



CASE NO. CR 38/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

**JEREMIA SHINDUME
ACCUSED**

HIGH COURT REVIEW CASE NO. 523/2011

CORAM: MULLER, J *et* SWANEPOEL, J

Delivered on: 20 April 2011

REVIEW JUDGMENT

SWANEPOEL, J.:[1] The accused was arraigned in the Magistrate's Court for the district of Ondangwa on the following charges (unedited):

"1. Count 1

That the accused is guilty of the crime of Assault:

In that upon or about the 15 day of November 2010 and at or near **Onankulo Uukwiyu Uushona** in the district of **Ondangwa** the said accused did wrongfully and unlawfully assault **Ruusa**

Ndilimeke by kicking her on her legs thereby causes her some wounds, injuries or hurt, pains.

2. Count 2 Assault (Threat)

That the accused is guilty of the crime of Assault: (Threat)

In that upon or about the 15 day of November 2010 and at or near **Onankulo Uukwiyu Uushona** in the district of **Ondangwa** the said accused did wrongfully and unlawfully assault **Ruusa Ndilimeke** by **threatening then and there to kill her** thereby causes the said **Ruusa Ndilimeke** to believe that the said accused intended and had the means forthwith to carry out his threat."

[2] On count 1 the accused was sentenced to payment of the amount of N\$500.00 or in default, five (5) months imprisonment. On count 2 a direct term of imprisonment of twelve (12) months was imposed.

[3] I directed the following query to the learned magistrate:

"The learned magistrate's reasons for imposing direct imprisonment without an option of a fine on count 2 particularly after having imposed a fine with an alternative term of imprisonment for actual assault on count 1, are awaited per return of mail."

[4] The learned magistrate replied as follows:

*"The complainant in the case of Assault (Threat) is not related to the accused, and **during the prosecutor's submission it was stated that the complainant was almost raped by the said accused**, and as such did the court feel that an option of a fine would not be appropriate, but rather direct imprisonment; and as such I imposed a custodial sentence in respect of count 2. (emphasis supplied).*

In respect of the 1st count the court imposed an option of a fine, because the injuries are not backed-up with J88, and I was left with the impression that the injuries incurred would warrant for a fine as sentenced”

[5] Upon receipt of the aforesaid reasons I directed that the accused be released forthwith on count 2 and these are the reasons therefore.

[6] The learned magistrate has in my view clearly misdirected himself when he took the submission by the public prosecutor before sentence into consideration that the complainant was almost raped by the said accused. The accused was not charged with attempted rape nor was he in any event afforded the opportunity to address the court on this fact (which was not evidence) before sentence.

[7] In the result the sentence of twelve (12) months imprisonment cannot stand and it is substituted with the following.
Six (6) months imprisonment wholly suspended for a period of three (3) years on condition that the accused is not convicted of assault during the period of suspension.

SWANEPOEL, J

I agree

MULLER, J