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| <b>Case Title:</b><br><i>The State v Reen Kwenani</i>  | <b>Case No:</b><br>CR 36/2019              |
| <b>High Court MD Review No:</b><br>1555/2018   | <b>Division of Court:</b><br>Main Division |
| <b>Heard before:</b><br>Mr Justice Liebenberg <i>et</i><br>Mr Justice Miller (Acting)  | <b>Delivered on:</b><br>03 May 2019        |
| <b>Neutral citation:</b> <i>S v Kwenani</i> (CR 36/2019) [2019] NAHCMD 134 (03 May 2019)   |  |
| <b>The order:</b> <ol style="list-style-type: none"> <li>(a) The conviction on counts 1 and 2 are confirmed.</li> <li>(b) The sentences imposed on counts 1 and 2 are set aside and substituted with the following: <ul style="list-style-type: none"> <li>On count 1 the accused is sentenced to a fine of N\$1 000 or 6 (six) months' imprisonment plus a further 6 months' imprisonment suspended for a period of 5 years on condition that the accused is not convicted of the offence of assault, committed during the period of suspension.</li> <li>On count 2 the accused is sentenced to a fine of N\$ 500 or 3 (three) months' imprisonment.</li> </ul> </li> </ol> <p>The sentences are antedated to 12 September 2018.</p> |  |
| <b>Reasons for order:</b>  |  |
| LIEBENBERG J (concurring MILLER AJ) <ol style="list-style-type: none"> <li>1. This is a review in terms of s 302 of the Criminal Procedure Act 51 of 1977 (the CPA).</li> <li>2. The accused was charged in the magistrate's court for the district of Katima Mulilo on two counts. In respect of count 1 he was charged with assault by threat r/w the Combating of Domestic Violence Act 4 of 2003 and on count 2 for <i>crimen injuria</i>, read with the same Act. The charges emanated from an incident where the accused verbally insulted and threatened to assault his biological mother (the complainant).</li> </ol>   |  |

3. He pleaded guilty to both counts and after being questioned in terms of s 112(1)(b) of the CPA, the trial court convicted the accused as charged and sentenced him to 12 months' imprisonment on each count. The convictions are in accordance with justice and shall be confirmed. However, with regards to the sentences imposed the review court took issue with the gravity of the sentences.
4. A query was sent to the trial magistrate enquiring firstly whether the court attached any weight to the fact that the accused pleaded guilty, was forgiven by the complainant and was in a position to pay a fine. Secondly, whether a sentence of 12 months' imprisonment on count 2 was justified in the circumstances of the case. The magistrate replied and conceded that lesser sentences should have been imposed taking into account the fact that the accused's mother reconciled with him.
5. It is evident from the record that the accused is a first offender. The court in *S v Brand and Various Others*<sup>1</sup> held that 'not all offences warrant a sentence of imprisonment and a first offender should not be sent to jail if there is some other adequate punishment'. The court identified such other adequate punishment as a fine. However, a fine should not be imposed if the offence is so serious that imprisonment is the only appropriate punishment (*A Kruger: Hiemstra's Criminal Procedure*).
6. Therefore the question to be determined is whether the sentences imposed by the trial magistrate were shockingly inappropriate in the circumstances. To this end regard should be had to the sentencing norms of comparable cases in this jurisdiction.
7. The court in *S v Visage*<sup>2</sup> with regards to the offence of *crimen injuria* held that an imposition of 12 months' imprisonment induces a sense of shock. The court further held that such an offence generally attracts punishment in the nature of a fine or, in appropriate instances, a caution and discharge. With regards to the offence of assault by threat, in *S v Kido*<sup>3</sup>, the accused was sentenced to a term of 3 months' imprisonment for the offence. The sentencing norm for offences of this nature has always
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<sup>1</sup> 1991 NR 356 (HC) at 357.

<sup>2</sup> 2010 (1) NR p 271 at 273.

<sup>3</sup> 2014 (3) NR 697 (HC)

been to either impose a fine or a short term custodial sentence, depending on the circumstances of the case.

9. With regards to fines, the learned author A Kruger points out that even when the accused will in all probability not be able to pay a fine, it ought to be imposed as alternative to imprisonment. Furthermore, the author alluded to the fact that if it appears that the accused will be unable to pay a fine, the court is obliged to explain to the unrepresented accused that payment of a fine could also be deferred in appropriate circumstances.<sup>4</sup>
  
10. It is evident that the offences the accused was convicted of were not of a serious nature warranting a lengthy custodial sentence. The accused had a regular income of about N\$1 000 per month and had the amount of N\$700 saved up in order to pay a fine. The magistrate in her sentencing reasons took into account that the accused was a first offender and that the complainant reconciled with the accused. The fact that the accused was at least partly in a position to pay a fine was never considered. Though the personal circumstances of the accused were referred to during sentence, it would appear that mere lip service was paid thereto. The court thus failed to accord these important factors the necessary weight.
  
11. The magistrate emphasised that the offences were serious and prevalent in that district; moreover where in this instance it was directed at the accused's biological mother. From a reading of the magistrate's reasons it is evident that the court took a serious view of the respect to be shown to elders in society and reasoned that 'instead the youth being the one to derail society expectations by impairing the dignity of the senior citizens'(sic). Though the accused's actions were unacceptable and disrespectful towards his elderly mother and cannot be condoned, it would however appear that the court made him the scapegoat of all those guilty of similar conduct. The court clearly over-emphasized the seriousness of the crimes committed and although, as far as count 1 is concerned, a deterrent sentence is called for, it must still be guided by what was stated in *S v Rabie*<sup>5</sup> namely that 'punishment

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<sup>4</sup> A Kruger. 2014. *Hiemstra's Criminal Procedure* at 28-56.

<sup>5</sup> 1975 (4) SA 855 (AD).

should fit the criminal as well as the crime, be fair to society, and blended with a measure of mercy according to the circumstances.'

12. For the reasons set out above, we are of the view that the court misdirected itself by the imposition of direct imprisonment on both counts without the option of a fine which, in the present circumstances, we find shockingly inappropriate (*S v Tjiho* 1991 NR 361 (HC)).

13. In the result, it is ordered:

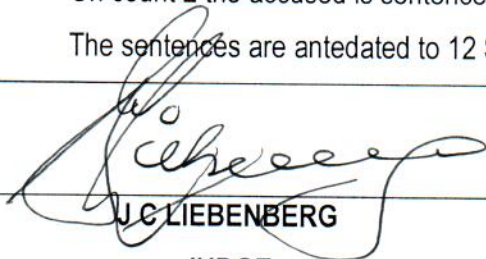
(a) The conviction on counts 1 and 2 are confirmed.

(b) The sentences imposed on counts 1 and 2 are set aside and substituted with the following:

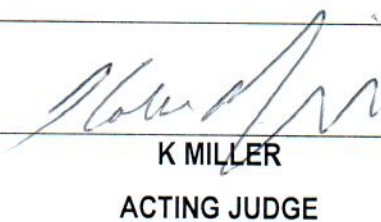
On count 1 the accused is sentenced to a fine of N\$1 000 or 6 (six) months' imprisonment plus a further 6 months' imprisonment suspended for a period of 5 years on condition that the accused is not convicted of the offence of assault, committed during the period of suspension.

On count 2 the accused is sentenced to a fine of N\$ 500 or 3 (three) months' imprisonment.

The sentences are antedated to 12 September 2018.



J.C. LIEBENBERG  
JUDGE



K MILLER  
ACTING JUDGE