REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2020/00056

In the matter between:

DANIEL JOSEPH **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation*:* *Joseph v S* (HC-NLD-CRI-APP-CAL-2020/00056) [2021] NAHCNLD 48 (26 May 2021)

Coram: SMALL AJ and MUNSU AJ
Heard: **30 April 2021**
Delivered: **21 May 2021**
Released: **26 May 2012**

Flynote: Criminal Procedure - Appeal against sentence-High Court has inherent jurisdiction to correct a patently incorrect conviction by a lower court even though the appeal was against sentence only.

Criminal Procedure - Appeal against sentence-Inherent jurisdiction to consider conviction- Relationship between appellant and the complainant his aunt, although family members related by consanguinity descended from the same ancestor not

enough to constitute a domestic relationship for purposes of the Combating of Domestic Violence Act 4 of 2003-To constitute a domestic relationship under the Act they must have some connection of a domestic nature, including, but not limited to, the sharing of a residence, or one of them being financially or otherwise dependant on the other.

Criminal Procedure - Appeal against sentence-Court using its inherent jurisdiction to alter the conviction of guilty of assault with the intent to do grievous bodily harm read with section 21 of the Combating of Domestic Violence Act, 4 of 2003 to guilty of assault with the intent to do grievous bodily harm.

Criminal Procedure - Appeal against sentence- The court a quo wrongly approached this matter as if only a lengthy unsuspended period of imprisonment were appropriate-Such approach closed its eyes to the other more appropriate sentences available.

Summary: The appellant was arraigned before the Magistrate's Court on a charge Assault with the intent to do grievous bodily harm read with the provisions of section 21 of the Combating of Domestic Violence Act 4 of 2003 after assaulting his aunt all over her body with a palm stick. The Court a quo sentenced the Appellant to 3 years direct imprisonment.

The Court implemented its inherent jurisdiction to, in an appeal against sentence alter the conviction of guilty of assault with the intent to do grievous bodily harm read with section 21 of the Combating of Domestic Violence Act, 4 of 2003 to guilty of assault with the intent to do grievous bodily harm.

The Court *held* that the court a quo wrongly approached this matter as if only a lengthy unsuspended period of imprisonment were appropriate and that such an approach closed its eyes to the more appropriate partial suspension of the sentence.

The appeal against sentence was accordingly upheld, the court a quo's sentence is substituted with a sentence of: Three (3) years imprisonment of which one (1) year is

suspended for five (5) years on condition that the accused is not convicted of assault with the intent to do grievous bodily harm committed during the period of suspension. The appeal against sentence is accordingly upheld.

ORDER

1. The Respondent's point in limine is dismissed and the appellant's late filing of his notice of appeal is condoned.

2. The Conviction of guilty for Assault with intent to do grievous bodily harm read with the provisions of section 21 of the Combating of Domestic Violence Act, 4 of 2003 is altered to read as follows: Guilty of Assault with intent to do grievous bodily harm.

3. The appeal against sentence is allowed and the sentence is set aside and substituted by the following sentence: Three (3) years imprisonment of which 1 year imprisonment is suspended for 5 years on condition the accused is not convicted of assault with the intent to do grievous bodily harm committed during the period of suspension.

4. The sentence is antedated to 13 July 2020.

JUDGMENT

SMALL AJ: (MUNSU AJ concurring):

Introduction

[1] This is an appeal against sentence. Appellant, a 25-year-old Namibian male was arraigned before Eenhana Magistrate’s Court held at Ohangwena before the leaned magistrate D. N. Kambinda on a charge of Assault with the intent to cause grievous bodily harm further read with the provisions of section 21 of the Combating of Domestice Violence Act 4 of 2003.

[2] When the appeal against sentence was heard on 30 April 2021, Appellant represented himself and the Respondent was represented by Mr Sibungo.

Point In Limine

[3] Mr Sibungo raised a point in limine and argued that appellant's notice of appeal which was filed on the 10th of August 2020 was filed outside the fourteen courts days after 13 July 2020 prescribed by the rules. The date of 10 August 2020 used by counsel is however not correct. Rule 67(1) requires the notice of appeal to be filed with the clerk of court. In this case the date stamp of the clerk of court Eenhana indicated that the notice of appeal was only filed there on 1 September 2020.

