

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI
REVIEW JUDGMENT

Case Title: <i>S v Jason Shapange</i>	CR NO: 5 /2021 CASE NO: 93/2019
	Division of Court: Northern Local Division
Heard before: Honourable Ms. Justice Salionga J et Honourable Mr. Justice Munsu A J	Delivered on: 29 January 2021
Neutral citation: <i>S v Shapange</i> (CR 5/2021) [2021] NAHCNLD 06 (29 January 2021)	
IT IS ORDERED THAT: <ol style="list-style-type: none">1. The conviction is confirmed.2. The sentence is set aside.3. On each count, accused is sentenced to a fine of N\$ 3000 or 90 days imprisonment of which N\$1000 or 30 days imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of <u>assault</u> committed during the period of suspension. It is ordered that the sentence imposed on count one is to run concurrently with the sentence on count two and the sentence imposed on count three is to run concurrently with the sentence imposed on count four.4. The sentences are backdated to 14 June 2019.	

Reasons for the above order:

SALIONGA J (MUNSU AJ concurring):

[1] The accused pleaded guilty to two counts of assault and two counts of crimen injuria. Section 112 (1) (a) of the Criminal Procedure Act 51 of 1977 was applied and was convicted as charged. He was sentenced to N\$3000.00 alternatively 90 days imprisonment of which N\$1000.00 and 30 days is suspended for 5 years on condition the accused is not convicted of any offence contravening the Domestic Violence Act 4 of 2003 committed during the period of suspension. The magistrate ordered the sentence to apply to each count and to run consecutively.

[2] On review the reviewing judge has no issue with the conviction and sentence imposed. However it is the formulation of the condition that prompted this court to direct the following query to the learned magistrate; whether the condition of suspension was not vague.

[3] The learned magistrate rightfully conceded that the condition is wide and might lead to uncertainty as it is too vague. She sought directives and guidance from the Honourable Reviewing Judge.

[4] The condition that the accused is not convicted of any offence in contravening the Domestic Violence Act, Act 4 of 2003 is too wide and accused would not know which offence under the Act he is prohibited from committing. This court had on numerous occasions reiterated that the condition of suspension must be clear, specific and certain.

[5] Another issue which was only detected while preparing this judgement is where the magistrate had ordered the sentence to apply to each count and to run consecutively. I am alive that sentencing falls within the discretion of a trial court and the review or appeal court can only interfere in exceptional cases. However in my view where multiple offences committed are closely connected in terms of time, common facts and in respect whereof the individual sentences may cumulatively amount to a sentence that induces a sense of

shock it is appropriate for that court to consider ordering sentences to run concurrently and not consecutively. See *S v Young* 1977 (1) SA 602 (A) at 610E-H.

[6] In the instant matter count one and two are relatively connected as they were committed on the same day, same place and against his grandmother Olivia Johannes. Whilst count three and four were also committed on the same day, same place and against his sister Hileni Jonas. It appears the accused used obscene language before threatening to assault both complainants. It is thus proper when justice demands that the incident be viewed as one whole, a composite sentence should be imposed so as to avoid duplication and resultant undue harshness. See *Fourie v S* [2001] 4 All SA 365 (SCA) par [20] or convictions should be taken together for sentencing purposes. Since the offences are relatively connected the latter option ought to be considered.

[7] The magistrate further framed the suspended part of the sentence as follows ...‘of which N\$1000 and 30 days is suspended...’ It is not clear what she meant because if the conditions are substantive and breach of only one of them exposes the accused to implementation then “or” must be used, not “and.”

[8] For the reasons stated above I find the sentences too harsh and induce a sense of shock warranting interference by this court.

[9] In the result, the following orders are made:

1. The conviction is confirmed.
2. The sentence is set aside.
3. On each count, accused is sentenced to a fine of N\$ 3000 or 90 days imprisonment of which N\$1000 or 30 days imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of assault committed during the period of suspension. It is ordered that the sentence imposed on count one is to run concurrently with the sentence on count two and the sentence imposed on count three is to run concurrently with the sentence imposed on count four.
4. The sentences are backdated to 14 June 2019.

J T SALIONGA JUDGE	D C MUNSU ACTING JUDGE