CASE NO.: CA 119/2010

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

NATANGWE MARTIN MUAHAFA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 07.03.2011
Delivered on: 11.03.2011

APPEAL JUDGMENT

LIEBENBERG, J.: [1] Appellant appeared in the Magistrate's Court, Tsumeb on a single charge of assault with intent to do grievous bodily harm. He pleaded not guilty and conducted his own defence; but in the end, he was convicted as charged and sentenced to five years imprisonment. This appeal lies against sentence only.

[2] Although respondent in its heads of argument contends that appellant was admitted to bail pending the appeal, there is nothing on record showing that it is indeed the position. However, when the appeal was heard, it was confirmed that appellant was not in custody; but admitted to bail pending appeal.

[3] The trial was finalised with appellant sentenced on 14 May 2009 to five years' imprisonment. Although the date on which the Notice of Appeal was drawn is 19 May 2009, the only date stamp appearing on the said notice is that of the Registrar of the High Court, dated 15 December 2010. It is not clear why the notice was filed with this Court and not with the clerk of court, as required by the rules of the Magistrates' Court (Rule 67 (1)), and whether this was merely an erroneous duplicate filing. Be it as it may, the notice should have been filed with the clerk of the court, together with the power of attorney, even before an application for bail, pending appeal, could be entertained. Although there is no documentary proof that the notice of appeal was filed within the time frame of fourteen days, as required by the rules; and the respondent not taking issue with that, I shall, for purposes of the appeal, accept that to have been the position.

[4] The grounds of appeal raised in the Notice of Appeal are: The sentence is disturbingly inappropriate and induces a sense of shock; the magistrate failed to take into account appellant's personal circumstances; and instead, over-emphasised the seriousness of the offence vis-a-vis the mitigating factors.

[5] The presiding magistrate in his additional reasons expressed the view that the sentence was proper and did not induce a sense of shock; and, even though appellant was a first offender, it did not mean that direct imprisonment could not be imposed. Furthermore, that appellant should have given thought to his children before he committed the offence; that he was not married to the complainant and therefore could not have claimed her fidelity; and lastly, that appellant was dismissed from his employment as a result of the sentence imposed.

[6] The prosecution called two witnesses namely, the complainant Fiena Tuyeni and Gotlieb Binge, an eye witness. The appellant testified in his defence. Briefly the evidence adduced at the trial can be summarised in the following terms:

It is common cause that appellant and the complainant were both in the military and based at Oshivelo army base. That, they had an ongoing relationship prior to the night of the incident; during which accusations of infidelity were flung at the complainant (by the appellant), who had just returned from Windhoek. This culminated in a vicious attack on the complainant, during which she was slapped and hit several times on her head and body with handles of a mop and a rake, respectively. Complainant testified that the moment appellant entered her room, situated in the barracks; he locked the door behind him and started accusing her of infidelity. He then slapped her once on the cheek and pushed the television (from its stand) onto the floor. He broke the mop and used the handle to hit the complainant thrice on the head, causing open wounds, from which she bled, covering her face in blood. After crushing a DVD he continued assaulting her all over her body with the rake handle during which she lost one of her front teeth. She tried to shelter herself by going into a locker, but apparently without much success. It seems that complainant lost consciousness at that stage, as she only afterwards realised that she also sustained injuries on her legs and open wounds on her face. She was subsequently admitted to hospital where the wounds were sutured. She was left with a scar on the face and several marks ('scars') on her thighs.

[7] The medical examination report handed into evidence by agreement, was, for reasons unknown, compiled only after ten days by Dr. Sefu. The gist of the report is that there were bruises and abrasions on the right arm, right thigh, right side of the neck, and the back. There were three open wounds; all sutured i.e. two on the scalp, one below the right eye, and one on the left forearm. The right eye was still swollen whilst one tooth on the upper jaw was missing.

[8] The evidence given by the witness Binge corroborates the evidence of the complainant as far as it concerns the assault, perpetrated on the complainant. He said he was awoken by the cries of help coming from the complainant, and when he went to her room, he found the door

locked. He ran to the window and as the light was switched on, he saw the appellant beating the complainant with a stick. He was unable to state the number of blows inflicted. When he told appellant to stop, he replied saying: *"I will stop now"*, but simply continued. Binge decided to drive to the police station to summon the police to the barracks, but was told that they were already on their way. Upon his return, he came across a police officer telling appellant to stop, otherwise they would break down the door. Appellant then opened the door and came outside, followed by the complainant, crying, with her head covered in blood. Complainant was transported to Tsumeb hospital that same evening.

[9] According to the appellant he caught the complainant in the act of having sexual intercourse with an unknown man. When complainant later on opened the door, this person came out and ran away. He confronted her and she asked for his forgiveness. As he was about to leave the room she pulled him on the arm, causing him to fall onto the bed. He said he then lost his temper and slapped her, causing her to knock her head against the wall. He confirmed hitting her with a broomstick. He explained that the television and DVD broke when complainant pushed him; whereafter he fell, breaking it in the process. He admitted having beaten complainant on her buttocks with the broomstick; also that he was told by both Mr. Binge and Warrant Officer Shivute, from the Namibian Police, to stop doing so.

