



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 18/2017

In the matter between:

**JOHANNES TSHIKONGO**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Tshikongo v S* (CA 18/2017) [2017] NAHCNLD 88 (17 August 2017)

**Coram:** TOMMASI J and JANUARY J

**Heard on:** 8 August 2017

**Delivered:** 17 August 2017

**Flynote:** Appeal — Sentence — Assault on a police officer and *crimen injuria* — No reasons advanced for sentencing — Court thus unable to determine the factors considered or weight attached thereto — Sentence for assault on police officer not unduly harsh or shockingly inappropriate — Appeal partially succeeds — Sentence in respect of count two is wholly suspended.

**Summary:** The appellant was sentenced to 6 months imprisonment for assault on a police officer and a further 6 months imprisonment for the offence of *crimen injuria*. The learned magistrate provided no reasons for sentence and the court was thus unable to determine what factors the court *a quo* considered and what weight was attached to the factors. The court held that the sentence imposed in respect of the assault is not shockingly inappropriate but ordered that the sentence imposed in respect of count 2 be wholly suspended.

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### ORDER

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1. The appeal against sentence partially succeeds in that the sentence of 6 months' imprisonment imposed in respect of count two (*crimen injuria*) be wholly suspended for a period of 3 years on condition that the appellant is not convicted of the offence of *crimen injuria*, committed during the period of suspension.

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### JUDGEMENT

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TOMMASI J (JANUARY J concurring)

[1] This is an appeal primarily against the sentence. The appellant was convicted of having contravened s 35(1) of the Police Act, 1990 (Act 19 of 1990) i.e assault on a member of the police and *crimen injuria*. The appellant was sentenced to 6 months imprisonment for the assault and 6 months' imprisonment for *crimen injuria*.

[2] The appellant was sentenced on 10 October 2016, he drafted his notice of appeal on 14 October 2016 and it was filed at court on 2 November 2016, i.e .3 days out of time. Mr Pienaar, counsel for the respondent, correctly conceded that there are

reasonable prospects that the court may interfere with the sentence in respect of count 2 i.e. *crimen injuria*. The court therefore proceeded to hear the appeal.

[3] The first ground of appeal was that: 'The court erred by not elaborating the drawn of conducting self-defence rather than equaring private or state funded lawyer through legal aid.' (sic). This ground does not comply with Rule 67(1) of the Magistrate's Court Rules which provides that the grounds of appeal must be clear and specific. This ground of appeal was therefore not entertained. The appellant's right to legal representation was in any event properly explained and the appellant on each occasion, chose to proceed without applying for legal aid after considering his options which the court explained to him.

[4] The Second "ground" was merely a request for a reduction in the sentence 'which was given without a reasonable fine or suspension'.

[5] The appellant was charged with having beaten the police officer with a cup, pouring water on him and punching him. The following facts formed the basis of the conviction: The complainant, a Police Officer visited the cells to feed the inmates. The appellant wanted to be taken to the clinic. The complainant informed the appellant that he must wait because they were only two on duty. The appellant swore at him and prevented him from locking the door. The appellant started throwing at him food and which struck complainant on his left shoulder. Complainant went to the charge office and returned with a more senior officer. The appellant was still verbally abusive and informed the other officer that the complainant refused to take him to the hospital. The appellant struck the complainant around the armpit and threw water and a cup at him.

[6] The appellant, in mitigation, placed the following facts before the court. He is single, the father of three young children living with his grandmother, he is unemployed and unable to pay a fine. No previous convictions were proven. The learned magistrate did not give any reasons for imposing the sentences and stated that he had nothing to add on his *ex tempore* judgment.

[7] This court is not in a position to determine which circumstance and factors the learned magistrate considered and what weight he accorded to the different factors.

This court now has to determine, in the absence of the reasons by the magistrate, whether the sentences imposed were appropriate.

[8] It is an aggravating factor that the assault and verbal abuse was perpetrated on a police officer whilst he was performing his duties. The courts ought to be mindful not to be too lenient under these circumstances as these officers are entrusted with the difficult task to maintain law and order. The appellant on the other hand is a first offender and the injuries were not serious. The court cannot consider imposing a fine as the appellant is unemployed and thus unable to afford a fine. The sentence imposed for the assault perpetrated on a police officer, under the circumstances of this case, is not unduly harsh or of such a nature that it induces a sense of shock. Inmates need to be deterred from considering violence as an option when there are procedures set in place for pursuing grievances.

[9] Mr Piennaar already indicated that the sentence in respect of count two is not consistent with sentences generally imposed for this offence. This can be gleaned from the following remark by Hoff J, as he then was, in *S v Visagie*<sup>1</sup>:

'In my view the imposition of 12 months imprisonment for a crime such as *crimen injuria* is, in the circumstances, inappropriate since it induces a sense of shock. Although each case is considered on its merits, the offence of *crimen injuria* generally attracts a punishment in the nature of a fine or, in appropriate instances, a caution and discharge.'

[10] The words used to insult the police were vile and demeaning. These two incidences are however so closely related that this court may consider ameliorating the cumulative effect of the sentence imposed by the court *a quo* by ordering that it be wholly suspended. This will also serve as a personal deterrent.

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<sup>1</sup> 2010 (1) NR 271 (HC) at page 272 – 273, paragraph 11,

[11] In the result the following order is made:

1. The appeal against sentence partially succeeds in that the sentence of 6 months' imprisonment imposed in respect of count two (*crimen iuria*) be wholly suspended for a period of 3 years on condition that the appellant is not convicted of the offence of *crimen iniuria*, committed during the period of suspension.

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MA Tommasi

Judge

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H C January

Judge

APPEARANCE

For the Appellant:

Mr Johanes Shikongo  
Oluno Correctional Facility  
Inperson

For the Respondent:

Mr Pienaar  
Of Office of the Prosecutor General  
Oshakati