IN THE HIGH COURT

(BISHO)

CASE NO.: CA&R2/2002

DATE: 19 APRIL 2002

In the matter between:

XOLILE LUDADA

versus

THE STATE

JUDGMENT:

EBRAHIM J:

In this matter the appellant lodged an appeal against his sentence in respect of three convictions in the Court a quo. These convictions were firstly, a contravention of section 67(1)(a) of the South African Police Service Act, 68 of 1995, namely that he resisted arrest. The second offence was that of assault, and the third offence was one of malicious injury to property.

He has not appealed against the convictions.

The matter is before us today despite the fact that the appellant is not represented. It appears for one reason or another that the legal representation which he acquired when the appeal was initiated is no longer available to him and consequently for that reason he is unrepresented. I am not sure whether the appellant is in court, but it appears that he was released on bail pending appeal.

Mr Kristafor who appears for the State initially filed a notice in which he sought to have the matter struck from the roll since the appellant had not filed heads of argument. He has, however,

supplemented this with heads of argument in which he, by implication, contends that the convictions were proper since he has addressed himself solely to the question of sentence. I may mention in regard to sentence the attitude of the State as reflected in its heads of argument is that the magistrate should have considered the possibility of imposing a sentence of correctional supervision. On that basis Mr Kristafor has suggested that the Court invokes its inherent powers of review to remit the matter to the Court a quo for it to hear evidence and consider a sentence in terms of section 276(1)(h) or (i) of the Criminal Procedure Act, 51 of 1977.

Today when the appeal was called Mr Kristafor was asked whether he could persist with the contention that the conviction should stand. To his credit Mr Kristafor has conveyed to the Court that on reflection he can no longer support the convictions and has conceded that these fall to be set aside.

It is so that the appellant was asked to attend the police station apparently on the basis of some complaint that his wife had lodged. In this regard the police attended at his home and then asked him to report at the police station. He thereupon reported and it appears that at that stage the police sought to arrest him and to incarcerate him. From the evidence in the Court a quo it is clear that the appellant resisted and he resisted most strenuously. Indeed it appears that there was a physical altercation of some note and in the process the appellant grabbed a drain pipe and this was dislodged and also grabbed hold of the policeman's T-shirt and caused this to be torn. Furthermore it appears that he may also have physically assaulted one or more of the policemen who sought to detain him.

It is apparent from the evidence that was tendered that the policeman who sought to arrest the appellant, and this was a Mr Mzwabantu Daba, an inspector in the South African Police Services, had indicated that a charge had been laid against the accused by his wife. No further evidence was tendered to indicate what the nature of the charge was, nor was there any evidence to indicate whether the police had either personally witnessed the offence being committed or had a reasonable suspicion that he had committed this offence.

Be that as it may it is perfectly clear from the evidence that this created a lacunae in terms of the evidence and the fact that he resisted arrest could not on its own be regarded as an offence. Any individual who is subjected to an unlawful arrest may within certain parameters exercise such reasonable force as is necessary to prevent himself from being taken into custody. I do not intend expanding on what the nature of such resistance may be, but I say that it should be reasonable and should be within particular parameters.

On the basis of the evidence before the Court a quo all that the appellant did was to grab hold of a drain pipe, clearly to prevent himself from being dragged either into the police station or into the cells, and, secondly, that he grabbed hold of the policeman's T-shirt which in the process became torn. He may also, in defence of the physical force that was being applied to him, have administered a blow or two to the policemen. Whatever the situation there is no doubt that the actions of the policemen were unlawful. There could be no situation, therefore, where the appellant could be said to have resisted arrest.

On that basis he should not have been convicted of the offence of resisting arrest. It follows that if such a conviction cannot be sustained

that he could not then be convicted of any offences because of his actions in resisting an unlawful arrest. Consequently he could not therefore also be convicted of assault, nor or malicious injury to property. In my view the convictions are improper and fall to be set aside.

It clearly follows that the sentences which were imposed must also be set aside.

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Y EBRAHIM

JUDGE : BISHO HIGH COURT

PICKARD JP:

I agree. I may add for the sake of clarity that the appeal was initially brought against sentence only. However, in my view, and I presume in my learned brother's view, the conviction is not found to be in accordance with justice and that we intend setting it aside on the basis of our inherent review jurisdiction.

Conviction and sentence are thus set aside.

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B de V PICKARD

JUDGE PRESIDENT : BISHO HIGH COURT