

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTION 61

Case Title: The State v Franklin Gaillermore Cloete	Case No: CR 144/2023
High Court MD Review No: 1907/2023	Division of Court: High Court, Main Division
Coram: Liebenberg J <i>et</i> Shivute J	Delivered: 5 December 2023
Neutral citation: <i>S v Cloete</i> (CR 144/2023) [2023] NAHCMD 792 (5 December 2023)	
ORDER: <ol style="list-style-type: none">1. The convictions on counts 1 – 3 are confirmed.2. The sentence is set aside and substituted with 2 years' imprisonment. Counts 1 – 3 are taken together for purpose of sentence.3. The sentence is antedated to 4 October 2023.	
REASONS FOR ORDERS:	

LIEBENBERG J (SHIVUTE J concurring):

[1] Serving before court is an application for review from the Luderitz Magistrate's Court where the accused was arraigned on three charges, to wit: count one – Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003; count two – Assault by threat read with the provisions of the Combating of Domestic Violence Act 4 of 2003; count three – Assault common also read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The accused, after evidence was led, was convicted and sentenced to five years' imprisonment.

[2] This is an instance where the matter has not been referred to the trial court for the magistrate's reasons as required under s 304 of the Criminal Procedure Act 51 of 1977 (the CPA) as doing so may result in prolonged prejudice to the accused person on account of the proceedings not having been in accordance with justice.

[3] When regard is had to the record, it becomes apparent that much weight was placed on the previous convictions of the accused in arriving at the sentence imposed. The court a quo, in sentencing, reasoned that 'accused has not one or two but seven previous convictions similar in nature. Accused received various fines and two year imprisonment however still returns to this court. It is clear that when you have seven sentences that are similar it gives the impression that you have a habit of committing offences in a domestic set up.'

[4] It has been said that the accused should be punished for the offence he committed and not so much for his previous convictions for which he has already been sentenced. In *S v Baartman*¹ it is stated thus:

'But the period of imprisonment must be reasonable in relation to the seriousness of the offence, otherwise it inevitably overemphasises the interests of society at the expense of the interests of justice and the interest of the offender, if it does, it cannot be a just sentence. In a case as this, it is necessary to be aware of three considerations:

¹ *S v Baartman* 1997 1 SACR 304 (E) at 305b-e.

- (a) The accused should be sentenced for the offence charged and not for his previous record;
- (b) The public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and
- (c) While it might be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased.'

[5] Although the offences for which the accused was convicted are serious, the weight to be accorded to the previous convictions must still be relative and should not overshadow the crimes for which the accused must be punished. In the present instance, the previous convictions were clearly overemphasised at the expense of the interest of the accused which culminated in the imposition of an unjust sentence.

[6] It is without a doubt that the seriousness of the offences committed, justify the imposition of direct imprisonment in this instance but five years' imprisonment, under the circumstances, is excessive and falls to be set aside and substituted.

[7] In the result, it is ordered that:

- a) The convictions on counts 1 – 3 are confirmed.
- b) The sentence is set aside and substituted with 2 years' imprisonment. Counts 1 – 3 are taken together for purpose of sentence.
- c) The sentence is antedated to 4 October 2023.

J C LIEBENBERG
JUDGE

N N SHIVUTE
JUDGE