

**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK JUDGMENT**

Case no: CR 86/2013

NOT REPORTABLE

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**BRITZ HENDRICKS**

**ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 1653/2013)

*Neutral citation: State v Britz (CR 86/2013) [2013] NAHCMD 381 (20  
December 2013)*

**CORAM: SMUTS, J et UEITELE, J**

Delivered on: 20 December 2013

**Flynote:** In an automatic review the court found itself unable to confirm a sentence of 2 years imprisonment for attempted murder on the basis that it was not accord with justice. The accused had stabbed a woman with whom he had been in a domestic relationship. One stab wound was to the face of the complainant and in close proximity to her left eye. The court found that the

presiding magistrate failed to accord sufficient weight to the seriousness of the offence and especially to its domestic context.

## **ORDER**

The conviction is confirmed but not the sentence. Given the conclusion I have reached, I direct the Registrar of this court to provide a copy of this judgment to the office of the Prosecutor-General.

## **JUDGMENT**

**SMUTS. J.:** [1 ] This matter has come before me by way of automatic review.

2] The accused was charged with attempted murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. The particulars by the charge were that on or about 27 March 2009 and in Windhoek the accused allegedly unlawfully assaulted Ms Cindeley Von Cuttichau by stabbing her on both hands and in the face with a knife and kicking her with booted feet in the ribs twice with the attempt to murder her.

3] The accused pleaded not guilty to the charge on 26 October 2010. In explanation of his plea, he said that when he returned home from work, he had a quarrel with the complainant who took an empty beer bottle and attempted to stab him. He said that he pushed her away and went to bed.

4] The complainant gave evidence that the accused was her ex-boyfriend. She said that she and her small daughter, who was then 2 years old, had proceeded to the single quarters in Katutura, with one of her friends. They had bought some wine and cool drink and returned home. The accused had followed them. She said that the accused quarrelled with her friend and he then proceeded in the complainant's direction and, whilst she was holding her small child, stabbed in her direction. She testified that she

ducked to avoid the blow and put her child down. She had raised her left hand to avoid the blow and was stabbed in the middle finger of her left hand - with the knife which the accused had wielded in her direction. He stabbed at her again and the knife struck her on the left side of her head in close proximity of her left eye where she sustained a cut wound of some 4 cm close to her eye. She exhibited the scar in court. She was stabbed a third time - in her right hand as she tried to block a further stabbing attempt, also resulting in a cut wound. She became weak because of her blood loss and was taken to hospital by her friend. She remained in hospital for a week. During that time, she underwent surgical treatment. The complainant also said that the accused had kicked her in the bladder region two days before the stabbing which had caused her pain and discomfort.

5] A J88 medical report was received in evidence which indicated lacerations to her left forehead and her left hand.

6] The accused testified to the effect as stated in his plea explanation, denying the assaults and suggesting that the complainant's wounds were self inflicted (by a broken beer bottle).

7] The presiding magistrate rightly rejected the accused's version and correctly convicted him on 30 March 2010.

8] The accused was a first offender and addressed the court in mitigation of sentence. He said he was 35 years old with 3 children aged 12 years, 7 years, and 6 months old respectively. He was not married and was employed as a carpenter. He also said that he looked after his grandmother and paid for her medical expenses.

9] In sentencing the accused, the court correctly referred to the well established principles in sentencing - taking into account the personal circumstances of the accused, the nature of the crime and the interests of society.

10] The court correctly acknowledged the mitigating weight of the accused being a

first offender and breadwinner for his 3 children and grandmother. The court also rightly recognised the aggravating feature of the case being in the context of a domestic dispute and the use of a knife and the stab wound in the face - and the potentially fatal consequences of a stab wound to the head. The court also noted that the accused had expressed no remorse for his actions. The presiding magistrate also referred to the wide spread prevalence crime of this kind which could no longer be tolerated. The court then sentenced the accused to 2 years imprisonment without the option of a fine.

