



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI
APPEAL JUDGMENT**

Case no: HC-NLD CRI-APP-2018/00014

NANGOLO MATIAS JOSEF

APPELLANT

v

**THE
RESPONDENT**

STATE

Neutral citation: Josef v S (HC-NLD-CRI-APP-2018/00014) [2018] NAHCNLD 86
(11 September 2018)

Coram: JANUARY J *et* SALIONGA AJ

Heard: 17 July 2018

Delivered: 6 September 2018

Fly note: Criminal Procedure – Sentence – Assault with intent to do grievous bodily harm – Custodial sentence of 5 years' imprisonment – Sentence considered startlingly inappropriate in circumstances of case – Custodial sentence justified – Sentence altered to 3 years' imprisonment.

Summary: The appellant appeared in the Ondangwa Magistrate Court on 3 charges of assault with intent to do grievous bodily harm, assault threat and crimen injuria read

with the provision of Domestic Violence Act 4 of 2003. He pleaded guilty to all charges. However a plea of not guilty was entered in terms of section 113 of the Act in respect of count 1. Evidence was led and subsequently the appellant was convicted on count 1 and on count 2 and 3 he was found guilty upon his own admission. He was sentenced to 5 years imprisonment on count 1 and on count 2 and 3 to N\$1500 or six months imprisonment each. Although the appellant appealed against both conviction and sentences imposed on all charges he did not file his grounds of appeal against the conviction. The magistrate misdirected himself in imposing the maximum sentence of 5 years on count 1. The sentence imposed was found to be severe, shocking and inappropriate in the circumstances and 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. As a result the appeal is upheld. The sentences imposed on count 1 is set aside and the appellant is sentenced to three (3) years imprisonment. The appeal against sentences on count 2 and 3 is dismissed.

ORDER

1. The appeal against the conviction is refused.
2. The appeal against the sentence on count 1 succeeds. The sentence of 5 years imprisonment is set aside and replaced with a sentence of 3 years imprisonment.
3. The appeal against the sentence on count 2 and 3 is refused and the sentences imposed are confirmed.
4. The sentence is antedated to 13 June 2013.

APPEAL JUDGMENT

SALIONGA AJ (JANURY J concurring):

Introduction

[1] Appellant appeared in the Ondangwa magistrate court on a count of assault with intent to do grievous bodily harm , a count of assault by threat and a count of crimen injuria read with the provisions of the Domestic Violence Act 4 of 2003.

[2] The appellant pleaded guilty to all counts and was convicted upon his own admission on count 2 and 3. A plea of guilty on count 1 was however altered to not guilty. After the evidence was led he was subsequently convicted on 12 June 2016. He was sentenced in respect of count 1 to 5 years' imprisonment and on count 2 and 3 to N\$1500 or 6 months imprisonment each respectively. The sentences in all counts were ordered to run consecutively. The appellant appeared in person during the trial and appeal proceedings.

Submission by appellant

[3] The appellant dissatisfied with the magistrate's decision appealed against the conviction and sentences on all counts. His grounds of appeal are not very clear on the notice of appeal. No grounds of appeal against the conviction were given. The grounds of appeal against sentences can be summarized as follows. That the appellant prayed to this honorable court for an affordable fine and that the 5 years imprisonment imposed in respect of count 1 be reduced. That he is a first offender, did not waist the court's time by pleading guilty and has no previous conviction.

Submission by Respondent

[4] Respondent in his response correctly submitted that the sentence to be imposed is in the discretion of the trial court. A court of appeal will only interfere with the sentence of the trial court if the sentence is vitiated by irregularity or if there is a misdirection or if the sentence is one to which no reasonable court would have arrived

at. He made reference to *State v Tjiho* 1991 NR 361 (HC) where Levy J set out the following circumstances at 366 A-C:

- '(i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentence proceedings;
- (iii) the trial court failed to take into account material facts or over-emphasised the importance of other factors;
- (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and 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.'