[4] Perusal of the relevant part of the record indicate that appellant completed a handwritten notice of appeal against sentence and filed that notice as well as an affidavit requesting condonation with the Correctional Service Authorities on 21 July 2020. This was well within the prescribed 14-day period. This handwritten notice was then clearly typed and again signed by appellant on 10 August 2020 and date stamped on 11 August 2020. Thereafter it was received by the Clerk of Court at Eenhana on 1 September 2020.

[5] This is thus another notice of appeal that was delivered to the Correctional Facility Authorities within the prescribed period of fourteen days after sentence but only filed with the clerk of court Eenhana 36 court days after the conviction and sentence and 31 court days after receiving it originally. [1]

[6] Be as it may the typed notice of appeal was filed with the clerk of the court Eenhana after the prescribed fourteen court days. Fortunately for appellant he also completed and filed an affidavit requesting condonation although he strictly would not have required condonation if his notice of appeal were only filed by the

[1] See also *Lazarus v S* (HC-NLD-CRI-APP-CAL-2020/00043) [2020] NAHCNLD 172 (03 December 2020), *Aron v S* (HC-NLD-CRI-APP-CAL-2019/00095) [2020] NAHCNLD 173 (08 December 2020) and *Shetu v The State* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 34 (1 April 2021)

Correctional Service Authorities on or before 31 July 2020. They had ample time, to wit eight court days for filing appellants original or a typed version thereof with the aforesaid clerk of court.

[7] Mr Sibungu further submitted that the appellant provided neither a reasonable explanation for his late filing of his notice nor indicated good prospects of success on appeal. Although technically correct, I find this argument a bit forced for two reasons. Firstly, the appellant has a right of appeal to the High Court from the court that convicted and sentenced him. The dilatory way the authorities dealt with his notice of appeal places him as a layperson in an invidious position. He is now compelled to provide a reasonable explanation for his late filing and convince the court that he has reasonable prospects of success on appeal before this court can even entertain his appeal against the sentence.

[8] Section 309 (2) of the Criminal Procedure Act, 51 of 1977, provides for condonation of the appellant's failure to file a notice of appeal within the prescribed period of 14 days provided for in the Magistrate's Court Rules. Condonation is not simply granted because it is requested. The Court condones the non-compliance with the rules once the applicant provides an acceptable and reasonable explanation and when the prospects of success on appeal are good. As in the present instance, the appellant acted without any assistance from a legal representative, the Court, considering the circumstances of the case, pay full attention to the prospects of success on appeal. [2] In this case, I will also consider that the appellant did all he could do to appeal against his sentence. Institutional negligence placed an unnecessary additional burden on his right to appeal against his sentence from the lower court.

The facts of the matter

[9] Even though appellant's appeal only lies against his sentence, this Court must consider the evidence presented for his conviction and certain other facts to thoroughly appraise the sentence imposed.

[2] *Nghuulondo v The State* (CA 72/2014) [2014] NAHCMD 373 paragraph 4 (08 December 2014*); S v Arubertus* 2011 (1) NR 157 (SC) at 160). *S v Wasserfall* 1992 NR 18 (HC) at 19I-J

[10] The charge against Appellant in the Court a quo was formulated as follows: 'In that upon or about 22nd day of January 2020 and at or near Omafu in the district of Eenhana the said accused did unlawfully an intentionally assault Felish Katrina Maria by hitting her with a dry stick all over her body with intent to do the said Felish Katrina Maria grievous bodily harm. Relationship between accused and complainant Aunt/Nephew.

[11] On 13 July 2020 the accused pleaded guilty to the aforesaid charge. From the questioning in terms of section 112(1)(b) of The Criminal Procedure Act, 1977 it transpired that Appellant admitted hitting his aunt the complainant Felish Katrina once on the arm with a palm stick while defending himself as the complainant was attacking him with a panga. He denied that his aunt was seriously injured. A plea of not guilty was entered in terms of section 113 and the matter was postponed for trial.

[12] The complainant gave evidence and alleged that the appellant insulted her in her house and after she pushed him out of her house, he assaulted her, and she fell hurting her back. The appellant was taken away but returned with a palm stick and assaulted her again all over her body. She said she had several injuries and one of her teeth was broken. She denied having a panga and said she was seated when assaulted. She also denied being hit only once on the arm.

[13] The J88 of complainant and an affidavit completed in terms of section 212(4)(7A) of the Criminal Procedure Act, 1977 was handed in by agreement. This report indicate that complainant was 46 years old and had a swollen forehead, swelling around the eyes, swollen left arm and abrasions on her left cheek. A fracture of the outer bones in the left forearm [ulna] and a broken upper tooth was indicated by the doctor.

