

IN THE HIGH COURT OF SOUTH AFRICA
[TRANSVAAL PROVINCIAL DIVISION]

DATE: 14/3/2005

NOT REPORTABLE

Magistrate
Potgietersrus

Case no: TM30

Supreme Court Ref. No: 5568

THE STATE vs JAN MARAKALLA

REVIEW JUDGMENT

SHONGWE J

[¹] The accused was convicted of the contravention of Section 17 (a) Act 116 of 1998(Domestic violence Act). He disobeyed a protection order. He was sentenced to 3years imprisonment wholly suspended for 5 years on the usual conditions.

[2] Upon review, the magistrate was asked to consider, whether, seen in retrospect, the sentence is not excessive. The magistrate responded by saying that the maximum penalty *is* 5 years imprisonment which *is* an *indication* that the legislature views the offence

in a serious light. He also cited the prevalence of this type of offence in Potgietersrus.

- [3] It is trite that the trier of facts should balance the factors to be considered when imposing sentence. The seriousness of the offence and the prevalence thereof should not be over-emphasized at the expense of the personal circumstances of the accused and the interests of society. The accused and the complainant are married persons which factor should count heavily in favour of the accused to ensure a stable and harmonious relationship. The court should not be seen to encourage a divorce. This I say because even if the sentence is wholly suspended, the effect is that should the accused, for some reason, again contravene the same section, he will have to serve a period of 3 years imprisonment in addition to any other sentence imposed, if committed within the 5 years. Seen in that light the sentence is undoubtedly inappropriate. Therefore I feel obliged to interfere.
- [4] The complainant was not physically assaulted rather she was threatened. In order to encourage the bonds of marriage and the accused's responsibility to continue maintaining his family a suspended sentence is appropriate in the circumstances.

[5] When the magistrate was requested to comment on the sentence by the reviewing Judge, he said the following, *inter alia*, "that, such a sentence is to Blacks tantamount to a verdict of discharge as the accused is not serving the sentence but walks freely outside" [Sic] It is unfortunate that the magistrate expressed himself/herself in that way because not only is the remark inappropriate but also irrelevant. I seriously see no need to express an opinion with racial connotations. Thank God this was not said in a public court room with the public listening. The community relies on the court's impartial adjudication and pronouncement of the sentence and justice in general. Such remarks are unnecessary as they may be viewed as sowing the seeds of division. Such remarks may be viewed as bringing the administration of justice into disrepute and may cause unwarranted embarrassment to the judiciary.

[6] **In conclusion I make the following order:**

6.1 The conviction is confirmed.

6.2 The sentence is set aside and substituted with the following:

"The accused is sentenced to 12 months imprisonment wholly suspended for 3 years on condition he is not convicted of the contravention of Section 17 (a) of

Section 116 of 1998 committed during
the period of suspension .

J B. SHONGWE
JUDGE OF THE HIGH COURT

I agree.

L O BOSIELO
JUDGE OF THE HIGH COURT