

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2023/00065

In the matter between:

**MATIAS HAUTONI**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Hautoni v S* (HC-MD-CRI-APP-CAL-2023/00065) [2024]  
NAHCMD 96 (08 March 2024)

**Coram:** JANUARY J and D USIKU J

**Heard:** 22 January 2024

**Delivered:** 08 March 2024

**Flynote:** Criminal Procedure – Appeal against sentence – Assault with intent to do grievous bodily harm read with the provisions of the Domestic Violence Act 4 of 2003 – Appellant was convicted on his own plea of guilty – sentence too harsh under the circumstances – Court entitled to interfere with the sentence imposed by the court *a quo* – Appeal against sentence succeeds.

**Summary:** The appellant was charged with the crime of assault with intent to do grievous bodily harm read with the provisions of the Domestic Violence Act

4 of 2003. He pleaded guilty to the charge and was accordingly convicted as charged, whereafter, he was sentenced to thirty (30) months' direct imprisonment. Aggrieved by the sentence, the appellant filed a notice to appeal against his sentence.

*Held:* that the sentence imposed is too harsh under the circumstances.

*Held further that:* a fine coupled with a suspended imprisonment would equally have achieved the objectives of sentencing.

*Held that:* the sentence of 30 months imprisonment is shockingly inappropriate and too severe under the circumstances and therefore, renders the appeal Court to interfere in the sentence imposed by the *court a quo*. The appeal against sentence is upheld.

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## ORDER

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1. The application for condonation is granted.
2. The conviction is confirmed.
3. The sentence is set aside and substituted with the following sentence;  
The accused is sentenced to 30 months' imprisonment of which six months are suspended for a period of five years, on condition that the accused is not convicted of assault with intent to do grievous bodily harm, committed during the period of suspension.
4. The sentence is antedated to 26 June 2023.
5. The matter is removed from the roll and regarded finalised.

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## APPEAL JUDGMENT

D USIKU J (JANUARY J concurring):

Background

[1] The appellant appeared before the Walvis Bay Magistrate Court, charged with a count of assault with intent to do grievous bodily harm read with the provisions of the Domestic Violence Act 4 of 2003. He pleaded guilty to the charge and was accordingly convicted as charged. On 26 June 2023, the appellant was sentenced to thirty (30) months imprisonment.

[2] Dissatisfied with the sentence, the appellant filed a notice of appeal against his sentence.

[3] Mr Siyomunji appeared for the appellant whilst Ms Amukugo appeared on behalf of the respondent.

[4] The appellant's grounds of appeal against his sentence are as follows:

(i) The court *a quo* erred in law and/or on the facts, in that it failed to give due regard to an alternative sentence other than direct imprisonment.

(ii) That the court *a quo* erred in law and/or facts, in that it meted out a sentence of thirty months' imprisonment to the appellant without consideration of the fine and/or alternative sentencing to imprisonment.

(iii) That the court *a quo* erred in law and/or facts, in that it failed to find that direct imprisonment as meted out against Appellant is not the only suitable sentence that could satisfy the objectives of punishment, namely, retribution and deterrence.

[5] In addressing the court regarding his condonation application, the appellant attributed the cause of delay in timeously lodging his appeal to the bureaucratic nature and processes and procedures at the prison where he is incarcerated. He had prepared his notice of appeal on 4 July 2023, however, it was eventually only filed on 11 August 2023.

[6] In so far as the prospects of success on appeal are concerned, the appellant informed the court that he has very good prospects in that he was a first time offender and immediately admitted guilt for the offence committed and did not waste the court's time. He further indicated that the 30 months imprisonment is very harsh on a charge of assault with grievous bodily harm. The appellant emphasised that the court *a quo* did not take into consideration the fact that he was provoked by the complainant who went to his house and damaged his property because she thought he was with another woman. As a result of the provocation, the appellant retaliated. According to the appellant those circumstances, should have warranted a lesser sentence or even a suspended sentence.