[10] Judging from the State witnesses' evidence and specifically the injuries inflicted with a broom/mop handle as noted on the medical examination report, it is evident that complainant was subjected to a brutal and vicious attack. Complainant lost consciousness during the assault and testified that she vomited and 'had to use the toilet'. She was left with a permanent scar below her eye and marks on her legs.

[11] In his *ex tempore* judgment the magistrate - clearly having rejected the appellant's version of catching complainant in the act and her pushing him down onto the bed - stated that appellant was not provoked, but became angry as a result of his jealousy. The magistrate,

in my view, was correct in rejecting the appellant's account of what led to the assault on the complainant. There is no reason for this Court to interfere with the magistrate's findings on credibility and factual findings and it was neither contended that any misdirection or irregularity was committed by the magistrate in his evaluation of the evidence.

[12] The court, in its judgment on sentence, amplified its earlier view by saying that the complainant was of slender build and unable to defend her against the appellant's attack. The court *a quo* took cognisance of the fact that appellant was armed with a firearm at the time and concluded that the only reason why he did not use it, was because he had forgotten about it. However, there is nothing on record justifying that conclusion. The magistrate clearly viewed the assault in a serious light and was mindful that it could have had fatal consequences. Regard was also had to appellant's continued assault, despite intervention from others, calling on him to stop. These are all factors the magistrate was entitled to consider when passing sentence and I am unable to find that he misdirected himself in that regard.

[13] There can be no doubt that the assault falls in the category of cases that can be described as serious. Appellant made use of a broomstick/mop handle to hit the complainant with, all over her body. A fair number of these blows were directed at the head, causing open wounds and her bleeding from her head. Despite complainant's cries for help and her telling the appellant that she had lost a tooth, he persisted. The magistrate's opinion, that the assault could have been fatal, is not without merit. This Court frequently tries cases in which the victims were subjected to similar and even lesser degrees of assaults, with fatal consequences. The fact that complainant lost consciousness under the attack, could be indicative of the severity thereof; whilst her being nauseous, a sign that she was in shock. Aggravating factors are: that complainant was completely defenceless and no threat to the appellant; it was a protracted and unprovoked assault in which appellant persisted, despite being told to stop; he made use of a weapon which inflicted serious injury, leaving complainant with permanent scars on her face and body.

[14] On the opposite side lie the mitigating factors, and the court *a quo* took into account that appellant was in the employ of the Namibian Defence Force; that he had a sickly mother suffering from cancer and who, together with other family members and his own two children, were all his responsibility, as he was the only person in the family with a monthly income. When testifying in mitigation, appellant said that although he could not undo his misdeeds, he was sorry for what he has done. He is thirty-four years of age and a first offender.

[15] Appellant asserted that the trial magistrate failed to take his personal circumstances into account; more specifically, the fact that appellant was a first offender; had *three* minor children of school going age; would lose his employment; and had acted out of frustration and hurt because of complainant's infidelity. The grounds raised, in my view, are without merit.

[16] Firstly, appellant only has *two* minor children and not three as contended. Secondly, in his testimony appellant said that he did confront complainant about her infidelity, but only became angry when she pulled/pushed him down onto the bed -not that he was 'frustrated'. In any event, the court specifically found that he had acted out of jealousy, a finding appellant must have accepted, for he did not appeal against his conviction as well. Furthermore, by not specifically stating in the *ex tempore* judgment that the court was mindful that appellant was a first offender and that he would lose his employment as a result of the sentence imposed, does not mean to say that it was given *no consideration* at all. This is not an instance where the Court of Appeal - as it often is the case - is faced with a situation where *no* reasons for conviction or sentence are provided.

[17] *In casu*, sufficient reasons were given in the judgment on sentence for this Court to see which factors were considered and the weight given thereto. At page 30 of the record of

proceedings the magistrate, after conviction, specifically enquired from the prosecutor whether a criminal record of the appellant was available, which was answered in the negative. The magistrate was alive to the fact that appellant was a first offender and equally must have appreciated the fact that, by imposing direct imprisonment, appellant obviously would lose his employment. To that end the following appears from the record at p 38:

> *"Therefore, although the sentence the Court decides to impose against you, it has also touched the minds of the Courts, although I feel pain at the bottom of my heart for your mitigatory factors, for the people whom you are responsible with and your loved mother who is suffering from cancer, I would fail in my duty should I not impose a direct imprisonment..."* (sic)

In my view, there is nothing showing that the magistrate failed to take into consideration the personal circumstances of the appellant, and the appeal cannot succeed on that ground.

[18] Besides emphasising the seriousness of the crime and the nature of the injuries inflicted, the court *a quo* also took into account the prevalence of the specific offence; and that it was usually defenceless people, like women and children, who fall victim to unscrupulous criminals. The magistrate was under a duty to take notice of the incidence of crime in his area **(S** *v Muvangua,* 1975 (2) SA 83 (SWA); *S v Packereysammy,* 2004 (2) SACR 169 (SCA)). These are all aggravating factors the magistrate was entitled to take into account when deciding what punishment would not only serve the interests of the appellant, but also that of society. In this case, appellant's actions were unprovoked and unjustified; more so because the relationship between him and the complainant was such that he could simply have walked away and terminated his relationship with her, without turning violent and 'punish' her for something he believed she was guilty of. We live in an orderly society where the rights of others are respected - also the freedom of association - a fundamental right enshrined in the Namibian Constitution. As a member of the Forces, appellant ought to have understood this better than the average person.

