REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case Title: *The State v Thurupallan Kumaren Govender*	Case No: HC-MD-CRI-APP-CAL-2020/00106
	Division of Court: Main Division
Heard before: Honourable Mr. Justice Liebenberg *et* Honourable Ms Justice January	**Delivered on:** 19 May 2021
Neutral citation: *S v Govender* (HC-MD-CRI-APP-CAL-2020/00106) [2021] NAHCMD 250 (19 May 2021)	

The order:

1. The sentence of 18 months' imprisonment is set aside;

2. The appellant is sentenced to 9 months' imprisonment of which 2 months' imprisonment is suspended for 5 years' on condition that the accused is not convicted of crimen injuria committed during the period of suspension;

3. The sentenced is antedated to 21 September 2020;

Reasons for the order:

Introduction

[1] The appellant was charged with crimen injuria read with the provisions of the Combating of Domestic Violence Act 4 of 2003 (the Act), in that he called the complainant with whom he was in a domestic relationship a 'bitch'.

[2] He was represented by Mr. Karuaihe in the court *a quo*. He pleaded guilty to the charge and was convicted pursuant to a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA) reflecting his plea explanation. The appellant is appearing in person in this court and the respondent is represented by Mr. Muhongo.

The merits

[3] He was sentenced to 18 months, imprisonment on 21 September 2020. The appeal is against sentence.

[4] The appellant has two previous convictions. From the submissions before sentence by the public prosecutor, it seems that the previous convictions are from cases in relation to the same complainant. One is for the violation of a formal warning (presumably in relation to a protection order) where he was convicted and sentenced on 12th April 2018 to a fine of N$2000 or 6 months' imprisonment. The other one is for assault by threat where the appellant was convicted and sentenced on 15th April 2019 to 6 months' imprisonment, wholly suspended for 5 years on condition that the appellant is not convicted of the offence of assault by threat, read with the provisions of Act 4 of 2003, committed during the period of suspension.

[5] The appellant at the time of sentencing was 37 years old. He is divorced and has 3 children. The complainant is the mother of one of these children. The incident occurred on 22 December 2019. The appellant was in custody for about 9 months at the time of sentence. He used to reside in Cape Town and only came to Namibia for holiday. He was employed and

earned a salary of N$7 500. He lost his employment in the meantime due to his arrest.

[6] The complainant testified in accordance with section 25(1) of the Act. She used to be in a relationship with the accused. They have one child together. On the date of this incident the accused harassed her at home. Despite the accused being chased away, he continued running around the house where the complainant was, listening to her conversations with other persons; insulting her that she was a bitch, poor, good for nothing, threatening her that he was there for her and not the child; insulting her with her mother's vagina and even called her mother a witch.

[7] She testified that this was not the first incident of this nature. In the past, the accused threatened to kill her, insulted her, threw things around and had a threatening attitude on countless occasions. She lost track of how many cases she opened against the accused. She wanted him to be sent to jail.

The appeal

[8] The appellant's grounds of appeal are: the learned magistrate over emphasized the seriousness of the crime and the evidence in aggravation; the learned magistrate failed to apply her mind as the sentence does not fit the crime; she did not consider that the appellant showed remorse; that the appellant pleaded guilty as a sign of remorse; that a custodial sentence is inappropriate in the circumstances; that the appellant was a first offender on a charge of crimen injuria; failed to consider the evidence in mitigation and the sentence is unreasonable and no reasonable court would have imposed it.

[9] Mr. Muhongo opposed the appeal. He filed heads of argument wherein he justifies the sentence. In a nutshell, he submitted that the learned magistrate properly applied her mind and considered the relevant factors. Further it is submitted that the learned magistrate did not over-emphasized the seriousness of the offence but placed more emphasis on the seriousness of the offence balanced against the personal circumstances. This submission was made with reference to case law wherein it is accepted that not all competing factors need to be given equal weight and that one or more factors may deserve more weight or

outweigh personal circumstances of an accused.[1]

[10] Mr. Muhongo was alerted to the fact that the appellant was 9 months in custody, trial awaiting and asked when the court considers that period with the sentence of 18 months' imprisonment, if it does not culminate in an inappropriate sentence. Mr. Muhongo then submitted that this court may suspend a portion of the sentence imposed.

[11] We need to reiterate that:

'When it comes to sentencing the correct approach of the trial court is to decide on an appropriate term of imprisonment and thereafter to determine whether to suspend such sentence wholly (where permissible) or partially. The portion of the sentence suspended thus remains an integral part of the sentence and cannot be treated as something separate from or additional to the non-suspended portion of the sentence. . . .'[2] (our emphasis)

[12] There is a misperception in some circles that when part of a sentence is suspended, that the sentence is reduced. The purpose of suspending a portion of a sentence is to ameliorate the effect of the sentence at the time of sentencing. When an accused dishonors a condition or conditions he/she still has to serve the suspended portion as an integral part of the initial sentence.

[13] Considering the crime, the personal circumstances of the accused and the convictions of society, the purpose and objectives of punishment i.e. prevention, deterrence, reformation and retribution, we are in agreement with the magistrate that the circumstances of this matter are such that the court a quo's approach to consider a custodial sentence as justified, cannot be faulted. Although the offence of crimen injuria would ordinarily not be regarded as serious to justify a long period of imprisonment, the circumstances in this matter, in our view, are exceptional as this is the third instance where the victim is the same complainant. That said, there must still be a relation between the crime, the personal circumstances of the appellant and the interest of society. We are however, of the view that the learned magistrate over emphasized the past conduct of the appellant and seriousness of this offence. In the

[1] See: *S v Ignatius Petu Muruti*, High Court case no. 10/2011 delivered 27 January 2012.
[2] *S v Lwishi* 2012 () NR 325 (HC) at 327 C.

circumstances, the sentence is shocking, harsh and inappropriate; moreover, where the appellant was in custody trial awaiting for 9 months, and pleaded guilty.

[14] This court is empowered in terms of section 304(2) (c) (ii) of the CPA to confirm, reduce, alter or set aside the sentence or any order of the magistrate's court.

[15] In the result, it is ordered:

1. The sentence of 18 months' imprisonment is set aside;

2. The appellant is sentenced to 9 months' imprisonment of which 2 months' imprisonment is suspended for 5 years' on condition that the accused is not convicted of crimen injuria committed during the period of suspension;

3. The sentenced is antedated to 21 September 2020.

Judge(s) signature	**Comments:**
JANUARY J	
LIEBENBERG J	
Counsel:	
Appellant	**Respondent**
Mr. Siyomunji of Siyomunji Law Chambers	Ms. Nyoni of Office of the Prosecutor-General