

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Helmut Gaohab	Case No: CR 30/2023
High Court MD Review No: 1694/2022	Division of Court: High Court, Main Division
Coram: Liebenberg J <i>et</i> Claasen J	Delivered: 16 March 2023
Neutral citation: <i>S v Gaohab</i> (CR 30/2023) [2023] NAHCMD 122 (16 March 2023)	
ORDER: <ol style="list-style-type: none">1. The conviction on count 1, assault by threat, is set aside.2. The conviction and sentence on count 2, assault with intent to do grievous bodily harm, is confirmed, but amended to read:	

'Accused is sentenced to 24 (twenty-four) months' imprisonment, wholly suspended for a period of 5 (five) years on condition that accused is not convicted of assault with intent to do grievous bodily harm, read with the provisions of Act 4 of 2003, committed during the period of suspension'.

REASONS FOR ORDERS:

LIEBENBERG J (CLAASEN J concurring):

[1] The accused was charged with one count of assault by threat and another count of assault with intent to do grievous bodily harm, both counts read with the provisions of the Combating of Domestic Violence Act 4 of 2003. After evidence was heard, the accused was convicted on both counts. The counts were taken together for purposes of sentencing and the accused was sentenced to 24 (twenty-four) months' imprisonment wholly suspended for a period of 5 (five) years on condition that he is not convicted of assault with intent to do grievous bodily harm, read with the provisions of Act 4 of 2003, committed during the period of suspension.

[2] Upon receipt of the record sent on review, a query was directed to the trial magistrate as to what satisfied her that there was no duplication of convictions, considering that the counts the accused was convicted of, arose from the same incident and committed with one criminal intent. The court further queried how this duplication would impact on the sentence imposed when regard is had to the fact that the two counts were taken together for sentencing.

[3] In her response to the query, the magistrate conceded that there was indeed a duplication of convictions and implored the court to regard the lesser count of assault by threat as a duplication. Furthermore, that the sentence imposed be allowed to stand.

[4] The authorities pertaining to the duplication of convictions are trite. The tests to be employed are the single evidence (intent) test and the same evidence test.¹ It is evident from the record how the criminal transaction played out and it is without a doubt that, although two criminal acts were committed i.e. that of assault with intent to do grievous bodily harm as well as assault by threat, they were both committed with a single intent. Consequently, the accused should only have been convicted on the count of assault with intent to do grievous bodily harm.

[7] It is my considered view that the conviction on the count of assault with intent to do grievous bodily harm must stand and the conviction on the assault by threat, under the circumstances, be set aside. The court now turns to the issue of sentencing.

[8] For purposes of sentencing, the two convictions were taken together. Under the circumstances, the consequence of count 1 falling away is likely to impact on the sentence. There is no doubt that the accused grievously assaulted the complainant by hitting her with a glass kettle on the head; thereafter hitting her again with a plastic kettle as well as a hard object and a glass paraffin container; hitting her with his hands and kicking her on her body while she lay on her bed covering her son from harm's way. The complainant also suffered a laceration on her finger after she grabbed hold of a knife which the accused was aiming at her. In these circumstances and in light of the serious nature of the attack, the sentence imposed by the court a quo, in my view, is justified and not to be interfered with, despite count 1 falling away.

[9] With regards to the formulation of the sentence imposed, it must be pointed out that the prohibited offence of which the accused should not be convicted of is assault with intent to do grievous bodily harm and not s 21 of Act 4 of 2003. To this end, the sentence stands to be amended.

¹ *S v Gaseb and Others* (SA 9/99) [2000] NASC 6; 2000 (1) SACR 438 (NmS) (9 August 2000).

[10] In the result, the following order is made:

1. The conviction on count 1, assault by threat, is set aside.
2. The conviction and sentence on count 2, assault with intent to do grievous bodily harm, is confirmed, but amended to read:

‘Accused is sentenced to 24 (twenty-four) months’ imprisonment, wholly suspended for a period of 5 (five) years on condition that accused is not convicted of assault with intent to do grievous bodily harm, read with the provisions of Act 4 of 2003, committed during the period of suspension’.

J C LIEBENBERG
JUDGE

C CLAASEN
JUDGE