

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

REVIEW JUDGMENT

Case no: CR 38/2018

In the matter between:

**THE STATE**

v

**CHELSEA AUSEB**

**ACCUSED**

(High Court Review Case No. 335/2018)

**Neutral citation:** *S v Auseb* (CR 38/2018) [2018] NAHCNLD 84 (13 August 2018)

**Coram:** JANUARY J *et* SALIONGA AJ

**Delivered:** 13 August 2018

**Flynote:** Criminal procedure – Sentence – Assault with intent to do grievous bodily harm – Custodial sentence of 5 (five) years imprisonment–of which 1 year imprisonment is suspended for 4 years on condition. Sentence considered startlingly inappropriate in circumstances of case – Custodial sentence justified – Sentence altered to 3 years imprisonment.

**Summary:** The accused was charged with assault with the intent to do grievous bodily harm. He pleaded not guilty and after evidence was led he was convicted. The magistrate sentenced him to 5 years direct imprisonment of which 1 year is suspended. He is a first offender and no previous conviction. Court a quo overemphasising the seriousness of the offence. There is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of review. Sentence too excessive and inappropriate and set aside on review.

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### **ORDER**

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1. The conviction is confirmed.
  2. The sentence of 5 (five) years imprisonment of which 1 year imprisonment is suspended for 4 years on condition is set aside and is substituted with the following sentence: 3 years imprisonment .
  3. The sentence is antedated to 23 May 2018.
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### **JUDGMENT**

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SALIONGA AJ (JANUARYJ concurring):

[1] Accused stood charged with assault with intent to do grievous bodily harm in the Tsumeb Magistrate Court and was convicted on 23.05.2018. He was subsequently sentenced to 5 years' imprisonment of which 1 year imprisonment is suspended for 4 years on condition the accused is not convicted of assault with intent to do grievous bodily harm, committed during the period of suspension.

[2] On review I directed a query to the learned magistrate whether, in the circumstances of the case, the sentence was not too excessive.

[3] In his reply the magistrate indicated that he had taken the following factors into consideration; the personal circumstances of the accused, the offence committed, the interest of the community. He made reference to *S v Simon* 2007 (2) NR 500 at p 517 whereby the court in weighting up these factors observed that 'It cannot be gainsaid that in cases of sentencing where different and competing factors jostle for treatment it is necessary to strike a balance which will do justice to the accused and the interests of society'.

[4] The magistrate was also of the view that the sentence imposed was fair and justified in that there is evidence that a fight between the accused and complainant erupted prior to the assault and thereafter the complainant ran away. The accused chased complainant and eventually stabbed him twice on the back whilst on the ground. That the accused retaliated since the offence was committed after the fight had already stopped. That the J88 indicates the seriousness of injuries suffered as result of an unprovoked attack by the accused and that no remorse could be seen from him.

[5] The magistrate correctly pointed out that the complainant suffered a deep cut wound on the left shoulder, stab wounds on the back, cut wounds on the left side of the neck and on right back and abrasions on the left shoulder as indicated in J88 medical report. I do also agree with the learned magistrate that based on the nature and the manner in which the offence was committed and prevalence thereof; a custodial sentence was inescapable.

[6] This court is mindful that sentencing generally is the discretion of the presiding officer which can better estimate the circumstances and the need for a heavy or light sentence than an appellate court and the review court will only interfere if there is a misdirection on the trial court. In the instant case there is no medical evidence adduced pertaining to what kind of medical treatment the complainant received. All that was handed in was the J88 medical report specifying the nature of the injuries sustained.

[7] In the same review there is nothing suggesting that the injuries sustained were life threatening apart from the scars that could still be visible on the date of the trial. No

wonder the accused was charged with assault with intent to do grievous bodily harm instead of attempted murder. In circumstances as the present, the court, without having heard medical evidence regarding the seriousness of the injury to the complainant and the nature of the treatment given, should not on the sole evidence of the complainant have come to the conclusion, that the attack was serious. In my view to come to such a conclusion in the absence of reliable evidence, would constitute overemphasising the seriousness of the offence.

[8] Notwithstanding the above, it does not mean the offence committed by the accused in the present instance is not considered to be serious at all; as, for purposes of sentence, the court must look at the facts of the particular case and after having weighed these up together with the personal circumstances of the accused, decide what punishment would be fitting in the circumstances.

[9] In deciding what a suitable sentence would be, the circumstances under which the attack on the complainant took place are such that the offence is serious and the accused cannot escape custodial sentence. It seems appropriate, as the trial court did, to suspend part of the sentence.

[10] After due consideration of all competing factors, I have no doubt in my mind that in the circumstances of this case, a custodial sentence of five years' imprisonment 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 the court of appeal' (see *S v Nakanyala* (CR 53/2014) [2014] NAHCMD 274 (19 September 2014) and *S v Tjiho* 1991 NR 361 (HC) at 366B-C). Accordingly, the sentence cannot be permitted to stand and must be set aside.

[11] In the result, the following order is made:

1. The conviction is confirmed.

2. The sentence of 5 years direct imprisonment of which 1 year is suspended for 4 years on condition is set aside and is substituted with the following sentence: 3 years imprisonment.
3. The sentence is antedated to 23 May 2018.

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JT SALIONGA  
ACTING JUDGE

I agree

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HC JANUARY  
JUDGE