



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

CR NO.: 13/2016

In the matter between:

THE STATE

and

ALWEENDO FILLIPUS

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: 198/2016

Neutral citation: *The State v Fillipus* (198/2016) [2016] NAHCNLD 82 (23 September 2016)

Coram: **CHEDA J**

Delivered: **23 September 2016**

Flynote: Trial magistrates should not view scrutiny or review as a personal attack, but, a necessary judiciary process designed to guide and educate them — Where an accused is charged with one lesser and one serious charge, it is inappropriate to impose a wholly suspended sentence on a more serious one and impose a fine on a lesser one — The exercise of judiciary discretion must manifest itself in the sentence and / or outcome of the proceedings and not by mere mention of it — The fact that the State has not appealed a magistrate's court decision does not bar, the scrutiny magistrate or reviewing judge from raising a query on the matter brought to it by a review process.

Summary: This matter was referred for review as per the review procedure. A query was raised and the magistrate took issue with a host of issues regarding the review procedure. The court dealt with the issue of the suspended sentence, position of the State in such matters and use of a judicial discretion. Proceedings were, however, confirmed.

ORDER

1. The proceedings are confirmed.
2. The learned trial magistrate should bear in mind the above guidelines in future.

JUDGMENT

CHEDA, J

[1] This is a review judgment forwarded to me as per criminal review procedure. The accused was charged as follows:

Count 1 – Assault with intent to do grievous bodily harm as read with section 21 of the Combating of Domestic Violence Act, Act 4/2003

Count 2 – Assault by threat as read with Section 21 of Act 4/2003

[2] I raised a query with the learned trial magistrate and the said query which resulted in the following:

“In addition to my *ex tempore* reasons, I may only add that I have exercised my judicial discretion in suspending the sentence in *toto*. A wholly suspended sentence is just one of the many sentencing options available to the trier of facts during sentencing. A wholly suspended sentence is in itself not a lenient sentence just because the accused would not have to serve it immediately. Amongst others, a suspended sentence may deter an accused from committing further and/or similar crimes during the period of suspension. The accused may serve a sentence if he breaches the condition of suspension.

I have attempted to reply to the honourable judge's query without clarity on what ground the sentenced I have imposed appears to be lenient. Most probably, my reply would have been different if, for example the state has appealed against my sentence and as required have stated their grounds of appeal".

[3] There are three issues which emanate from the above response which I intend to deal with, two of which seem to be a serious misconception about reviews:

Attitude towards reviews

[4] It has been my observation and indeed of some of my colleagues as well, that, some magistrates view comments of either Regional Magistrates or High Court Judges as a personal attack on their persons. I would like to disabuse them of this unfortunate misconception. The judiciary is one of those disciplines which is governed by a high code of conduct and whose guiding beacon is the attainment of justice for all manner of people.

[5] Therefore, there is nothing personal by a reviewing or scrutiny judicial officer which can be made to bear on those below them. For that reason those judicial officers whose work fall for either scrutiny or review which can be made to bear on those below them is purely for judicial purposes without fear, favour, affection or goodwill. The review procedure is there as a guide to those who the legal system, has for the time being, placed below others, for example Judges and scrutiny Regional Magistrates. It is for that reason that courts *a quo* should view reviews as educational and not as personal attacks on them.

[6] The danger of viewing it as an attack is that those whose work is being reviewed suddenly develop a defensive mechanism which unfortunately clouds the whole object of a review or scrutiny. Those who are impervious to guidance and correction will unfortunately remain where they are, as such attitude does not augur well for the proper administration of justice.

Discretion

[7] It is trite law that a trier of facts has an unfettered discretion with regards to sentence, see *S v Holder* 1999 (2)SA 70 (A) (77-78). However, the said discretion should be seen to be judicially exercised. This should manifest itself in the sentence passed in comparison with the circumstances surrounding the commission of the offence. Doubt is cast when a judicial officer simply states that he/she has used a judicial discretion, whereas the sentence passed is in complete variance with the logical conclusion thereof. Judicial discretion is not a term to be used loosely without a proper application of one's mind.

[8] Justice would have been served if the learned magistrate had suspended the less serious charge than the serious one. It was not proper for him/her to have suspended the whole sentence on a crime of this nature. Accused should have been made to suffer for the more serious offence as it shows that he went ahead and carried out his threat, by physically assaulting the complainant.

[9] Judicial discretion requires a careful thought-process of a judicial officer who consciously applies his or her mind to the task before him/her. It is a term which connotes judicial seriousness and its proper application is manifested in the judgment and/or sentence without more. Above all, it should not be used to escape judicial interference as that is an inherent power of review or scrutiny designed to ensure that accused persons receive justice thereby eliminating sentences which are passed by capricious and whimsical magistrates.

