REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2020/00018

In the matter between:

LAZARUS JONAS **APPELLANT**

v

THE STATE

RESPONDENT

Neutral Citation: *Jonas v S* (HC-NLD-CRI-APP-CAL-2020/00018) [2020] NAHCNLD 112 (21 August 2020)

Coram: JANUARY J and DIERGAARDT AJ
Heard: **20 August 2020**
Delivered: **21 August 2020**

Flynote: Sentence – Appeal against – Interference by court of appeal – Such interference only justified where sentence vitiated by irregularity or misdirection – found to be shockingly inappropriate-Appeal against sentence is upheld.

Summary: The appellant was convicted on a charge of assault with intent to do grievous bodily harm following a plea of not guilty. The State lead evidence and he

was convicted. The J88 medical report was handed in as evidence and formed part of the record. The report reflects a wound of 1cm on the left arm of the complainant that purports to be a mere cut. He was sentenced to 36 months direct imprisonment.

The court *held that;* the sentence of a direct imprisonment is shockingly impropriate and too severe under the circumstances and therefore renders the Appeal Court to interfere in the sentence imposed by the Magistrate. The appeal against sentence is upheld.

ORDER

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1. The Appeal against sentence is upheld.

2. The sentence of 36 months imprisonment is set aside and replaced with the following sentence:

   2.1 36 months imprisonment of which 24 months imprisonment suspended for 5 years in terms of section 297 of the criminal procedure Act 51 of 1977 on condition that that accused is not convicted of committing the offence of assault with intent to do grievous body harm during the period of suspension.

3. This order is back dated to 30 September 2019.

APPEAL JUDGMENT

DIERGAARDT AJ, (JANUARY J concurring):

Introduction

[1] The appellant was convicted of Assault with intent to do grievous bodily harm in the Magistrates Court of Ohangwena. He was sentenced to 36 months imprisonment.

[2] The appellant is a self-actor and the state was represented by Ms Petrus.

[3] The appellant was sentenced on 30 September 2019 and the notice of appeal is dated 14 October 2019.

[4] The appellant appealed against the sentence on the grounds which can be briefly summarized as follows: the Magistrate overemphasized the seriousness of the offence and the interest of society, the magistrate allegedly completely ignored his personal circumstances being his youth and the fact that he had dependants. He further alleges that the custodial sentence caused a sense of shock and his prayer is for the Appeal Court to give him the option of a fine or to reduce the custodial sentence.

[5] I also considered the Magistrates reasons for the sentence in that the accused showed no remorse to the court and that his personal circumstances were outweighed by the seriousness of the offence. He described the appellant's behaviour as being bullying as the complainant was 17 years of age and the appellant was 36 years old at the time.

Applicable Law

[6] The appeal court is entitled to interfere with a sentence in the following instances as provided for in *S v Tjiho,*[1] as follows:

a) The trial court misdirected itself on the facts or on the law.
b) An irregularity which was material occurred during the sentencing proceeding.
c) The trial court failed to take into account material facts or overemphasized the importance of other factors.
d) The sentence imposed 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 a court of appeal.

[1] *S v Tjiho* 1991 NR 361 (HC) at 366 A-B.

[7] The circumstances of the offence were briefly as follows: That on 12 June 2018 at Ouhongo village the appellant took the complainants glasses from a child and kept it for himself. The complainant approached the appellant and asked for his glasses but the appellant refused and reacted by producing a knife and stabbed the complainant on the arm. The J88 medical report was handed in as evidence and formed part of the record. The report reflects a wound of 1cm on the left arm of the complainant that purports to be a mere cut. The appellant only stabbed the complainant once. Upon evidence adduced during the trial in the court a quo the magistrate assessed the evidence and correctly convicted the accused on assault with intent to do grievous bodily harm.

[8] During mitigation the appellant submitted his personal circumstances being that he is unemployed, a father of two children and caretaker of his mother.

[9] It is common cause that the appellant was not offered an opportunity to pay a fine as the *court a quo* imposed a direct term of imprisonment. The appellant submitted that the sentence imposed is too severe and that the *court a quo* ought to have imposed a lenient sentence.

[10] It is noted that all aspects of sentencing are of course within the discretion of the sentencing court and a court of appeal cannot interfere unless the discretion was not exercise judicially. When exercising the discretion to determine the length of imprisonment the sentencing court must be guided by what is reasonable.

[11] The accused person was charged with assault, this charge came as a consequence of the accused inflicting a cut on the arm of the complainant. It is my considered view that the trial court did not properly apply its mind during the process of sentencing on the seriousness of the offence committed and as a result overemphasizing the interests of society and the crime itself when arriving at that sentence as the appellant was a first offender.

[12] The court is alive to the fact that the complaint is much younger compared to the accused but the courts must not be too fast to give harsh sentences without giving full weight to the offence and the act actually committed by the offender. In this instance this was a mere cut, and yes it warrants punishment but surely the trial magistrate could have come to a more fitting sentence for the offence committed.

[13] It is correct for the appellant to argue that the sentence of a direct imprisonment is shockingly impropriate and too severe under the circumstances and therefore renders the Appeal Court to interfere in the sentence imposed by the Learned Magistrate.

[14] The appeal is therefore allowed to stand.

[15] In the result I make the following order:

1. The Appeal against sentence is upheld.

2. The sentence of 36 months imprisonment is set aside and replaced with the following sentence:

   2.1. 36 months imprisonment of which 24 months imprisonment suspended for 5 years in terms of section 297 of the criminal procedure Act 51 of 1977 on condition that that accused is not convicted of committing the offence of assault with intent to do grievous body harm during the period of suspension.

3. This order is back dated to 30 September 2019.

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A Diergaardt

Acting Judge

I agree,

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H January

Judge

APPEARANCES

FOR THE APPELLANT:	Mr L Jonas Of Oluno Correctional Facility, Ondangwa
FOR THE RESPONDENT:	Ms S Petrus Of The office of the Prosecutor General, Oshakati