

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

CR No: 38/2016

In the matter between

THE STATE

And

MUYENGA MUSHONGO

ACCUSED NO 1

LUKAS ERICK

ACCUSED NO 2

HIGH COURT MD REVIEW CASE NO 376/2016

Neutral citation: State v Mushongo (CR 38/2016) [2016] NAHCMD 109 (11 April 2016)

CORAM: LIEBENBERG J et UEITELE J

DELIVERED: 11 April 2016

Flynote: Criminal procedure – Sentence – Charge of assault with intent to do grievous bodily harm – Accused found to have acted with common purpose – Substantially different fines imposed – Trial court misdirecting itself on facts when finding that one accused had used a weapon during commission of offence – Evidence about any of the accused being armed, lacking – Personal circumstances of accused persons virtually identical – No basis in law to make any distinction between accused in sentencing – Sentence set aside and accused persons given same sentence.

ORDER

1. The convictions of both the accused are confirmed.
2. The sentence of accused no 1 is confirmed.
3. The sentence of accused no 2 is set aside and substituted with a fine of N\$1 500 or 10 months' imprisonment.
4. The sentence is antedated to 29.06.2015.

JUDGMENT

LIEBENBERG J: (Concurring UEITELE J)

[1] The accused were charged with the offence of assault with intent to do grievous bodily harm and, after evidence was heard, both were convicted as charged. The convictions are in order and will be confirmed. Accused no 1 was sentenced to a fine of N\$1 500 or 10 months' imprisonment, while accused no 2 was given a much heavier sentence, to wit: N\$4 000 or 2 years' imprisonment.

[2] When the matter came on review a query was directed to the magistrate enquiring as to why substantially different sentences were imposed on the accused when the evidence shows that the accused had acted with common purpose, and the court having convicted the accused on that basis.

[3] The magistrate is not entirely clear in her response when she states that accused no 2 who 'exaggerated by [using] an object which caused a serious injury on the victim'¹ and him not even being a party to the fight. Notwithstanding, the magistrate seems to acknowledge the disparity in the sentences imposed and proposes that the fine imposed on accused no 2 be reduced to N\$3 000 or 1 year imprisonment, without stating why a distinction should be made between the accused, in sentencing.

[4] It would therefore appear that the only reason why a distinction between the two accused was made, was because accused no 2 had used a weapon, or object, when committing the offence; also, that he had no reason to be involved. The trial court clearly misdirected itself on this point as there is no evidence on record that any weapon or object had been used during the assault; neither did that form part of the complainant's testimony. According to him, accused no 2, when they met on the street at night, accused him of having insulted him, and then punched him in the face. He fell to the ground where after accused no 1 joined in and both kicked him several times in the ribs. Though no medical records were submitted into evidence, the complainant said he was beaten all over his body and sustained a broken jaw for which he was

¹ I take it that what was intended is that the accused's actions were aggravating.

hospitalised for one week. According to the evidence adduced, accused no 2 started the fight and was indeed a party thereto, despite the magistrate's opinion that he 'was not even a party to the fight'. As for accused no 1, he joined in and was just as much part of the assault as accused no 2. It is thus difficult to see on what basis the court decided to differentiate between the two accused regarding their actions and moral blameworthiness, and based on that, decided to impose different sentences. This probably came about due to the fact that the court erroneously assumed that accused no 2 had been armed. This was a serious misdirection and entitles this court to interfere with the sentence imposed on accused no 2 which differs markedly from that of accused no 1.

[5] Both the accused are married, with children and self-employed. They are almost of the same age and without previous convictions. Regarding their financial means to pay a fine if the court were to impose same, they said that they would be capable to raise some funds, depending on the amount of the fine imposed. It is thus clear that as far as it concerns their personal circumstances, the accused persons are virtually in identical positions, and there is nothing exceptional justifying a departure in sentencing. Also clear from the judgment is that the court found accused no 1 to have been present almost from the beginning and that they had acted in concert when assaulting the complainant. Against this background there was no basis in law to make any distinction between the two accused in sentencing and they ought to have received the same sentence. The sentence imposed on accused no 2 therefore falls to be set aside and substituted with a suitable sentence.

[6] In the event of accused no 2 having paid the fine or any part thereof, he must be refunded *pro rata*.

[7] In the result, it is ordered.

1. The convictions of both the accused are confirmed.
2. The sentence of accused no 1 is confirmed.
3. The sentence of accused no 2 is set aside and substituted with a fine of N\$1 500 or 10 months' imprisonment.
4. The sentence is antedated to 29.06.2015.

J C LIEBENBERG

JUDGE

S F I UEITELE

JUDGE