REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

Case No: CC 2/2021

In the matter between:

THE STATE

v

MOSES MUTUKA **ACCUSED**

Neutral citation*: S v Mutuka* (CC 2/2021) [2022] NAHCNLD 25 (28 March 2022)

Coram: SMALL, AJ

Heard: **25 March 2022**

Delivered: **28 March 2022**

Flynote: Criminal Procedure-Sentence -The primary purposes of punishment are deterrence, prevention, reformation, and retribution. The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation. The other theories, reformative, preventive and deterrent, all find their

justification in the future, in the good that will be produced because of the punishment.

Criminal Procedure-Sentence-Combating of Domestic Violence Act 4 of 2003 does not prescribe increased or mandatory sentences for common law crimes committed in a domestic setup - The existence of such a relationship between perpetrator and victim is not per se the aggravating factor-The aggravating feature of crimes committed in the domestic context is instead found in the additional blame of the conduct of those who abuse their position in such a circle to commit crimes against victims who depend on them for basic human needs like food, shelter, clothing, safety, love, and care. In many instances, this dependency is the reason why victims do not, or cannot afford to, put distance between themselves and the perpetrator of the abuse.

Summary: The accused was convicted of assault with the intent to do grievous bodily harm on diverse occasions as provided for in section 94 of the Criminal Procedure Act, 51 of 1977, read with the Combatting of Domestic Violence Act, 4 of 2003

The Court *found* that when an adult slaps a youthful toddler against the head or neck, causing her to fall, and that the assaults described by the other witnesses, is indicative of an intention to injure such victim seriously especially if she was also injured seriously.

A fine was not considered appropriate as it would trivialize the offence. A sentence of imprisonment partially suspended was imposed.

ORDER

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1. Five [5] years imprisonment of which two [2] years imprisonment is suspended for a period of five [5] years on condition the accused is not

convicted of assault with intent to do grievous bodily harm committed during the period of suspension.

SENTENCE

SMALL AJ:

[1] On 23 February 2022, the Court convicted the accused of Assault with the intent to do grievous bodily harm. The assaults were committed on diverse occasions, as provided in section 94 of the Criminal Procedure Act 51 of 1977. The Combatting of Domestic Violence Act, 4 of 2003 applies as the accused, and the victim was in a domestic relationship as the toddler Katjire Matumbo was the daughter of his girlfriend Lydia Gamses.[1]

[2] Mr Camm represented the accused, while Mr Sibungo represented the State. The State called Lydia Gamses, the former girlfriend of the accused and the mother of Katjire Matumbo, in aggravation of sentence as is required by section 25 of the Combatting of Domestic Violence Act 2003. The Defence led no evidence on behalf of the accused before sentence.

[3] Ms Gamses requested the Court to impose a sentence of ten years imprisonment. Consequently, in cross-examination, she said that she does not consider the imposition of a fine appropriate in this matter.

[4] Numerous decisions have spelt out the approach regarding factors to be considered and the purposes of punishment. I do not think it is necessary to add to those, and I will refer to a previous decision where I summarized several aspects in this regard.

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[1] *S v Mutuka* (CC 2/2021) [2022] NAHCNLD 15 (23 February 2022).

'The Namibian Supreme Court in *S v Van Wyk*[2] has settled the general approach when it comes to sentencing thirty years ago. The triad of factors that a sentencing court must consider is the crime, the offender, and the interests of society. The primary purposes of punishment are deterrence, prevention, reformation, and retribution. While deterrence has been described as the all-important object of punishment and the other aspects as accessories, retribution is considered of lesser importance in modern times. In sentencing, the difficulty arises, not from the general principles applicable but from the complicated task of harmonising and balancing these principles and applying them to the facts. The duty to harmonise and balance does not imply equal weight or value to the different factors. Situations can arise where it is necessary and often unavoidable to emphasise one at the expense of the other.' [3]

[5] Holmes JA, sitting in the South African Appeal Court in *S v Rabie* [4] quoting from Gordon Criminal Law of Scotland (1967) at 50 at 862A-B, explained the differences between the different theories as follows:

'The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation... The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment.'[5]

[6] I, however, agree with the stipulation in *R v Karg* [6] regarding the continued importance of retribution. Especially while violence against vulnerable persons and children continues relentlessly in the Namibian society:

'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into

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[2] *S v Van Wyk* 1993 NR 426 (SC).

