



CASE NO. CA 163/2005

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

APPELLANT

and

SGT. LAWRENCE N MUJIWA

RESPONDENT

CORAM: HOFF, J *et* NDAUENDAPO, J

Heard on: 2009.04.03

Delivered on: 2009.04.03 (*Ex tempore*)

JUDGMENT

HOFF, J.: [1] This is an appeal by the State against the conviction and sentence imposed in the magistrate's court for the district of Gobabis. The respondent in this matter initially charged with the offence of assault with intent to do grievous bodily harm was at the end of the trial convicted of common assault and sentenced to a fine of N\$100.00 or ten days imprisonment. It is against this conviction and sentence that the appeal lies.

[2] Ms Jacobs who appears on behalf of the appellant in this matter submitted that the evidence presented in the court *a quo* proved that the offence of assault with intent to do

grievous bodily harm was in fact committed by the respondent in this matter. And furthermore that the sentence imposed is startlingly inappropriate and should be amended. Mr Mbaeva who appears on behalf of the respondent in this matter submitted to the contrary namely that the evidence presented the court *a quo* did not prove the commission of the offence of assault with intent to do grievous bodily harm, and submitted that the sentence imposed was an appropriate sentence.

[3] It is common cause that in the court *a quo* the complainant testified in respect of the assault on her by the respondent to the effect that she received two blows to her face by means of a fist of the appellant that she fell down and that she was thereafter kicked all over her body. A second witness was called by the State who confirmed that she saw the injuries the next day on the face of the complainant and that she saw a swelling on the cheek of the complainant.

[4] A medical report was also handed in which indicated two haemathoma on the face of the complainant. The respondent, in the face of this evidence, elected not to testify. Initially the respondent pleaded guilty to the crime of common assault in that he had only slapped the complainant once in her face. The failure of the respondent to testify in the court *a quo* meant that the evidence presented on behalf of the State remains uncontradicted and this Court therefore finds that the assault perpetrated on the complainant consisted of two blows to the face of the complainant as well as some kicking all over her body. The question however is whether that constitutes assault with intent to do grievous bodily harm. This Court is of the view that having regard to the injury sustained that such an assault did not

constitute assault with intent to do grievous bodily harm but constituted the crime of common assault.

[5] Regarding the sentence imposed in the court *a quo* this Court is of the opinion that there is merit in the submission by Ms Jacobs on behalf of the appellant that having regard to the circumstances under which this offence was committed that the sentence imposed is startlingly inappropriate. The factors that the court *a quo* should have taken into account was the fact that the victim, the complainant in this matter, was a female; that the perpetrator was a male and it was not disputed that the victim the complainant was puny person and the respondent in this matter much stronger person. However the fact that the assault was perpetrated by a male person on a female person in my view increases the moral blameworthiness of the perpetrator. Secondly another factor which in my view should be taken into consideration in considering an appropriate sentence is the fact that at the time of the commission of the offence respondent was a police officer and that the offence was committed furthermore in public in full view of inmates and other members of the police force. Having regard to the circumstances of this case an appropriate sentence does not warrant a direct term of imprisonment but as was imposed in the court *a quo* a fine with an alternative term of imprisonment.

[6] This Court is of the view that an appropriate sentence in the circumstances is a fine of N\$800.00 or eight months imprisonment, and such fine is then now imposed on the respondent. This fine is imposed despite the fact that the respondent might have paid the previous fine imposed or might have serve the previous sentence of imprisonment.

[7] In the result therefore the conviction in the court *a quo* is confirmed but the sentence is set aside and substituted with the sentence pronounced by this Court.

HOFF, J.

I agree

NDAUENDAPO, J

ON BEHALF OF APPELLANT:

ADV. JACOBS

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL

ON BEHALF OF RESPONDENT:

MR MBAEVA

Instructed by:

MBAEVA & ASSOCIATES