



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

REVIEW JUDGMENT

Case no: CR 39/2018

In the matter between:

**THE STATE**

v

**JONAS KHOBOSEB**

**ACCUSED**

(High Court Review Case No 333/2018)

**Neutral citation:** *S v Khoboseb* (CR 39/2018) [2018] NAHCNLD 85 (13 August 2018)

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

**Delivered:** 13 August 2018

**Flynote:** Criminal procedure —Sentence — Imposition of — Factors to be taken into account — Court held where different and compelling factors jostle for treatment it is necessary to strike a balance which will do justice to the accused and interest of society—that sentencing generally is the discretion of the presiding officer and the review court will only interfere if 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 imposed by trial court not appropriate — Custodial sentence appropriate— It is manifestly excessive and induced a sense of shock in the mind of the court — Consequently, court entitled to interfere with the sentence.

**Summary:** Criminal procedure – Sentence – Imposition of – Factors to be taken into account – Court held that where different and compelling factors jostle for treatment it is necessary to strike a balance which will do justice to the accused and interest of society – Trial court entitled to give greater weight to one factor than to others so long as it is not at the expense of disregarding entirely the other factors – Court held further that it is the trial court which can better estimate the circumstances and the need for a heavy or light sentence than an appellate court – In instant case court found that trial court considered all relevant factors and custodial sentence inescapable – Appellant was sentenced to 4 years imprisonment – Court found that 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– Court was accordingly entitled to interfere with the sentence imposed – Court concluded that while a custodial sentence was appropriate such sentence should be set aside and be replaced with 3 years' imprisonment.

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### ORDER

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1. The conviction is confirmed.
2. The sentence of 4 years imprisonment is set aside and is substituted with 3 years' imprisonment.
3. The sentence is antedated to 15 May 2018.

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### JUDGMENT

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SALIONGA, AJ (JANUARY, J concurring):

[1] The accused appeared in the Tsumeb Magistrate Court charged with one count of assault with intent to do grievous bodily harm. He pleaded not guilty and after the evidence was led he was convicted and sentenced to 4 years' direct imprisonment.

[2] When the matter came before me on automatic review, I directed a query to the learned magistrate whether, in the circumstances of the case, the sentence was not too excessive.

[3] The magistrate in his response indicated that when he imposed the sentence; he considered the well-known factors which a court minded to act fairly and judicially ought to consider in sentencing an accused person. They are the personal circumstances of the accused, the crime he or she has been convicted of and the interests of society. He made reference to *S v Simon* 2007 (2) NR 500 where the court in weighing up these factors observed at 517: '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'. In such exercise one factor is bound to be given greater weight than the others. Additionally, the court in *Simon* at 517E relying on authorities, reiterated 'the principle that the imposition of sentence was pre-eminently a matter for the discretion of the trial court, and it is that court which can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellat court'.

[4] On the aforesaid reasons, we do not fault the learned magistrate for according greater weight to the seriousness of the crime in the instant proceeding. In any case he did not do so at the expense of disregarding the other factors. As we have mentioned previously, it is trite that punishment is pre-eminently a matter of discretion resting in the trial court and this court will only interfere with the sentence if it is so manifestly excessive that it induces a sense of shock in the mind of the court. (See, *S v Ndikwetepo & others* 1993 NR 319 (SC)).

[5] In deciding what a suitable sentence would be, the circumstances under which the attack on the complainant took place dictates that the accused cannot escape a

custodial sentence. Though the size of the sharp object was not established during the trial, it can safely be assumed that, it is capable of causing serious injuries in all probability and the injuries sustained are of a more serious nature.

[6] However in the instant case there is no medical evidence adduced pertaining to the medical treatment the complainant received whilst hospitalised or any evidence suggesting that the injuries sustained were life threatening or even of a serious nature .All that was handed into evidence was the J88 medical report reflecting that the complainant had a deep lacerations on both sides of the lower chest. In circumstances as the present, the court, without having heard medical evidence regarding the seriousness of the injury and the nature of the treatment given, should not have on the sole evidence of the complainant come to the conclusion, as it did. The fact that the complainant was hospitalised for days, does not, render the attack serious and to come to such a conclusion in the absence of reliable evidence, in my view, would constitute a misdirection (see *S v Nakanyala* (CR 53/2014) [2014] NAHCMD 274 (19 September 2014)).

[7] After due consideration of all competing factors, I have no doubt in my mind that a custodial sentence of four 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 [review]' (*S v Tjiho* 1991 NR 361 (HC) at 366B-C). Based on these reasoning and conclusions reached we are of the opinion that this court should interfere with the sentence imposed by the trial court, considering the facts and nature of this case. Accordingly, the sentence cannot be permitted to stand, it must be set aside and replaced with an appropriate sentence.

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

1. The conviction is confirmed.
2. The sentence of 4 years imprisonment is set aside and is substituted with 3 years' imprisonment.

3. The sentence is antedated to 15 May 2018.

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JT SALIONGA  
ACTING JUDGE

I agree

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HC JANUARY  
JUDGE