[14] Another witness Cecilia Hambeleleni also gave evidence corroborating complainant that after an argument and pushing appellant out of her house, appellant assaulted complainant causing her to fall. Appellant was stopped by his mother but return later armed with a palm stick and beat the complainant while she was seated. This witness also denied that the complainant had a panga, and that appellant acted in self-defence.

[15] The appellant did not give evidence and was correctly convicted of assault with the intent to do grievous bodily harm. I however deem it necessary to remark on his conviction of guilty of assault with the intent to cause grievous bodily harm further read with the provisions of section 21 of Act 4 of 2003.

Domestic Relationship under the Combatting of Domestic Violence Act 4 of 2003

[16] What is meant by a domestic relationship in section 21[3] and elsewhere in the Combatting of Domestic Violence Act 4 of 2003, is defined in section 3 of the said Act. The different relationships that are considered domestic relationships for purposes of the Act are listed in 6 distinct groupings defined under section 3(1)(a) to 31(1)(f). Due to the facts of this case, I do not need to deal with the groupings listed in section 3(1)(a), 3(1)(b), 3(1)(c), 3(1)(d) and 3(1)(f).

[17] Factually section 3(1)(f)3(1)(f)[4] is the only grouping under which the appellant and his aunt can be categorized to be considered as a domestic relationship in terms of the Act. The appellant and his aunt, the complainant, are family members related by consanguinity. They descended from the same ancestor insofar the complainant's mother was the appellant's grandmother, or the complainant's father was the appellant's grandfather in the regular usage of the word aunt.[5] That alone is,

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[3] 21 Domestic violence offences

(1) The offences listed in the First Schedule are domestic violence offences when they are committed or alleged to have been committed against a person, or in relation to a person, with whom the person charged with those offences has a domestic relationship.

(2) Any person found guilty of a domestic violence offence is liable on conviction to the penalties ordinarily applicable to the offence in question.

[4] '(e) they-

(i) are or were otherwise family members related by consanguinity, affinity or adoption, or stand in the place of such family members by virtue of foster arrangements; or

(ii) would be family members related by affinity if the persons referred to in paragraph (b) were married to each other,

and they have some connection of a domestic nature, including, but not limited to-

(aa) the sharing of a residence; or

(bb) one of them being financially or otherwise dependant on the other; '

(f) …..'

[5] The evidence is that appellant's mother was complainant's sister.

however, not enough to constitute a domestic relationship for purposes of the Act. It is a domestic relationship in terms of the Act only when the additional requirements mentioned in the subsection are met. In addition, they must have some connection of a domestic nature, including, but not limited to, the sharing of a residence, or one of them being financially or otherwise dependant on the other.

[18] The Act did not contemplate including family members related by consanguinity, affinity, or adoption into the definition of a domestic relationship if they are not sharing a residence or are not financially or otherwise dependant on the other.

[19] Before a Court can thus conclude that they are in a domestic relationship for purposes of the Act, an accused must either admit that the parties fall within the aforesaid prescribed definition of a domestic relationship or the State must present evidence to prove such relationship. There is simply no evidence on record in the present matter that the appellant and his aunt were in a domestic relationship for purposes of the Act. A mere statement that she is his aunt and his mother's sister is not enough to place the relationship within the definition.

[20] The court a quo's conviction of the appellant of assault with the intent to do grievous bodily harm read with the provisions of section 21 of Act 4 of 2003 is thus wrong. However, the question is whether this Court can do anything to correct this since the present appeal is against sentence only. The only basis on which this Court can do so is if it falls within this Court's inherent jurisdiction.

Inherent Jurisdiction of the High Court

[21] The High Court is not entitled to make substantive law and cannot act contrary to statutory prohibition. Still, it has a reservoir of power to be employed in circumstances where the law does not cater for a given situation in advancing the administration of justice. This power will be used by the High Court sparingly and only in exceptional circumstances. If the court purports to exercise an inherent jurisdiction in cases where it cannot do so, the decision will be a nullity.[6]

[6] *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* 2010 (2) NR 703 (HC) paragraph 30

[22] The High Court has the inherent jurisdiction to correct irregularities in the conviction even if the appeal is against sentence only if it is in the interest of justice to do so. [7] This Court thus have the jurisdiction to change the conviction by the Court a quo to read guilty of assault with intent to do grievous bodily harm.