[3] *S v Domingo* (CC 9/2020) [2021] NAHCNLD 115 (16 December 2021) paragraph 11.

[4] *S v Rabie* 1975 (4) SA 855 (A).

[5] *S v Domingo* (supra) paragraph 11.

[6] *R v Karg* 1961 (1) SA 231 (A) at 236A-B. Also see *S v Kanguro* 2011 (2) NR 616 (HC) paragraph 9 and *S v Schiefer* 2017 (4) NR 1073 (SC) paragraph 30.

disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.'[7]

[7] It is essential to consider *S v Harrington*[8], where the Court said that a sentencing court should never assume a vengeful attitude and quoted with approval from Francis Bacon's essay 'On Revenge' which stated:

'Revenge is a kind of wild justice which, the more man's nature runs to, the more ought law to weed it out.'

Submissions by Counsel

[8] Mr Camm pointed out that the accused is a first offender and had been in pre-sentence custody for about two years. He urged the Court to sentence the accused to a fine partially suspended for a period the Court considers appropriate. Mr Sibungo on the other hand suggested a sentence of five years imprisonment.

The accused, the crime and societal interests

[9] The accused at present is 33 years old. He was born and raised in Mangetti in the Tsumkwe Constituency. He attended school to Grade 6 at Mangetti Primary School. At the time of the commission of the offence, he was 29 years old. Before his arrest, the accused worked as a charcoal worker at farm Wildgemoet. He is a first offender at the age of 29. The accused has three children, aged 12, 9 and 4. The two elder kids are with their mother in Tsintsabis, while the lastborn stays with the accused's mother. Both the accused's parents are still alive, but both are unemployed. He has two younger siblings, a brother, and a sister. It appears as if the accused provides financial support to all of them.

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[7] See also the oft quoted judgement of Smuts AJ [as he then was] in *S v Bothile* 2007 NR (1) 137 (HC) paragraph 21 and *S v Matlata* 2018 (4) NR 1038 (HC) paragraph 30, *S v Kadhila* [2014] NAHCNLD 17 (CC 14/2013; 12 March 2014).

[8] *S v Harrington* 1989 (2) SA 348 ZSC at 362E-H.

[10] The Court convicted the accused of assaulting the victim, a toddler Katjire Matumbo on diverse occasions. The accused did this by beating her using his fists and open hand, dragging her on the ground and beating her against a corrugated iron. She lost some of her teeth during the assaults.[9] The victim at the time was not yet two years old. The doctor concluded that the victim's body had lesions of different production dates indicating that she had received trauma at other times and on different dates. The injuries could not have been inflicted in a simple fall.[10]

[11] I previously in *S v Domingo*[11] dealt with the interest of society as follows and wish to reiterate it here:

'Society is no longer prepared to put up with criminals in its midst. They show their anger and frustrations through public demonstrations and even at times by taking the law into their own hands. However, a court must always be mindful that general expectation is not synonymous with the public interest. The courts must serve the interests of society and, though cognisant of its feelings and expectations, they should not blindly adhere to it. Substantial justice requires that the accused's interests and circumstances are considered with that of society and the circumstances of the case. The sentence should be such that he will be welcomed back in society's midst after he has served his sentence. However, the balancing of these principles and the application thereof to the facts is, often, complicated and no easy task.'[12]

[12] In the court's determination of what punishment is appropriate in the circumstances of this case, I will regard the triad of factors, namely the personal circumstances of the accused, the offence and the circumstances of its commission, and the interests of society. Punishment must fit the criminal as well as the crime. Depending on the circumstances, it should as far as possible be fair to the community but also blended with a measure of mercy.[13]

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[9] *S v Mutuka* (CC 2/2021) [2022] NAHCNLD 15 (23 February 2022) paragraphs 12-21.

[10] *S v Mutuka* (CC 2/2021) [2022] NAHCNLD 15 (23 February 2022) paragraphs 27-28.

[11] *S v Domingo* (CC 9/2020) [2021] NAHCNLD 115 (16 December 2021) in paragraph 21.

[12] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665; [1995] ZACC *3) at 431C – D* and *S v Kapia and Others* 2018 (3) NR 885 (HC) paragraph 37.

