A222/05

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 14/2/2005

NOT REPORTABLE

Magistrate:

FOCHVILLE

Review Case no.: A 738/2004

High Court Ref. No.: 145

THE STATE VS BEN SIMON MAVIMBELA

REVIEW JUDGMENT

WEBSTER J

The accused, aged 70 years, was convicted in the Magistrate's Court, Fochville on a charge of assault, with the intent to do grievous bodily harm and sentenced to R2 000 or six (6) months' imprisonment which was wholly suspended for a period of three (3) years on condition that he is not convicted of any form of assault which is committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine.

When the matter first came before me on automatic review I was perturbed by the sentence. I invited the Director of Public Prosecutions (DPP) to comment on the sentence in the light of the evidence. The response from

the DPP is now to hand. I thank both counsel responsible for their memorandum: it is certainly helpful.

The imposition of a sentence is a matter that reposes in the hands of the trial officer: that much is now trite. A court of review or appeal will only interfere if it is clear that the trial court misdirected itself in a material respect or has exercised its discretion in an improper or unreasonable manner.

The accused pleaded guilty to the charge of assault with intent to do grievous bodily harm. In his explanation in terms of section 112(1)(b) of the Criminal Procedure Act the accused admitted that he struck the complainant once with an iron rod after he had been subjected to extreme provocation by the complainant. She had slapped him twice, insulted and sworn at him. She attempted to strike the accused with an aerial of a motor vehicle. When the accused left the place where they i.e. complainant, the accused and his wife, had been drinking with his wife the complainant followed him striking the air with the aerial. The complainant again swore at the accused after he had entered his house. She tried to uproot the accused's fence. He went up to her to stop her from uprooting the fence. She struck the accused with the aerial. He then picked up an iron rod and struck the complainant. These facts were accepted by the public prosecutor.

No medical evidence was tendered by the State. The inference that the complainant did not suffer any visible injury is one that can be reasonably inferred from this. It is against this backdrop that the appropriateness of the sentence imposed by the trial court must be considered.

Both counsel from the DPP are unanimous that the trial Magistrate over-emphasized the seriousness of the offence and failed to have due regard for the circumstances that preceded the commission of the offence as well as the personal circumstances of the accused. I agree.

The accused is aged 70 years. He has no previous convictions. He is unemployed. His sole income is the old-age pension. Both he and the complainant had consumed intoxicating liquor: no effort was made by the trial Magistrate to ascertain their state of sobriety.

The sentence imposed, albeit suspended, is a severe one regard being had to the mitigating facts referred to above. Should the accused be ever convicted of assault in the future the sentence will count heavily against him and attract a custodial sentence with no option of a fine. Whilst the intention of the trial Magistrate was to keep the accused out of prison, sight should not be lost of the fact that a suspended sentence is " ... part of the sentence of the court and, indeed, a part which possibly will have to be served. The need for careful consideration of a sentence which, as a whole is appropriate, cannot be relaxed merely because there is a possibility that the suspended portion of the sentence will eventually not have any real effect in the sense that it will not have to be served. It remains important to bear in mind throughout that the full sentence imposed might have to be served in the end and accordingly that the period of the suspended punishment should be carefully considered in the context of the unsuspended punishment" (S v Setnoboko 1981(3) SA 550 at 554 F-H). I am in entire agreement with this exposition of the effect of a suspended sentence. In *casu,* it is abundantly clear that the accused, if ever called upon to pay a fine of R2 000 will, in all probability, not have it nor be able to raise it either from family, friends or any source. This Court is consequently entitled to interfere with the sentence.

It has been suggested by the two State counsel that the sentence be set aside and substituted with one of a fine of R1 000 or three (3) moths' imprisonment which must be wholly suspended. Whilst this sentence is lighter than that which was imposed it is still inappropriate in my considered view, regard being had to the mitigating factors and the total absence of any injury. I consider the appropriate sentence to be the one set out below.

The conviction is confirmed. The sentence is set aside and substituted with the following:

"The accused is sentenced to a fine of R200 or fourteen (14) days' imprisonment which is wholly suspended for three (3) years on condition that the accused is not convicted of assault or assault with the intent to do grievous bodily harm".

G. WEBSTER
JUDGE OF THE HIGH COURT

I agree.

D S S MOSHIDI
ACTING JUDGE OF THE HIGH COURT