



REPORTABLE

CASE NO. CR 31/2012

**SUMMARY:**

**IN THE HIGH COURT OF NAMIBIA**

**MAIN DIVISION**

**HELD AT WINDHOEK**

In the matter between:

**THE STATE**

and

**EFRAIM GURUSEB**

*HOFF, J / SMUTS, J*

*15 May 2012*

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Suspension of sentence – condition of suspension should only refer to an offence which has a material connection to the nature and circumstances of the offence of which the accused had been convicted of – condition must not be so wide that it has no nexus with the offence the accused had been convicted of

Care should be taken that a severe suspended sentence is not put into operation by a petty contravention

Duty of court to formulate condition(s) of sentence within certain parametres – something which should not in an ill-considered manner be left to be taken care of in the future.

Conditions of sentence must also be reasonable and formulated in such a way that they do not cause future unfairness and injustice.



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In the matter between:

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and

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**HIGH COURT REVIEW CASE NO.: 700/2012**

**CORAM:** HOFF, J *et* SMUTS, J

Delivered on: 15 May 2012

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**REVIEW JUDGMENT**

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**HOFF, J:** [1] The accused was convicted of the crime of assault with intent to do grievous bodily harm and sentenced to 3 years imprisonment of which 1 year imprisonment was suspended for a period of 5 years on condition that the accused is not convicted of assault with intent to do grievous bodily harm, assault common, or indecent assault committed during the period of suspension.

[2] The accused pleaded guilty that he stabbed the complainant with a knife in his back and in his stomach.

[3] I directed a query to the magistrate requesting reasons why in the formulation of the conditions of the suspended part of the sentence "common assault or indecent assault" were included.

[4] The magistrate in his reply referred me to the provisions of section 297 (1)(b) of Act 51 of 1977 which provide that a court may pass sentence but order the operation of the whole or any part thereof to be suspended on any condition referred to in paragraph (a)(i) which the court may specify in the order.

The magistrate continued and stated: "Therefore the discretion on the condition(s) to be attached to the sentence is the courts. The offences attached to the condition, namely assault common and indecent assault can be regarded to fall within the category of section 297 (1)(a)(i)(hh)".

[5] In terms of section 297 (1)(a)(i) a Court may postpone (in contradistinction to a suspension) the passing of a sentence on one or more conditions relating to, in terms of subsection (hh)",any other matter".

[6] The expression “any other matter” is extremely wide but must be interpreted in the light of the principle that a condition must be related to the offence in question.

The Court in *S v Van den Berg* 1976 (2) SA 232 (TPD) at 234 H referred with approval to the matter of *S v Radebe* 1973 (3) SA 940 (O) where it was held that a condition of suspension should only refer to an offence which has a *material connection to the nature and circumstances of the offence of which the accused had been convicted of* i.e. it must not be so wide that it has no nexus with the offence the accused had been convicted of.

[7] The reference to “indecent assault” is in my view too far removed from the nature and circumstances of the offence of assault with intent to do grievous bodily harm of which the accused had been convicted of. In addition indecent assault also implies conduct of a sexual or immoral nature and as such there is no nexus at all between indecent assault and the offence the accused had been convicted of.

[8] The reference to “assault common” is not unrelated to the offence of assault with intent to do grievous bodily harm but should in the light of the sentence imposed not have been included in the manner it was drafted in the suspended sentence. I say this for the following reasons:

One year imprisonment was suspended on condition the accused is not convicted of common assault committed within the period of suspension. This in turn means that should the accused be convicted of common assault (which depending on the circumstances may be regarded as a petty offence) there exist the possibility that the suspended sentence of one year imprisonment may be put into operation in addition to the sentence which may be imposed for his second conviction.

[9] In *S v Allart* 1984 (2) SA 731 TPD the court held that a suspended sentence for dealing in dagga in contravention of section 2(a) of Act 41 of 1971 on condition that section 2(a) and section 2(b) (possession or use of dagga) are not contravened falls within the ambit of section 297(1) of the Criminal Procedure Act, 51 of 1977 but warned that care should be taken to ensure that a severe suspended sentence for a contravention of section 2(a) is not put into operation by a petty contravention of section 2(b). The Court in *Allart* at 736 A – B held that the condition of suspension must be formulated to eliminate this danger and that the attitude of the trial court should not be that the Court which has in future the duty to consider an application to put the suspended sentence into operation, would have the discretion to further suspend that sentence. To do so would be to neglect the duty of the trial court to formulate the condition(s) of sentence within certain parametres, something which should not in an ill-considered manner be left to be taken care of in the future. As was suggested in *Allart (supra)* by imposing an appropriate qualification, for example that the suspended sentence can only be put into operation when effective imprisonment of a specific period is imposed for the subsequent conviction, may the problem be avoided.

[10] I endorse these views.

In *S v Benn; S v Jordaan; S v Gabriels* 2004 (2) SACR 156 CPD it was held that in addition to the requirement that the conditions of suspension should have some relation to the crime committed, the conditions must be reasonable and should further be formulated in such a way that they do not cause future unfairness and injustice.

[11] I am of the view that the sentence imposed by the magistrate court cannot be left unamended.

[12] In the result the following orders are made:

1. The conviction is confirmed.
2. The sentence is amended to read as follows:

Three years imprisonment of which one year imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of the crime of assault with intent to do grievous bodily harm or the crime of common assault committed during the period of suspension and where in respect of a conviction in respect of common assault the accused is sentenced to a direct term of imprisonment of not less than six months.

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**HOFF, J**

I agree

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**SMUTS, J**