[5] He further submitted that it is a fact the appellant was convicted of a serious offence and it is inevitable that appellant would be sentenced to some term of imprisonment. He however conceded that in respect of count 1 the magistrate' exercised his discretion unreasonably as the sentence imposed is startlingly inappropriate and induced a sense of shock warranting interference by this court. He was of the view that a portion of the sentence imposed should have been suspended for a period of three years on condition that the appellant is not convicted of assault, assault with intent to do grievous bodily harm or of domestic violence as defined in section 2 of the Act 4 of 2003 committed during the period of suspension. Notwithstanding the above, the respondent submits that the sentence on count 2 and 3 are in order and the appeal be dismissed.

Application of the law to the facts

[6] Levy J in *S v Tjiho* 1991 NR 361 at 364G –H (HC) described the discretion as follows:

'This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial Court fails to do so, the appeal Court is entitled to,... interfere with the sentence. Where justice requires it, Appeal Court will interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial Court as such erosion could undermine the administration of justice. Conscious of the duty to respect the trial Court's

discretion, appeal Courts have over the years laid down guidelines which will justify such interferences.’

[7] In the instant case the learned magistrate despite having heard the mitigating factors from the appellant and the state’s submission, imposed a sentence without giving reasons for such sentences. Furthermore when he furnished his reasons for sentence on the notice of appeal, the learned magistrate did not indicate what considerations he had taken into account in arriving at the appropriate sentence. He instead stated that the appellant was sentenced in an open court and indicated those who testified on the appellant’s behalf. He further stated that court officials who were present at court, his parents and his sister are all alive and can be contacted if need be. This court found no relevance to the learned magistrate’s contention above and this court will attach no consideration on them.

[8] In *S v Calitz en ‘n Ander* 2003(1) SACR 116 (SCA) it was held *inter alia*, ‘that it had to be emphasised that the proper protection, on the one hand, of the appellant’s constitutional right to an appeal and, on the other hand, the community’s interests that offenders be properly punished, required of a judicial officer that thorough attention be paid to the formulation and furnishing of reasons for sentence. Without it sound criminal justice was hampered. In the context of the present matter, the failure of the trial magistrate to furnish reasons for sentences, falls squarely within this admonition.’

[9] The circumstances under which the attack on the complainant took place are such that the accused cannot escape a custodial sentence. Though the size of the piece of wood was not established during the trial, it can safely be assumed that, had the complainant not blocked the blow with his forearm, in all probability, he would have been hit in the head and the injuries likely to have been of a more serious nature.

[10] In deciding what suitable sentence would be imposed the trial court should have looked at the facts of this case and after weighing these up together with the personal circumstances of the accused, decide on an appropriate sentence in the circumstances. The trial court was entitled to take into account that a weapon (piece of firewood) was used and the blow was directed at the complainant’s head. Also, that the assault was unprovoked. Opposed thereto stand the personal circumstances of

the accused that he is a first offender, pleaded guilty and did not waste court's time. In this regard the presiding officer is under duty to give reasons in writing why he imposed a particular sentence. Failure to give reasons as held in *Tjiho's* case will leave the appeal court with no other option but to interfere with the sentence imposed.

Conclusion

[11] After due consideration of all competing factors and applying the dictum indicated above, I have no doubt in my mind that in the circumstances of this case, a custodial sentence of 5 years' imprisonment is 'startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of [review]' (*S v Tjiho* 1991 NR 361 (HC) at 366 (B-C). Accordingly, the sentence on count 1 cannot be permitted to stand and must be set aside. The sentences on count 2 and 3 are in order and appeal has to be dismissed.

[12] In the result the following order is made.

1. The appeal against the conviction is refused.
2. The appeal against the sentence on count 1 succeeds. The sentence of 5 years imprisonment is set aside and replaced with a sentence of 3 years imprisonment.
3. The appeal against the sentence on count 2 and 3 is refused and the sentences imposed are confirmed.
4. The sentence is antedated to 13 June 2013.

J T Salionga
Acting Judge

I agree,

H C January
Judge

APPEARANCES:

THE APPELLANT:

Mr. N M Josef

In Person

Oluno Correctional Facility, Ondangwa

THE RESPONDENT:

Mr. J Mudamburi

Office of the Prosecutor General, Oshakati