

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

REVIEW JUDGMENT

Case No: 17/2018

In the matter between:

**THE STATE**

v

**ALVES TIMOTEUS**

**ACCUSED**

HIGH COURT NLD REVIEW CASE REF NO: 17/2018

**Neutral citation:** *S v Timoteus* (CR 17/2018) [2018] NAHCNLD 42 (23 April 2018)

**Coram:** CHEDA J and JANUARY J

**Delivered:** 23 April 2018

**Flynote:** Assault with intent to do grievous bodily harm as read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 should be viewed seriously by the courts. The fact that this Act was passed in addition to the common law crime of assault shows the seriousness of the crime. The courts should treat these crimes with the seriousness they deserve. Failure to do so will result in the public losing confidence in the justice delivery system.

**Summary:** Accused and complainant were boyfriend and girlfriend. During their relationship some misunderstanding took place which resulted in accused assaulting

complainant with fists, kicking her and hitting her with a stone. She sustained injuries. Although there was no medical report, it was serious. He was sentenced to a fine of N\$1500 (One Thousand Five Hundred Namibian Dollars) or 15 (fifteen) months imprisonment which was wholly suspended in total for a period of 2 (two) years on condition accused is not convicted of assault with intent to cause grievous bodily harm committed during the period of suspension. This was an injustice as accused deserved to be imprisoned or at least pay an effective fine. Certificate withheld.

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### ORDER

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1. The sentence is set aside and substituted.
2. The accused is sentenced to;  
N\$2000 or two (2) years' imprisonment of which N\$1000 or 1 year imprisonment is suspended for 4 years on condition that accused is not convicted of assault of which violence is an element.

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### JUDGMENT

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CHEDA, J (JANUARY J Concurring):

[1] This is a review matter which landed on my desk as per the review procedure. Upon perusal of the record I was of the view that the sentence was manifestly lenient in the circumstances, in light of that, I sought a comment from the learned trial magistrate which comment was duly made in the following manner:

'The answer to the Honourable Reviewing Judge is that the court take (sic) cognisance of the seriousness of the offence and its prevalence, but the court also had taken note that the accused have (sic) shown remorse as he promise (sic) not to repeat same that is the reason the court opted to give a wholly suspended sentence. The magistrate, however, stands to be guided by the Honourable Reviewing Judge on review.'

[2] The accused, a 30 year old man was charged with assault with intent to do grievous bodily harm as read with the provisions of the Combating of Domestic

Violence Act, Act 4 of 2003. He pleaded guilty, was convicted and sentenced as follows:

'Accused is sentenced to pay a fine of N\$1500.00 (One Thousand Five Hundred Namibia Dollars) or (15) fifteen months imprisonment suspended in total for a period of 2 (two) years on condition accused is not convicted of assault with intent to cause Grievous Bodily Harm committed during the period of suspension.'

[3] The brief circumstances are that the accused and complainant were in a love relationship. There was a misunderstanding between them which resulted in the accused assaulting the complainant with fists, kicking her and hitting her with a stone on the head. As a result of this assault, the complainant sustained some injuries. There was no medical report produced, nonetheless, judging by the weapon used and the place where it landed, it was a bad assault.

[4] The learned trial magistrate's response in justifying his lenient sentence is not in accordance with case authorities. Apart from decided cases, it is common cause that the legislature after taking on board a clarion call for a need to combat the scourge of domestic violence enacted the Combating of Domestic Violence Act, Act 4 of 2003 (hereinafter referred to as "the Act") and the justice system saw it fit that assault charges should be married to the provisions of the Act referred to above. This was so done as a recognition of the seriousness of this crime.

[5] In light of this noble cause, which, invariably all those charged with the delivery of justice have embraced, there is no reason why a judicial officer should not follow suit, especially in the face of such compelling, persuasive and above all binding case authorities. For a court to divert from such overwhelming authorities beggars belief.