Appeal by the State

[10] The State indeed has a right to appeal against a sentence imposed by a trial court. This is how the learned magistrate understands it as well. However, the magistrate seems to labour under a serious mistake of both fact and law that she thinks that where the State, for some reason does not appeal, the higher court should not raise a query. This is a serious and dangerous misconception of an otherwise simple procedure.

[11] This court, and indeed the scrutiny court has a right to raise an alarm where there is an outcry regarding an injustice in a trial and ultimately a sentence which is out of step with the current judicial thinking. This is what brings the court to correct this misconception by this judgment.

[12] The reviewing Judge in the exercise of its reviewing power is not guided by the query raised by the State. Indeed the State has a major role when either the conviction or sentenced is appealed against and in some instances can seek a review. These are entirely two different procedures whose aims and objectives are to achieve the proper administration of justice. Therefore, it was, incorrect for the learned trial magistrate, I.T Velikoshi to think that the reviewing judge should not raise a query where the State is silent. The sequence of events in this matter need to be emphasised in order to assist the learned magistrate's approach to this matter.

[13] On the 19 January 2011 the accused threatened to kill Alweendo Erastus by shooting him with a bow and arrow. At that time he was not charged with the said assault for the reasons that are not clear. This offence is count 2 in the proceedings under review.

[14] In count 1, which is supposed to have been count 2, by virtue of events in this matter, accused assaulted the same complainant on the 5 October 2011 with an iron bar several times on the various parts of the body and the said assault necessitated him to receive medical attention. It is this assault to do grievous bodily harm which has aroused my attention for the reasons that follow:

- (a) this was the second assault in less than a year on the same complainant. Surely the second assault is a clear indication that he is a violent man and if this, on its own, does not raise the trial magistrate's antenna, then nothing other than murder will ever will;
- (b) he used a dangerous weapon to assault the complainant;
- (c) the assault was indiscriminate and repeated. This type of reckless assault should have troubled the learned magistrate's mind; and
- (d) the complainant suffered injuries which necessitated medical treatment.

[15] The above factors, if properly taken into account would justify an imposition of a short, but, sharp sentence in order to adequately punish the accused. Above all, the learned trial magistrate should have borne in mind that this otherwise common law crime has had its severity upgraded by the enactment of the Combating of Domestic Violence Act, Act 4/2003. This, therefore, stands to reason that both individual and general deterrences are called for. In my opinion, failure to accord it the status it deserves, is to say the least, a miscarriage of justice and a failure by the trier of facts to do justice in the circumstances.

[16] While it is true that a suspended sentence is part of the sentencing regime, heed should not be lost that a suspended sentence in some instances is not justifiable, such as is in this case.

[17] A wholly suspended sentence should not be willy-nilly imposed. There are certain considerations to be made as shown in *S v Burger, 1975 (4) SA 877 at 881 A* where *Holmes JA* stated

“Balancing all relevant considerations, I come to the conclusion that an appropriate sentence would be of imprisonment for four years, with two years thereof suspended. The latter Damoclean warning is calculated to induce the appellant to watch his step in treading life’s pathway—to the benefit of society”

[18] In my view, where there are two offences, one minor and the other serious, it is inappropriate to impose a prison term on a serious one, only to wholly suspend it and then impose a fine on a lesser one. In *casu*, the assault with intent to do grievous harm should have attracted an effective prison term as it is more serious than the assault by threat and it was committed after the first one.

[19] In my mind this is the type of offender who should not have been treated with kid gloves as he had already exhibited signs of violence as far back as January. I should add that judicial officers should always be alive to conduct which if left unchecked may result in more serious crimes.

[20] Education finds a home in those who are open minded, after all is the most peaceful weapon which you may use to change the world. In addition, thereto, education made us who we are.

[21] It is trite law that Judiciary discretion should not only be exercised judicially, but, reasonably. Reasonably in that a judicial officer must apply his mind and indeed take into considerations all the relevant factors, therein.

[22] Judicial discretion should not be questioned save where it is vitiated by irregularity or misdirection or the sentence be disturbingly inappropriate, see *S v Rabie* 1975 (4) SA 855 (A) at 857 D – F. This was not the case in *casu*.

[23] It is for the above reason that I find that the sentencing approach adopted by the learned trial magistrate is out of step with well-known legal principles.

[24] In the result, this is the order:

1. The proceedings are confirmed.
2. The learned trial magistrate should bear in mind the above guidelines in future.

M Cheda
Judge