Approach in appeals against sentence

[23] Punishment falls within the ambit of the trial court's discretion. A Court of Appeal should not readily interfere with this discretion unless there is a good cause. There will only be good cause where the sentence is vitiated by an irregularity or misdirection or where the sentence imposed is disturbingly inappropriate and induced a sense of shock. To come to such a conclusion, the Appeal Court essentially must conclude that the sentencing court did not exercise its discretion regarding sentence, judicially, before it can interfere with the sentence.[8]

[24] In deciding what a just and appropriate punishment would be in the circumstances of a given case, the so-called triad [9] of factors, namely the accused's personal circumstances, the offence committed, and society's interests, are all considered.[10]

[25] Punishment should fit the criminal and the crime, be fair to society, and be blended with a measure of mercy if circumstances warrant it.[11] However, the facts of a case might require emphasizing one or more at the expense of others.[12]

[26] Courts should keep in mind that each sentence must be individualized to ensure an appropriate sentence. A proper exercise of the sentencing discretion

[7] *S v Kaevarua* 2004 NR 144 (HC) at 149J-150A, *S v Valede and Others* 1990 NR 81 (HC) at 83D and S v Lubisi 1980 (1) SA 187 (T) at 188H

[8] *S v Ndikwetepo and Others,* 1993 NR 319 (SC) at 322F-J; *S v van Wyk,* 1993 NR 426 (HC) at 447G-448B; *S v Ivanisevic and Another,* 1967 (4) SA 572 (A) at 575F-G*; S v Shapumba* 1999 NR 342 (SC); *S v Rabie* 1975 (4) SA 855 (A) *S v Tjiho* 1991 NR 361 (HC) at 362A-B, *Paulus v The State* (CA40/2015) NAHCMD 211 (11 September 2015).

[9] *S v Zinn* 1969 (2) SA 537 (A)..

[10] *S v Seas* 2018 (4) NR 1050 (HC).

[11] *S v Rabie* 1975 (4) SA 855 (A) at 862G – H.

[12] *S v Van Wyk* 1993 NR 426 (SC) at 448D-E (1992 (1) SACR 147 (NmS) at 165I-J.

requires duly considering other possible penalties before arriving at the appropriate one. As was said in *Shetu v The State*[13]

'This sentencing process is not satisfied by rubberstamping varying sentences of direct imprisonment on offenders for crimes in abstract labelled serious. Direct imprisonment is not the only appropriate punishment for corrective and deterrent purposes in this case. Straight imprisonment, in most cases, is only justified if the accused needs to be removed from society to protect the public and the seriousness of the individual case warrants it.[14] Fully or partially suspended imprisonment sentences in many instances can also serve the offence's nature and the public's interests.[15]

[27] A fully or partially suspended sentence of imprisonment has two beneficial effects. It first prevents the offender from going to jail or going to jail for an excessively long period. Secondly, he has the suspended sentence or the suspended part thereof hanging over him. If he behaves himself, he will not serve the suspended sentence or the suspended portion thereof. On the other hand, if he commits a similar offence, the Court can put the suspended sentence into operation. In most instances, a partially suspended sentence for a first offender is far more effective in rehabilitating an individual offender than an overly long period of imprisonment.[16]

[28] Not every misdirection however entitles a Court of appeal to interfere with the sentence of the trial court. The misdirection must be of such a nature, degree, or seriousness that it shows, directly or by inference, that the trial court either did not exercise its discretion at all or exercised it improperly or unreasonably. In this context, misdirection means an error committed by the trial Court in determining or

[13] *Shetu v The State* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 34 (1 April 2021) paragraph 26

[14] *S v Scheepers* 1977 (2) SA 154 (A) at 159A-C applied in *S v Paulus* 2007 (1) NR 116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 10.

[15] *R v Persadh 1944* NPD 357 at 358; *S v Goroseb* 1990 NR 308 (HC) at 309H-I. *S v Paulus* 2007 (1) NR116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 10.

