CASE NO.: CR 21/2012

IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

THE STATE

and

MALAKIA EPRAIM KOVI SHIKONDONGOLO

(HIGH COURT REVIEW CASE NO.: 97/2012)

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

Delivered on: 02 October 2012

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused was convicted in the magistrate's court for the district of Eenhana on a charge of assault with intent to do grievous bodily harm and sentenced to '36 months imprisonment of which 12 months is suspended for 5 years' on the usual conditions. The conviction appears to be in order and will be confirmed.

[2] When the matter came on review a query was directed to the magistrate requiring from her to furnish substantive reasons for the sentence imposed. This came in the form of four paragraphs styled as aggravating factors and in the following terms, (being nothing more than a repetition of the reasons mentioned when pronouncing sentence):

> '1. Assault with intent to do grievous bodily harm is a serious offence which is rife [in] the district.
> 2. The weapon used [by] the accused to inflict assault on the complainant, and the injuries sustained by the complainant is indicated on J88.
> 3. Accused assaulted complainant with no apparent reason.
> 4. Accused deserve[s] to be [rehabilitated] and corrected so that he can [become] a respectable law abiding businessman of the community.'

[3] The court, after hearing evidence, convicted the accused 'as charged' of assault with intent to do grievous bodily harm i.e. 'hitting him with fists and kicking with feet'; though it is alleged in the charge that the complainant was hit with a stick all 'over his body'. At no stage did complainant testify that the accused used a stick to assault him with. The magistrate's reference to a weapon used by the accused as an aggravating factor is thus misleading and not supported by the facts as the complainant was punched and kicked. Complainant said that he was hit with fists and when he fell down the accused kicked him 'about three times'. The medical examination report handed in shows that the complainant had a laceration and fracture of the left forearm; swollen left thigh; and swollen left cheek. There is nothing indicative, either from the report itself or the complainant's testimony, that the assault and the injuries inflicted were of serious nature. It is thus not clear from the magistrate's reasons on sentence which circumstances were relied on when reaching the conclusion that the assault perpetrated was serious. It was not established whether or not the complainant was kicked with shod feet; neither whether his arm got fractured as a result of the kicking or possibly when he

fell down when punched on the head. I am accordingly not persuaded that the circumstances prevailing during the commission of the offence are such that it requires punishment of direct imprisonment.

[4] When stating in her reasons that the accused attacked the complainant without reason, the magistrate clearly lost sight of the evidence adduced (and which is common cause) that the complainant owed the accused some money which he was supposed to take to the accused's home. When the accused was not at home the complainant went to a cuca shop in search of the accused but then started buying liquor, seemingly using the money he intended paying the accused with. When the accused later turned up demanding payment, this led to an altercation and subsequent fight during which the complainant got injured. A fair assessment of the evidence, in my view, would be to find that the accused, to a certain extent, had been provoked by the complainant. Although this *per se* may not be considered to be a ground of justification, it should be a mitigating factor taken into account in sentencing.

[5] The accused is 28 years of age; a first offender; single and has small children. The number of children was not established by the magistrate; neither whether they were in the accused's custody and whether he supports them financially. He is self-employed in that he sells goods (unknown).

[6] Besides those circumstances already mentioned above, the magistrate further relied on the prevalence of assault cases dealt with in that district which, according to her, make up 85% of all cases monthly registered in that court. There can be no doubt that a court should have cognisance of the number of similar cases dealt with in its jurisdiction and rely thereon in order to impose deterrent sentences. However, it would be wrong for such court in sentencing to over-emphasise this aspect at the expense of an accused's legitimate interests. The court *a quo* did not even refer to the accused's circumstances in its reasons on sentence and completely ignored the fact that the accused is a first offender having children. Although the court with the view of imposing a deterrent sentence was entitled to consider the prevalence

of the particular offence in that district, it had clearly given undue weight to that factor, resulting in a sentence being imposed that differs substantially from what ordinarily would have been considered to be appropriate punishment.

[7] In *S v Tjiho*[1] the following appears in the headnote:

> 'When sentencing an accused, the trial court must bear in mind the nature of the crime, the interests of society and the interests of the accused. These three factors are frequently referred to as the triad.
> The sentencing Judge or magistrate must keep in mind the purposes of punishment and must try to effect a balance in respect of the interests of the accused, and the interests of society in relation to the crime itself and in relation to those purposes. Whatever the nature of the crime may be, it is the person who committed the crime who is to be punished. His or her personal circumstances play an important role and must not be ignored. The nett result of this approach, is that sentences for similar offences frequently differ because personal circumstances differ. The personal circumstances of the accused must be weighed in relation to the interests of society. It is in the interests of society that the accused receive an appropriate sentence. Furthermore, law and order must prevail in society and society expects the court's protection against lawlessness. The accused must be prevented from repeating his crime and, if possible, reformed, and other persons must be deterred from doing what the accused did.'

[8] The trial court on the one hand failed to take into account material facts pertaining to the accused, while on the other hand, over-emphasised the importance of other facts which it considered to be aggravating. The sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by this court had it sat as court of first instance. Accordingly, the sentence cannot be permitted to stand.

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[1] 1991 NR 361 (HC).

[9] In the result, the Court makes the following order:

1. The conviction is confirmed.
2. The sentence imposed is set aside and is substituted with the following: 6 months' imprisonment wholly suspended for 5 years on condition that the accused is not convicted of assault with intent to do grievous bodily harm, committed during the period of suspension.
3. The sentence is antedated to 10.05.2012.
4. The accused to be liberated forthwith.

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LIEBENBERG, J

I concur.

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TOMMASI, J