

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case Title: <i>The State v Joseph Pendapala</i>	Case No.: CR 45/2022
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler AJ	Delivered on: 26 September 2022
Neutral citation: <i>S v Pendapala</i> (CR 45/2022) [2022] NAHCNLD 94 (26 September 2022)	
It is hereby ordered that: <ol style="list-style-type: none">1. The conviction on count 1: assault with intent to do grievous bodily harm is set aside and substituted with a conviction of common assault (read with the provisions of the Combating of Domestic Violence Act 4 of 2003).2. The sentence imposed on count 1 is set aside and the accused is sentenced to twelve (12) month's imprisonment.3. The conviction on count 2 is confirmed4. The sentence on count 2 is amended to read: Nine (9) months imprisonment of which three (3) months are suspended for a period of three (3) years on the condition that	

the accused is not convicted of assault by threat, committed during the period of suspension.

5. The sentences imposed in counts 1 and 2 to run concurrently.
6. The sentence is antedated to 25 June 2021.

Reasons for the order:

KESSLAU AJ (SALIONGA J concurring):

[1] The matter comes before this court on automatic review in terms of Section 302 of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[2] The accused, in the Magistrates Court of Outapi, plead not guilty to a charge of common assault (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) and a charge of assault by threat (read with the provisions of the Combating of Domestic Violence Act 4 of 2003). The State presented evidence upon which the accused was subsequently convicted in respect of count 1: Assault with the intent to do grievous bodily harm and Count 2: Assault by threat (both read with the provisions of Act 4 of 2003).

[3] The sentences imposed were on count 1: '24 Months imprisonment of which 12 months is suspended for a period of three years in terms of section 297 CPA 51 of 1977 on condition that accused is not convicted of any domestic related offence under the Combating of the Domestic Violence Act, Act 3 of 2003 or any assault during the period of suspension; Count 2: 9 months imprisonment of which 3 months is to be suspended for a period of three years in terms of section 297 of the CPA 51 of 1977 on condition that accused is not convicted of any assault by threat under the Combating of Domestic Violence Act, Act 4 of 2003 or any assault by threat during the period of suspension'. The sentences were ordered to run concurrent. The accused was sentenced on 25 June 2021 however the review was received almost seven months later on 20 January 2022.

[4] A query dated 21 January 2022 was directed to the learned magistrate to wit:

'1. Is "assault with intent to do grievous bodily harm a competent verdict to a charge of "common

assault”?

2. Is the condition of suspension not too wide and vague?’

[5] The magistrate took approximately six months to provide his reply thus the accused has served the imprisonment part of the sentence already. The reply reads as follows: ‘With regard to point 1, it is a well-known fact in law that assault with the intent to do grievous bodily harm is not a competent verdict to a charge of assault common. ...I do not understand what the honourable Judge meant by this as I did not indicate it in my sentence’. He conceded that the sentence was too vague and suggested a sentence of ‘24 months imprisonment of which 12 months is suspended for a period of three years in terms of sect 297 CPA 51 of 1977 on condition that accused is not convicted of Assault with the intent to do grievous bodily harm read with the combating of domestic violence act, act 4 of 2003 during the period of suspension’.

[6] The accused was charged and plead to common assault. After evidence he was convicted of the more serious offence of assault with the intent to do grievous harm. The magistrate appeared not to have used the six months it took to provide his answer to read the record for he would have noticed that the following is noted in his ruling:

‘From the evidence by the complainant, it was testified that accused used a broom stick in assaulting the complainant. The State preferred a lesser charge of assault common. Thus court is of the view that the accused was supposed to be charged of assault with the intent to do grievous bodily harm on count one read with the provisions of the Domestic violence Act, Act 4 of 2003. The count is looking at the intention of the accused at the time of assaulting the complainant. As such accused is found guilty of assault with the intent to do grievous bodily harm read with the combating of Domestic Violence Act, Act 4 of 2004 on count one.’ (sic)

[7] The magistrate committed a misdirection by convicting the accused of a different offense than the one he was charged with however the accused will suffer no prejudice if the conviction is amended to one of common assault on review. The magistrate, when imposing sentence, considered the offense of assault with the intent to do grievous bodily harm. It follows that the sentence needs to be adjusted to reflect the lesser charge.

[8] The conditions of suspension on both counts are too wide and vague and additionally it should include the provision that the accused should be convicted for an offense committed during the period of suspension.¹ The magistrate, in his reply, failed to

realise his mistake in that regard. When comparing similar sentences imposed for the offence of common assault in the domestic violence context, the tendency is to impose direct imprisonment of less than twelve months.² *In casu* the accused has, due to the delay in submitting the review, served his sentence and therefor this court will interfere only with the suspended part thereof.

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

1. The conviction on count 1: assault with intent to do grievous bodily harm is set aside and substituted with a conviction of common assault (read with the provisions of the Combating of Domestic Violence Act 4 of 2003).
2. The sentence imposed on count 1 is set aside and the accused is sentenced to twelve (12) month's imprisonment.
3. The conviction on count 2 is confirmed
4. The sentence on count 2 is amended to read: Nine (9) months imprisonment of which three (3) months are suspended for a period of three (3) years on the condition that the accused is not convicted of assault by threat, committed during the period of suspension.
5. The sentences imposed in counts 1 and 2 to run concurrently.
6. The sentence is antedated to 25 June 2021.

Judge(s) signature	Comments:
KESSLAU AJ:	None
SALIONGA J:	None

¹ *S v Afrikaner* (CR 73/2022) [2022] NAHCMD 351 (18 July 2022); *S v Damon* (CR 13/2022) [2022] NAHCMD 132 (24 March 2022); *S v Setson* (CR 31/2022) [2022] NAHCNLD 69 (6 July 2022)

² *S v Gebhard* (CR 37/2021) [2021] NAHCMD 220 (10 May 2021), *Camm v The State* (CA 43/2016) [2016] NAHCMD 280 (23 September 2016)