[16] *R v Persadh* 1944 NPD 357 at 358; *S v Goroseb* 1990 NR 308 (HC) at 309H-I. *S v Paulus* 2007 (1) NR 116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 11.

applying the facts for assessing the appropriate sentence. It is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion correctly and judicially. A shockingly inappropriate sentence, in many instances, results from excessive reliance on one or more of the factors to be considered when sentencing. That places the judgment in the category in which the appeal court can consider the sentence afresh.[17]

[29] In the present case, the court a quo correctly concluded that the appellant's assault of the complainant resulted in severe injuries of the complainant. Although not life threatening, they were serious. What further aggravates the assault is that the appellant is a male who assaulted an aunt who is almost 21 years his senior. This gender-based violence thus also amounted to the assault of an elder and family member who are traditionally respected and revered. This respect forms an integral part of the bonds that cement our society over all cultures. If we lose our respect due to our elders, we look at a community that will disintegrate due to the lack of a moral compass. Our courts cannot condone the arrogant assault of seniors when the assailants feel affronted by reprimands and direction by such elders. The perpetrators of such assaults should realize that the courts will seriously consider visiting such conduct with sentences of imprisonment.

[30] In determining an appropriate sentence, a court strives to arrive at a reasonable counterbalance between the relevant elements. This ensures that one factor is not accentuated at the expense of or to the exclusion of the others. The process is not merely a formula, nor is it satisfied by simply stating or mentioning the requirements. The Court shall consider, attempt to balance evenly, the nature and circumstances of the offence, the offender's characteristics and circumstances, and the impact of the crime on the community, its welfare, and concern. This approach and starting point, as expounded by the Courts over many years, is sound and is incompatible with anything less**.**[18]

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[17] in *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684B-C and *S v Redondo* 1992 NR 133 (SC) at 153A-E.

[18] *S v Banda and Others* 1991 (2) SA 352 (BG) at 355A-C and *S v Ncamushe* (CC 10/2017) [2021] NAHCNLD 45 (18 May 2021) paragraph 27

[31] A court must consider any substantial time spent in custody awaiting trial. It is not a mitigating factor lessening the severity of the criminal act or the accused's culpability. A court tasked with imposing an appropriate sentence however cannot ignore the substantial time an accused might have spent in custody pending his conviction and sentence. A court must accord sufficient weight to such time spent in custody and consider it with other relevant factors to arrive at an appropriate sentence. Taking it into account does not mean simply deducting the time spent in custody from the intended punishment. [19]

[32] From the record alone, it is apparent that the appellant spent just more than five months in custody before his conviction and sentence. The pre-trial incarceration was not considered by the court a quo. The court wrongly approached this matter as if only a lengthy unsuspended period of imprisonment were appropriate. This approach closed his eyes to other more appropriate sentences available. The court did not even consider partially suspending part of the imprisonment. It thus essentially rubberstamped the unsuspended sentence suggested by the State. Furthermore, the learned magistrate did neither consider nor reject the sentences of a fine or community service delivered under a suspended sentence requested by the appellant.

[33] This shows that the learned magistrate misdirected himself by not exercising his discretion regarding sentence judicially, resulting in a disturbingly inappropriate long sentence of imprisonment that induces a sense of shock. The appeal court can thus consider the sentence afresh. This, at the same time, satisfies the requirement of reasonable prospects of success on appeal that forms part of an application for condonation.

[34] Applying the principles stated hereinbefore I believe that a period of imprisonment with a part thereof suspended fits the appellant and the crime, is fair to

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[19] *S v Kauzuu* 2006 (1) NR 225 (HC) at 232E-G quoting numerous South African cases that set this principle. See also *S v Seas* 2018 (4) NR 1050 (HC) paragraph 27, *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 262 (30 June 2020) paragraph 11 and *S v Ncamushe* (CC 10/2017) [2021] NAHCNLD 45 (18 May 2021) paragraph 28.

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society and is blended with a measure of mercy as the circumstances of this matter warrants it.

[35] In the result it is ordered that:

1. The Respondent's point in limine is dismissed and the appellant's late filing of his notice of appeal is condoned.

2. The conviction of guilty of assault with the intent to do grievous bodily harm read with section 21 of the Combating of Domestic Violence Act, 4 of 2003 is altered to read as follows: Guilty of assault with the intent to do grievous bodily harm.

3. The appeal against the sentence is allowed and the sentence is set aside and substituted by the following sentence: Three (3) years imprisonment of which 1 year imprisonment is suspended for a period of 5 years on condition that the accused is not convicted assault with the intent to do grievous bodily harm committed during the period of suspension.

4. The sentence is antedated to 13 July 2020.

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D. F. SMALL

ACTING JUDGE

I agree,

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D. C. MUNSU

ACTING JUDGE

APPEARANCES

APPELLANT:	Mr Daniel Joseph Evaritus Shikongo Correctional Facility, Tsumeb
RESPONDENT:	Mr R S Sibungo Of Office of the Prosecutor General, Oshakati