where the provisions of the Combating of Domestic Violence Act 4 of 2004 finds application. In response, the magistrate is of the opinion that the sentence is proper and not excessive, shocking or inappropriate. In defending the sentence imposed, the magistrate took cognisance of the prevalence of the offence in the jurisdiction of Karibib and generally throughout Namibia. The sentence was thus aimed at general deterrence.

[9] The court in determining the appropriate sentence considered the nature of the crime committed, the personal circumstances of the accused and the interests of the society. The court acknowledged that the accused is a 22 year old first offender with one dependent child and that he showed remorse. It is apparent from the judgment of the court that emphasis was placed on the interests of society, the need to root out violence from its midst and the need to send out a 'harsh' message in order to curb the violence directed towards vulnerable members of society. The court also

noted that the sentence to be imposed will be met with a blend of mercy in that the accused will not be visited with 'the full jurisdiction of the court'.

[10] It is trite that sentencing is a matter for the discretion of the trial court and a court of appeal or on review will only interfere with the sentence where, amongst others, the sentence imposed is startlingly inappropriate, induces a sense of shock and where there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal, had it sat as court of first instance.[1]

[11] In *S v Uuta*,[2] it was held that 'although domestic violence is prevalent and serious as expressed in the authorities relied upon by the learned magistrate, the need to impose severe sentences in order to curb gender based violence also entails the duty to ensure that appropriate sentences are being imposed, taking into consideration the unique facts and circumstances of each case. Thus, the nature of sentences imposed should depend on the unique facts and circumstances of each specific case and be appropriate.'

[12] It is apparent from the judgment that excessive emphasis was placed on the interests of society and less consideration given to the seriousness of the offence the accused was convicted of i.e. common assault. This resulted in the imposed sentence of 2 years' imprisonment, partly suspended. A sentence of such severity is out of sync with the sentences generally imposed by other courts in cases involving common assault. The sentence imposed in this instance *prima facie* appears to be inappropriate. Though the circumstances warrant a custodial sentence, a period of two years is excessive and unjustified, regard being had to the personal circumstances of the accused and the nature of the offence.

[13] Through the same query, an observation was also noted that the record does not

[1] See *S v Tjiho* 1990 NR 361 at 366.

[2] *S v Uuta* (CR 6 /2021) [2021] NAHCMD 23 (4 February 2021)

reflect that the accused was sworn in when he testified. In his reply the magistrate conceded that such is not reflected on the record as a result of a typographical error and an oversight on his part; and that the accused was indeed sworn in. The issue of keeping proper record in appeal matters – which I also equally find applicable to review matters – was dealt with in the unreported case of *Coetzee v S.*[3] In that case it was held that the ultimate responsibility lies with the presiding magistrate to ensure that the record is a correct reflection of proceedings that took place before him or her.[4] There is no reason to doubt the magistrate's explanation regarding the accused's evidence being on oath, although more care should have been taken as regards record keeping. This is said in passing and does not effect or vitiate the outcome of the proceedings.

[14] In the result, it is hereby ordered that:

a) The conviction on a charge of assault with intent to do grievous bodily harm is set aside and substituted with a conviction of common assault.
b) The sentence imposed is set aside and the accused is sentenced to 7 month's imprisonment.
c) The sentence is antedated to 16 February 2021.

J C LIEBENBERG **JUDGE**	**C CLAASEN** **JUDGE**

[3] *Coetzee v S* (CA 52/2009) [2011] NAHC 72 *(*11 March 2011).
[4] See also *S v Kamenye* (CR 9/2019) [2019] NAHCNLD 31 (26 March 2019).