[7] Counsel for the appellant argued that the facts of this case do not justify a lengthy custodial sentence. A sentence of thirty (30) months direct imprisonment being very harsh and startlingly inappropriate. The court *a quo* did not give proper consideration and individualise the circumstances of the case. The appellant was a first time offender. At the time of the offence he had a six months premature baby that he is taking care of. The court *a quo* also failed to consider that the appellant pleaded guilty to the charge without wasting the court's time. He was provoked by the complainant who went to his residence due to jealousy as she thought that he was with another woman. The complainant even damaged his property.

[8] Counsel further implored this court to interfere with the sentence by replacing it with another sentence. His contention is that the learned magistrate misdirected herself in sentencing.

[9] The appellant prays for a sentence of two years' imprisonment of which one year should be suspended.

[10] On the other hand, counsel for the respondent's counter argument is that the court *a quo* sufficiently considered the circumstances of the appellant when passing sentence. Further that, the court *a quo* also took into account

the fact that the aggravating circumstances in this case and the seriousness of the crime committed are overwhelming, thus, the appellant's personal circumstances do not carry a great deal of weight when viewed against the heinousness of the crime committed.

[11] Counsel further submitted that there is a duty on the courts, while sentencing offenders for crimes committed in a domestic setting to ensure that members of the society are protected from such criminals. Therefore, the rule of law should be of paramount importance.

[12] Furthermore, counsel argued that the sentence imposed by the trial court is in accordance with justice and there is a need for domestic violence offences to be seen in a more serious light.

[13] In my view, the court *a quo* overemphasized the seriousness and the prevalence of the crime at the peril of the appellant's personal circumstances. To impose an effective 30 months' imprisonment on a first time offender, who tendered a plea of guilty, and whose private space was invaded by the complainant, is in my view too harsh. The court *a quo* indeed paid lip service to the consideration of mercy or leniency.

[14] In *S v Ndikwetepo*<sup>1</sup> it was held:

'Punishment is squarely within the discretion of the trial court. However, there are instances where the appeal court may interfere with the discretion of the trial court namely: if that discretion is not judiciously or properly or reasonably exercised or if the sentence is vitiated by an irregularity or misdirection, or the sentence imposed is so excessive that it induces a sense of shock.'

[15] There is no doubt that the appellant was convicted of a very serious crime which is also prevalent. However, the court must strike a balance between the factors which should be taken into account which will do justice to the appellant and the interest of society. His personal circumstances were not carefully considered when the court arrived at the sentence. The court *a*

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<sup>1</sup> *S v Ndikwetepo and Others* 1993 NR 319.

*quo* could have considered a sentence part of which it could have suspended. In *S v Tuhafeni*<sup>2</sup>, it was held;

‘The purpose of a suspended sentence and a partially suspended sentence is for individual deterrence. It has a limited rehabilitative purpose in that the offender will experience the hard ship of prison but the court, being merciful in suspending part of the sentence, intends this action to rehabilitate the offender. The suspended portion will hang over his head like the sword of Damocles and may further deter the accused from committing further crimes.’

[16] The appellant in this matter is a first offender, he pleaded guilty to the charge, thereby not wasting the court’s valued time. According to the appellant, the complainant was the aggressor in that she invaded his privacy, therefore provoking him. In *S v Drotsky*<sup>3</sup> it was held;

‘It is said that a man’s home is his castle. If there is one place where a person should feel safe and secure it is in his home.’

[17] Considering the circumstances of the case I am of the opinion that the sentence imposed is too excessive.

[18] As a result, the court makes the following order:

1. The application for condonation is granted.
2. The conviction is confirmed.
3. The sentence is set aside and substituted with the following sentence; The accused is sentenced to 30 months’ imprisonment of which six months are suspended for a period of five years, on condition that the accused is not convicted of assault with intent to do grievous bodily harm, committed during the period of suspension.
4. The sentence is antedated to 26 June 2023.

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<sup>2</sup> *S v Tuhafeni* (CR 10/2017) [2017] NAHCNLD 74 (2 August 2017).

<sup>3</sup> *S v Drotsky* 2005 NR 487 (HC).

5. The matter is removed from the roll and regarded finalised.

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D N USIKU

Judge

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J JANUARY

Judge

## APPEARANCES:

APPELLANT: M Siyomunji  
Of Siyomunji Law Chambers,  
Windhoek

RESPONDENT: A Amukugo  
Of the Office of the Prosecutor General,  
Windhoek