[6] The learned trial magistrate acknowledged the seriousness and prevalence of the offence, but, instead proceeded to impose a sentence which is so lenient in the circumstances to an extent of making a mockery of a loud and persistent cry by the Namibians is a serious contradiction in the delivery of justice.

[7] The magistrate's attempt to justify his leniency on the basis that the accused promised not to repeat the offence does not hold water at all. This promise or

undertaking is so common that if the courts were to take it as a remorseful gesture, then no accused will ever go to prison or get a proper sentence for that matter as words 'I will not do it again' or words to that effect are almost a mantra for every accused and/or offender. In as much as it is an expression of repentance, the courts need to be careful not to attach an undue regard to it to an extent of ignoring the seriousness of the offence committed.

[8] In as much as an expression of sorrow or request for forgiveness is indeed mitigatory, in my view, it cannot be allowed to outweigh the aggravating factors in this matter.

[9] Judicial officers should always warn themselves against adopting an armchair approach as opposed to a robust one on matters which seriously impact on those whose cases they preside over. They cannot afford to detach themselves from the communities they live in as this will result in society losing confidence in our judicial system.

[10] In as much as an accused's personal circumstances should be taken into consideration for the purposes of mitigation, heed should always be had that an offender should be punished for his/her misdeeds and such punishment is not achieved by the employment of kid gloves tactics. I take a leaf from remarks in *S v Namweya* (CC 13/2012) [2013] NAHCMD 341 (18 November 2013) regarding the prevalence of these crimes in the country at para 8 where Shivute J remarked:

'Although the accused is a first offender who has spent three years in custody awaiting his trial, factors which are in his favour, he did not show any remorse whatsoever. As already noted, the accused testified that he was supporting his son including his other members of his family. It may well be that his family has to suffer due to the accused's actions. This unfortunately is a consequence of crime and if this were to happen, the accused has himself entirely to blame.' (my emphasis)

[11] This case among many, emphasises the importance of the need for harsh penalties for assault brought under the umbrella of the Combating of Domestic Violence Act. It is this notion and idea that should always be a guiding principle for the courts in upholding the much desired protection of the vulnerable in our society.

Violence in the country has reached unprecedented levels and the courts must be seen to play their part in stemming up this tide.

[12] I, am of the view, therefore that, the complainant did not get justice in this matter and I am sure that she felt let down by the courts. These courts cannot afford not to protect the vulnerable, more so, when the whole nation is up in arms against domestic violence. This crime was committed in a domestic setting.

[13] Having stated my views above, I am of the opinion that, the accused deserved a harsh sentence and should have been sentenced to either a short and sharp prison term or at least an effective payment of a fine coupled with a suspended sentence in order to keep his future conduct in check. To sentence him to a fine which is wholly suspended is injustice.

[14] Before, I conclude I should add that the way the suspended sentence is couched does not in my view properly and effectively inform the accused as to what he should avoid. It is important in my considered view that in suspending a sentence the condition should not be so restricted to an extent of affording the accused an opportunity of finding a narrow escape in his future conduct.

[15] The condition of suspension in its present state seems to prevent the accused from committing the offence of assault with intent to do grievous bodily harm only. Such condition ignores one of the essential elements of assault, being that of violence. Therefore, violence is part and parcel of common assault or grievous bodily harm. It is an unavoidable ingredient thereto.

[16] It is for that reason that I rule that the condition should embrace both common assault and assault with intent to do grievous bodily harm. For that reason the suspended sentence, as an example should be concluded as follows:

[Accused is sentenced to.... (fine/imprisonment) of which .....(fine/imprisonment is suspended for .....years on condition that accused does not, during that period commit an offence assault of which violence is an element.]

[17] Accordingly I withhold my certificate.

[18] In the result:

1. The sentence is set aside and substituted.

2. The accused is sentenced to;

N\$2000 or two (2) years' imprisonment of which N\$1000 or 1 year imprisonment is suspended for 4 years on condition that accused is not convicted of assault of which violence is an element.

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M Cheda  
Judge

I agree

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HC January  
Judge