[19] Ms. *Kishi*, appearing for the appellant, conceded that the crime was serious, but submitted that it did not justify a sentence of direct imprisonment; which sentence in her view, was disturbingly inappropriate as a custodial sentence was not justified in the circumstances. Mr.*Lisulo,* for the responded, shared a different view and contended that, should the Court find the sentence to be too harsh - which he to some extent conceded - then a partly suspended sentence in the circumstances would be appropriate.

[20] It is trite that punishment falls within the ambit of the discretion of the trial court and that a Court of Appeal should not readily interfere unless there is good cause; and there will be good cause where the sentence is vitiated by irregularity or misdirection or, where the sentence imposed is disturbingly inappropriate and induced a sense of shock. To come to such conclusion, the Court must be satisfied that the sentencing court did not exercise its discretion, regarding sentence, judicially[1].

[21] The argument advanced on behalf of the appellant that the court *a quo* misdirected itself by disregarding the personal circumstances of the appellant is, as shown *supra*, without merit. The question that needs to be answered, in my view, is whether the sentence, on the facts of the present case, is disturbingly inappropriate as to induce a sense of shock. Although Mr. *Lisulo* initially contended that it was not the case, he later on conceded that he was unable to refer us to any case law on point, justifying a sentence similar to what has been imposed in this instance. Furthermore, that the term of imprisonment imposed might be unreasonably long and that this Court would therefore be entitled to reduce it; but, not to substitute it with a totally suspended sentence, as, in his opinion, that would not be an appropriate sentence in the circumstances.

[22] The concession, in my view, is properly made and I find a sentence of direct imprisonment of five years on a charge of assault with intent to do grievous bodily harm, in the circumstances of this case, to be inappropriate as to induce a sense of shock. The Court

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1 *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.

accordingly finds that the presiding magistrate, in sentencing, did not exercise his discretion judicially to the extent that the term of imprisonment isexcessive, and not justified. A sentence of this kind should be reserved for more serious cases. Although the assault was considered to be serious and warrants a custodial sentence, it simply did not warrant the exceptionally heavy sentence meted out by the court *a quo* in this instance.

[23] When regard is had to the main principles applicable to sentencing i.e. the triad of factors **(S** *v Zinn)*[2] and the main purpose of punishment **(S** *v Khumalo and Others)*[3], I firmly believe that a deterrent sentence is called for, individually and generally; and given the circumstances of the present case, it would be justified to emphasise the deterrent aspects of punishment[4]. Appellant, as submitted by Ms. *Kishi*, might not be a threat to society in general requiring his removal on that basis, but, the chances that he would in future become involved in other relationships are excellent; increasing the possibility that he might find him in a similar situation as the present, where jealousy takes control of his emotions. To that end, appellant needs to reform. In a broader sense, the message must be clear to all like-minded persons that the courts will not sit idle and watch how the rights of the vulnerable in our society, are simply trampled on; almost like these rights are non-existent. Women are not utility objects - they equally have rights like men and are entitled to look up to the courts for protection, where there rights have been violated.

[24] I have already alluded to the fact that in the present circumstances, a custodial sentence would be justified. We have been referred to the unreported judgment of *Angula ImmanuelKashamane*[5] where the Court substituted the sentence of three years

(direct) imprisonment (on a similar charge) with a totally suspended sentence. The Court in that instance found that the assault was not serious - unlike the Court's finding in the present case. Mindful of the fact that a wholly suspended sentence is also viewed to be a deterrent

2 1969 (2) SA 537 (A)
3 1984 (3) SA 327 (A)
4 See *S v van Wyk (supra)*
5 Case No. CA 42/2005 delivered on 14.08.2006

sentence hanging over the offender's head, I do not find the present case to be an instance where a wholly suspended sentence would be justified; reflecting that a proper balance was struck between the interests of the appellant and that of society. I believe justice dictates that the sentence to be imposed should also reflect the element of retribution, albeit to a lesser extent.

[25] In the result, it is ordered:

1. The appeal against sentence succeeds to the extent that the sentence is set aside and is substituted with the following: Three (3) years imprisonment of which eighteen (18) months imprisonment is suspended for five (5) years, on condition that the accused is not convicted of the offence of assault with intent to cause grievous bodily harm, committed during the period of suspension.
2. Appellant to report himself to the Clerk of Court Tsumeb within seven (7) days from today for committal.

LIEBENBERG, J

I concur.

TOMMASI, J

ON BEHALF OF THE APPELLANT	**MS. F. Kishi**
Instructed by:	**Kishi Legal Practitioners**
ON BEHALF OF THE RESPONDENT	**Mr. D. Lisulo**
Instructed by:	**Office of the Prosecutor-General**