11] The accused was sentenced on 30 March 2011. The review was only received by the Registrar of this court on 5 November 2013 and was then allocated. No explanation is provided by the presiding magistrate for the very lengthy delay of more than 2 and half years in providing the record of proceedings for automatic review. A possible explanation for this inordinate delay may be the fact that the certificate by the transcribers is dated 11 October 2013. But I would at the very least have expected the magistrate to set out the steps taken by him with regard to the finalisation of the transcription of the record and why and how the inordinate delay had occurred. That explanation would need to have addressed the date upon which the record was referred for transcription and what steps the magistrate took in the face of a lack of progress in its transcription. It is after all the responsibility of the presiding magistrate to ensure that records of cases which must proceed by way of automatic review to the High Court should be forwarded to the High Court with all due expedition. The failure to do so fundamentally undermines the administration of justice and may in several instances almost render nugatory the important right of accused persons to have their proceedings timeously reviewed by the High Court. What is entirely unacceptable in this instance is the lengthy delay of 2 and half years for the transcribed record to be forwarded to this court. The transcribed portion is a mere 38 pages long. What compounds this shocking delay is the absence of any explanation for it.

12] I turn to the sentence which the magistrate imposed upon the accused. The magistrate plainly appreciated the applicable principles in sentencing by referring to the triad of factors to be considered. But the presiding magistrate however in my view

misdirected himself in the application of those principles to the facts of this matter. Even though he rightly referred to the widespread prevalence of violence against woman and the potentially fatal consequences of the accused's actions, these factors were in my view accorded entirely insufficient weight in imposing a sentence of 2 years imprisonment.

13] The complainant's evidence was of the three stabbings she endured at the hand of the accused. She was able to block two of these - with her left and right hands respectively - whilst the other resulted in a stab wound close to her eye. The medical evidence corroborated the lacerations in the vicinity of her left eye and left hand. The cut to her right hand is not referred to in the J88 medical report. I thus accept that it was of a minor nature. As the magistrate correctly observed, the stabbing in the face could have had fatal consequences or could even have resulted in the loss of the complainant's sight in her left eye. Further aggravating features not mentioned by the magistrate are the repeated nature of the blows and the accused's assault two days previously (of kicking the complainant in the abdomen which caused injury to her bladder). Another aggravating factor was that the complainant was holding her 2 year old daughter when the accused started to attack her.

14] This court has previously stressed the importance of appropriately severe sentences for those who commit crimes involving domestic violence and violence against women and children, given the prevalence of such crimes and the need for society to address the evil of violence against women and children:

The prevalence of domestic violence and the compelling interest of society to combat it, evidenced by the recent legislation to that effect, require that domestic violence should be regarded as an aggravating factor when it comes to imposing punishment. Sentences imposed in this context, whilst taking into account the personal circumstances of the accused and the crime, should also take into account the important need of society to root out the evil of domestic violence and violence against women. In doing so, these sentences should reflect the determination of courts in Namibia to give effect to and protect the constitutional values of the inviolability of human dignity and equality between men and

women. The clear and unequivocal message which should resonate from the courts in Namibia is that crimes involving domestic violence will not be tolerated and that sentences will be appropriately severe.<sup>1</sup>

15] The Supreme Court recently emphatically reaffirmed these principles in *S v Shaduka*<sup>2</sup> in these terms:

'In addition to aggravating factors pertaining to the crime of murder in general, there are also particular reasons why society is entitled to demand an appropriate judicial response to the crime committed to by the accused: it was perpetrated in a domestic context. Crimes of this nature perpetrated on women and children are rampant in this country and the public at large has repeatedly demonstrated their concerns about its prevalence. So serious has it become that Parliament was moved to adopt the Combating of Domestic Violence Act in 2003. Notwithstanding its promulgation and enforcement, the commission of crimes falling within its scope continued almost unabated. This cannot be allowed and, whenever required, the punishment meted out by courts of law to address such crimes, should reflect the seriousness with which it is being regarded.'

16] Whilst I am mindful that punishment is pre-eminently a matter within the discretion of a trial court, the accused's abuse of the complainant was in my view of a gravely serious nature and calls for a more lengthy custodial sentence than imposed, despite being a first offender. Given that status, consideration could have been given to suspend a portion a far more lengthy custodial sentence on appropriate conditions. But what is clear to me is that a sentence of 2 years imprisonment is strikingly inappropriate and certainly does not in my view accord with justice. I am thus unable to confirm the sentence of 2 years imprisonment imposed on the accused as it does not in my view accord with justice.

17] The conviction is confirmed but not the sentence. Given the conclusion I have

1 *SvBohitile* 2007 (1) 137 (HC) at par [21].

2 Case No. 71/2011 unreported 13 December 2012.

reached, I direct the Registrar of this court to provide a copy of this judgment to the office of the Prosecutor-General.

DF Smuts  
Judge

I agree SFI

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