

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
REVIEW JUDGMENT**

CR NO: 15/2017

In the matter between:

THE STATE

and

NDEMUFEYO DAVID

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: **202/2017**

Neutral citation: *S v David* (CR15/2017) [2017] NAHCNLD 87 (17 August 2017)

Coram: TOMMASI J and JANUARY J

Delivered: 17 August 2017

Flynote: Review – Sentence – Assault with intent to do grievous bodily harm – Accused charged with co-accused – Evidence led – Absent on day of continuation – Co-accused convicted in his absence – Co-accused sentenced to N\$2500 or 18 months imprisonment – Accused thereafter convicted – Sentenced to N\$3000 or 24 months imprisonment – No justification for difference in sentences.

Summary: The accused was convicted of Assault with intent to do grievous bodily harm. He was tried with two co-accused but was absent on the day the trial continued and when the co-accused were convicted and sentenced. The co-accused were sentenced to a fine of N\$2500 or 18 months imprisonment. This accused was eventually sentenced to N\$3000 or 24 months imprisonment. There is no justification for the difference in sentencing. The sentence of N\$3000 or 24 months imprisonment is set aside. The accused is fined to N\$2500 or 18 months imprisonment.

ORDER

1. The sentence of N\$3000 or in default of payment 24 months imprisonment is set aside and is substituted with a sentence of;
 2. N\$2500 or in default of payment 18 months' imprisonment.
 3. The sentence is ante-dated to 26 May 2017.
 4. In the event that the accused having paid the fine of N\$3000, it is ordered that he should be refunded with the difference.
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JUDGMENT

JANUARY J (TOMMASI J concurring)

[1] This matter is before me on automatic review.

[2] The accused was charged with two co-accused on a charge of assault with intent to do grievous bodily harm. They all pleaded not guilty. The State only called the complainant as a witness where after the State's case was closed. All three accused cross-examined the complainant. The matter was there after periodically postponed because either the trial magistrate was not available or one or other of the accused was absent. Eventually the trial continued against the two co-accused in the absence of this accused.

[3] The two co-accused were convicted and sentenced to a fine of N\$2500 or in default of payment, 18 months' imprisonment on 09 September 2016. Those proceedings were sent for automatic review and the proceedings were certified in accordance with justice on 14 October 2016 by a different reviewing judge.

[4] The accused in this matter was convicted also for assault with intent to do grievous bodily harm. The conviction is confirmed. Like his two co-accused, no previous convictions were proved against him. After I had received the proceedings in this matter, I raised a query to the presiding magistrate as follows;

'The learned magistrate must kindly indicate what facts or factors she considered as more aggravating in the conduct of accused Ndemufeyo David to impose a heavier sentence than the other 2 (two) accused whose sentences of N\$2500 or in default of payment 18 months imprisonment were confirmed on review'.

[5] The learned magistrate sentenced this accused to N\$3000 or in default of payment 24 months imprisonment.

[6] The learned magistrate replied with a long response which I do not find necessary to quote verbatim in whole. She correctly, in my view found that all three the accused acted with a common purpose. Amongst referral to case law she states inter alia as follows;

'In response, I submit that although Accused person in question had acted in common purpose with the other Accused previously sentenced a heavier sentence was necessitated from the fact that Accused at present is totally without remorse at sentencing even after this offence was committed on 14 June 2012 which was about 5 years ago. Remorse and regret are valuable factors which gives the Court an insight whether there is a possibility that the offender will not recommit...'

The rest of her reply elaborates on the factors of remorse; recommitting the crime; the lack of repentance; that community service is not suitable; that accused was unemployed; that he is uneducated. In my view, the magistrate is missing the point.

[7] It is not evident from the evidence of the complainant who the main perpetrator was and who acted just as an accomplice. The complainant testified that four persons chased after him with knives in their hands. The persons amongst whom he identified the third accused, started to assault him by kicking him, punching him with fists, shooting him in the stomach with a “catterbelt” which I infer is a slingshot (kettie) and holding him on the body. The complainant fell on the ground whereupon the accused continued kicking him. The complainant realized that one of his arms was broken when he tried to get up from the ground. The fourth person was not before court. It is not evident who caused the arm to be fractured.

[8] I find no justification for the difference in sentences. The accused are 25 years, 22 years and respectively 22 years old. This accused was 22 years old at the commission of this offense. All three accused pleaded not guilty and none of the other two accused persons indicated that they are remorseful or more remorseful than this accused. The heavier sentence of N\$3000 or 24 months’ imprisonment stands to be set aside in the circumstances. The magistrate misdirected herself by not being consistent, and in imposing a different sentence.

[9] In the result:

1. The sentence of N\$3000 or in default of payment 24 months imprisonment is set aside and is substituted with a sentence of;
2. N\$2500 or in default of payment 18 months’ imprisonment.
3. The sentence is ante-dated to 26 May 2017.
4. In the event that the accused having paid the fine of N\$3000, it is ordered that he should be refunded with the difference.

H C JANUARY
JUDGE

I agree,

**M A TOMMASI
JUDGE**