

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CR 13/2013

In the matter between:

THE STATE

and

ALBERTINA VATILIFA HAUWANGA

High Court NLD Review Case Ref No.: 66/2013

Neutral citation: *The State v Hauwanga* (CR 13/2013) [2013] NAHCNLD 37
(28 June 2013)

Coram: LIEBENBERG J and TOMMASI J

Delivered: 28 June 2013

Flynote: Criminal procedure – Sentence – Antedating of sentence by trial court not permitted – Section 282 – Option of antedating only open to appeal and review court.

ORDER

1. The sentence of 24 months' imprisonment is set aside and substituted with 20 months' imprisonment.
 2. A copy of this judgment to be made available to the Ministry of Gender Equality and Child Welfare, Oshakati for the attention of Ms Simanga.
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JUDGMENT

LIEBENBERG J (TOMMASI J concurring):

[1] In a judgment delivered on the 22nd of April 2013 this court on review set aside the sentence imposed on the accused and remitted the matter to the trial court with the direction to request a social welfare report on the circumstances of the accused's 3 minor children, in view of the custodial sentence imposed. The magistrate was further directed to take into consideration when sentencing, the portion of the sentence already served by the accused.

[2] When proceedings continued on the 14th of June a report styled 'Pre-Sentence Report' compiled by Ms Simanga, from the Ministry of Gender Equality and Child Welfare was read into the record in the absence of the probation officer and handed up. The accused was again sentenced to 24

months' imprisonment and the sentence was antedated to the date on which the original sentence was imposed ie 19 March 2013.

[3] The report addresses the court's earlier concerns about the well-being of the accused's minor children who are at present in the custody of family members. From the report it is evident that it is in the best interest of the children that they remain in the custody of the respective families until such time the accused has served her sentence. An issue addressed in the report and which raises this court's concerns is that it would appear that the accused also ill-treated her minor children and acted violently towards them. It is therefore not strange that she was convicted of similar conduct towards the 3 year old victim in the present case.

[4] Against this backdrop it would not be desirable to return the accused's children to her without an enquiry being held into the accused's circumstances and whether she is fit to have the children returned into her custody. Once the accused had served her sentence the probation officer would therefore be required to initiate and facilitate Children's Court proceedings in which their custody and control is decided afresh.

[5] The order made by the magistrate to antedate the sentence is irregular as s 282 of the Criminal Procedure Act 51 of 1977 does not permit a trial court to antedate a sentence as this is strictly limited to substitute sentences imposed on review or appeal. See *S v Sileni*¹; *The State v Kristof Amalwa Seven*²; *The State v Uaumbondlembo Mbinge*³. Section 282 is intended to make it possible for the appeal or review court to take into account a part of a sentence which has already been served. The magistrate when sentencing the accused afresh was required to take into account the 3 months the accused had already served of the original sentence and in view thereof to impose an appropriate sentence. This she failed to do.

¹2005 (2) SACR 576 (EC) at 577e-h.

²Case No CR 06/2010 (unreported) delivered on 23.04.2010.

³Case No CR 06/2011 (unreported) delivered on 16.02.2011.

[6] Section 282 provides for antedating of a sentence of imprisonment where the sentence 'is set aside on appeal or review and any other sentence of imprisonment is thereafter imposed...'. A sentence of 24 months' imprisonment, given the circumstances of the case, appears to me appropriate. However, whereas the sentencing court failed to take into consideration the 3 months already served by the accused, as the magistrate was directed to do in the earlier judgment, this constituted a misdirection and the sentence cannot be permitted to stand.

[6] There is however one more aspect of the proceedings conducted in the court below that deserves further comment and that is the manner in which the social welfare report was received into evidence. The record of proceedings reflects that the accused was never afforded the opportunity to challenge any finding or recommendation made in the report as regards her children. This constitutes an irregularity but in the present circumstances I am satisfied that the accused did not suffer any prejudice as a result thereof because the report did not deal with the accused's personal circumstances but rather with that of her minor children in view of the custodial sentence imposed by the court.

[7] Magistrates however should be mindful that an accused person is entitled to challenge the admissibility and content of documentary evidence relied upon by the court, in this instance the social welfare report. This was not brought to the attention of the unrepresented accused and although the content of the report was read into the record, the accused was not asked whether or not she agrees with what has been stated in the report or whether she wants to challenge any findings or recommendations made by the probation officer in respect of her children.

[8] In the result the following order is made:

1. The sentence of 24 months' imprisonment is set aside and substituted with 20 months' imprisonment.

2. A copy of this judgment to be made available to the Ministry of Gender Equality and Child Welfare, Oshakati for the attention of Ms Simanga.

JC LIEBENBERG
JUDGE

MA TOMMASI
JUDGE