

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

CASE NO: CA&R106/2024

Date of delivery: 25 June 2024

In the matter between:

THE STATE

and

ATHULE MABHULU

REVIEW JUDGMENT

Bloem J

[1] The accused was charged in the magistrate's court, East London with assault with intent to do grievous bodily harm. The state alleged that on 28 August 2023 and at East London, he "*did unlawfully and intentionally assault [LM] by hitting her with fists with the intent to causing her bodily harm*". The accused pleaded guilty to the charge. His legal representative handed a written statement by the accused into court. In that statement the accused set out the facts which he admitted and on which he pleaded guilty. The magistrate was satisfied that the accused was guilty of the offence to which he pleaded guilty and convicted him of assault with intent to do grievous bodily harm. He was sentenced to pay a fine of R3 000 alternatively undergo imprisonment for 3 (three) months. The sentence was wholly suspended for 5 (five) years on condition that he not be convicted of assault with intent to do grievous bodily harm committed during the period of suspension.

[2] After the imposition of the above sentence, a senior magistrate, while performing judicial quality assurance inspection at the East London Magistrate's Court, noted that the accused might not have admitted all the elements of the

offence of assault with intent to do grievous bodily harm. The magistrate perused the record and realised that the senior magistrate was correct. The magistrate sent the matter on special review to this court.

[3] Assault with the intent to do grievous bodily harm includes all the essential elements for the offence of common assault. However, there is an additional element, namely that there must be an intent on the part of the accused to do grievous bodily harm. Assault consists in unlawfully and intentionally applying force to the person of another or threatening that person with immediate personal violence in circumstances which lead that person to believe that the person who made the threat intends and has the power to carry out the threat. To secure a conviction of assault with intent to do grievous bodily harm, the state must prove, in addition, that the person who applies force or threatens to do so had the intent to do grievous bodily harm. The offence of assault with the intent to do grievous bodily harm cannot be committed if it is not proved or admitted that the accused had the intent to do grievous bodily harm. The accused might, depending on the facts, be convicted of common assault under those circumstances.¹ Whether an accused had the intention to commit grievous bodily harm depends on the facts of each case. Factors to be taken into account when determining whether the accused intended to do grievous bodily harm include the weapon or instrument that the accused used; the degree of force that the accused used; the part of the body at which the attack was directed; and the injuries actually sustained by the victim.²

[4] In the present case the accused admitted to having assaulted the complainant “*by hitting her with a fist on her forehead, causing her bodily harm*”. The accused alleged that the complainant had accused him during the previous evening of having stolen a phone. He went to confront her at her home early the following morning. They exchanged words during which the complainant swore at him. He lost his temper and “*assaulted her with a fist on her forehead*”.

¹ Section 266(a) of the Criminal Procedure Act 51 of 1977 provides that if the evidence on the charge of assault with intent to do grievous bodily harm does not prove the offence of assault with intent to do grievous bodily harm, but the offence of common assault, the accused may be found guilty of common assault.

² *S v Zwezwe* 2006 (2) SACR 599 (N) at 603b-c.

[5] The above facts do not show that the accused threatened to apply force to the complainant. The accused's intention to do grievous bodily harm must accordingly be determined on the basis of his conduct. He used a fist on the complainant's forehead. There are no facts to indicate the degree of force that the accused used when he hit the complainant on her forehead. The bodily harm that the complainant sustained was not described. On the contrary, the facts do not show that the complainant sustained an injury. Regard being had to the above factors, it cannot be said that the accused committed assault with intent to do grievous bodily harm. That conviction must accordingly be set aside and replaced with a conviction on the competent verdict of common assault.

[6] The sentence imposed by the magistrate was in respect of a conviction of assault with intent to do grievous bodily harm. The accused should, on the facts admitted by him, have been convicted of common assault. The sentence is disproportionate to a conviction of common assault in the light of the facts admitted by the accused. Since all the facts relevant to the imposition of an appropriate sentence are on record, it will serve no purpose to remit the matter to the magistrate to impose a sentence after the conviction of common assault.

[7] The accused was born during October 1999, left school during grade 12, has been permanently employed by the same employer as a driver since he left school, has no children and has no previous convictions. It is of concern that he committed a violent crime against a woman. He apologised to her immediately after assaulting her and pleaded guilty. The accused will in all probability not make himself guilty of the same offence. The sentence must nevertheless be such that he should be reminded of the consequences which might follow if he were to repeat such offence.³

[8] In the circumstances, an appropriate sentence that would do justice to the personal circumstances of the accused; the nature of the offence and the circumstances under which it was committed; and the interests of society would be a fine of R1 000 or, in default, three months' imprisonment.

³ S v R 1998 (1) SACR 166 (W) at 171e-f.

[9] In the result, it is ordered that:

1. The conviction and sentence are set aside and replaced with the following:

“1. The accused is found guilty of common assault.

2. The accused is sentenced to a fine of R1 000 or, in default of payment, three months’ imprisonment.

3. The sentence is wholly suspended for three years on condition that the accused is not convicted of common assault committed during the period of suspension.”

2. The sentence is antedated to 8 April 2024.

GH BLOEM

Judge of the High Court

Hartle J.

I agree.

B HARTLE

Judge of the High Court