[13] *S v Zinn* 1969 (2) SA 537 (A) and *S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR 639); *S v Rabie* 1975 (4) SA 855 (A) at 862G – H; *S v Seas* 2018 (4) NR 1050 (HC) paragraph 23.

[13] I will in this matter attempt to apply what was summarized as follows in *S v Katsamba*[14]:

'A court searches for an appropriate sentence in each case. It, however, does not mean that there is only one such appropriate sentence. No court of law is perfect. The court is the community's arm dedicated to the making of assessments for proper sentences. The court's sentence judgement is essentially its evaluation of what is fair in the circumstances of a given case. It is, however, not a scientific calculation. A sentence cannot be objectively measured and then snipped off in the correct lengths.[15] It has been said that:

Sentencing, at the best of times, is an imprecise and imperfect procedure and there will always be a substantial range of appropriate sentences.'[16]

[14] There is a persistent demand for more severe sentences to be imposed on all offenders for all crimes. The apparent foundation for this demand is a steadfast belief that no punishment can be too harsh and that the more severe it is, the better it will protect society. This is not necessarily correct for all crimes.

[15] I will consider the substantial time spent in custody awaiting trial. This is not a mitigating factor that lessens the severity of the criminal act or the accused's culpability. However, a court tasked with imposing an appropriate sentence cannot ignore the accused's substantial time in pre-trial custody pending his conviction and sentence. A court must accord sufficient weight to such time spent in custody and consider it together with other relevant factors to arrive at an appropriate sentence. However, it has been said that taking it into account does not mean simply deducting the time spent in custody from the intended punishment.[17] In this matter I however believe such calculation will be fair and appropriate.

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[14] *S v Katsamba* (CC 14/2018) [2021] NAHCNLD 113 (6 December 2021) in paragraph 15.

[15] *S v Martin* 1996 (2) SACR 378 (W) at 381E-G.

[16] *Smith v The Queen* 1987 (34) CCC (3d) 97 at 109-110 by McIntyre J in the minority judgment as quoted in *S v Vries* 1996 (2) SACR 638 (Nm) at 643f-g; *S v Vries* 1998 NR 244 (HC) at 249G-H.

[17] *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 and *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 262 (30 June 2020) paragraph 11.

[16] Mr Camm submitted that section 21 of the Combatting of Domestic Violence Act, Act 4 of 2003 does not confer on that offence any character, different from other offences. Accordingly, the court should approach sentencing similarly to that in other cases.

[17] As I said in *S v Muronga* [18], the Combating of Domestic Violence Act 4 of 2003 does not prescribe increased or mandatory sentences for common law crimes committed in a domestic setup. It refrains explicitly from doing so. The Act, for the most part, clearly creates avenues for the victims of domestic violence, who live in a wide range of domestic relationships, to seek protection against such abuse when it occurs or creates avenues to prevent the commission of such offences with the assistance of the courts. However, the existence of such a relationship between perpetrator and victim is not per se the aggravating factor. The aggravating feature of crimes committed in the domestic context is instead found in the additional blame of the conduct of those who abuse their position in such a circle to commit crimes against victims who depend on them for basic human needs like food, shelter, clothing, safety, love, and care. In many instances, this dependency is the reason why victims do not, or cannot afford to, put distance between themselves and the perpetrator of the abuse.

[18] I do not consider a fine to be the appropriate Sentence in the circumstances of this case. It would diminish the crime committed and leave the accused with the perception that the offence of which he has been convicted is trivial. It is not.

[19] Finally, the following was said in *Shetu v The State:* [19]

'The alternatives are either a fine or a partially suspended sentence. A fine was not appropriate in the circumstances of this case. A suspended sentence 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

[18] *S v Muronga* (CC 05/2020) [2021] NAHCNLD 102 (29 October 2021) paragraph 21.

[19] *Shetu v The State* HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 34 (1 April 2021) paragraph 27.

sentence or the suspended part thereof hanging over him. If he behaves himself, he will not serve the suspended sentence or a portion thereof. On the other hand, if he subsequently commits a similar offence, the Court can put the suspended sentence into operation.' [20]

[20] In the result the accused is sentenced to:

1. Five [5] years imprisonment of which two [2] years imprisonment is suspended for a period of five [5] years on condition the accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension.

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D. F. SMALL

Acting Judge

[20] *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.

APPEARANCES

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