A382/05

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

NOT REPORTABLE

DATE: 24/3/05.

Magistrate:

SASELAMANI

Review Case no: 493/2005

High Court Ref. No.: 257

THE STATE VS KHUMBULANI ENOS HOBYANI

REVIEW JUDGMENT

WEBSTER J

The accused was convicted in the Magistrate's Court, Malamulele, on one count of arson and sentenced to eighteen (18) months' imprisonment or a fine of R6 000. The matter is before me by way of automatic review.

The factual background is set out below.

The State's case against the accused is that he arrived at the complainant's home, announced his presence and set a thatch-roofed rondavel alight and then announced that he had done something good in that he had set the rondavel alight during the

afternoon and not at night when the identity of the culprit would have not been known.

The accused's version was that on the morning of the day in question he awoke and proceeded to his grandparents' home where there was a ceremony for the ancestors. He was offered liquor which he drank. He was offered food which he declined. This angered an uncle who then struck the accused on his temple. He tried to ward off the blow and sustained a cut on his hand. He was again struck on the temple, this time with an iron rod. He fell to the ground. Water was poured over him and he recovered. He stood up but collapsed and lost consciousness. He regained consciousness and took a bicycle from one of his nephews and rode off on it with a view to proceeding to the Police Station to report the assault. He fell off the bicycle and lost consciousness. When he got up from there he went off and set the huts alight. He was apprehended and taken to the Police Station and charged. He awoke the next morning. It was then that he was informed of the previous day's occurrences regarding the setting alight of the huts. He stated that he had not intended to burn the huts but that this had occurred automatically after he had been unconscious.

The Magistrate analysed the accused's version, in particular the cross-examination of the complainant when the accused asked his grandmother whether she had not seen the blood on him before he set the huts alight and further that he had informed her that he had been injured by her child. She further referred to the fact that

the accused was in a position to walk 400 metres, pass other houses and head straight to the home of the person who had allegedly assaulted him.

I pause to mention that the accused was further able to recall the drinking, the food he was offered, the verbal exchange with his uncle, the assault, riding on the bicycle, water being poured over him, setting the huts alight and being chased. Such recollection is not consistent with someone who suffered amnesia or acted in some state of automatism. To my mind the allegation that he had no recollection of all these occurrences and that they were related to him by someone else is highly improbable. The commandeering of the bicycle, his intention of proceeding to the police, the mention of Scorpions, matters he claims went through his head cannot be matters that someone told him about. These issues are part and parcel of the rest of what he did that day. I agree with the trial Magistrate that the accused knew what he was doing and that he had been activated by anger. That being so, the conviction of the accused is in order.

The Magistrate mentions various mitigating factors. The accused's age is given as 29 years. He is married and has two children aged 10 years and 5 years. He is unemployed and receives a disability grant of R740. He has no previous convictions.

The Magistrate made no mention of the attack on the accused and the injuries he sustained. She made no mention of the fact that the accused was under the influence of liquor. The announcement of the accused's presence before setting the huts alight is no act of bravado but is consistent with an angry drunken person who believes, rightly or otherwise, that he has suffered an injustice and wants to retaliate. In the absence of any finding on the attack on him such evidence cannot be overlooked. Rather than take cognisance of this the Magistrate made remarks that indicate that rather than evaluate the mitigating and aggravating factors she allowed herself to sacrifice the accused on the altar of deterrence and retribution. She remarks in her judgment on sentence as follows: *"The demeanour of the accused that he has shown to this court is a shame and a disgrace. It is clear that the accused does not have respect for any person.*

That was the reason that made the accused to burn the complainant's huts on the day in question. Because here in court the accused wants to do whatever he wants whenever he wants. Accused is not remorseful to what he has done on the day in question.

Accused was also not justified· to burn the two huts of the complainant on the day in question. Because if it is true that the accused was assaulted on the day in question the accused was supposed to go and lay the charge with the police rather than him taking the law into his own hands and burn the huts of the complainant

If people are involved in a squabble that does not mean that they must resort to violence to solve the said squabble. So the court thinks that maybe the problem that makes people to resort to violence when they are faced with this kind of a problem or in the situation because the sentences that are being imposed by the courts are not having any deterrent effect even to the would be offenders.

Whereas the objective of the courts when imposing a sentence is to deter the accused person and even the would be offenders. They rnust be deterred by the kind of sentence that is imposed by the court. The truth is that each and every case is unique and it must be treated as such by the courts.

This offence was committed by the accused in broad daylight. It shows that he does not have any respect He did not fear any person. He was determined to commit the said offence. Stand up."

With the full knowledge of the accused's financial circumstances and without considering other sentencing options available to the court save a suspended sentence the Magistrate proceeded to impose a fine that is clearly way beyond the personal means of the appellant. Further, the sentence can have no rehabilitative effect on the accused. In my view, a sentence that would have incorporated community service would have been preferable.

The imposition of a fine is indicative of a presiding officer's intention to keep an accused out of prison. Being a first offender who acted out of anger after being assaulted a sentence that could keep a first offender out of prison was justified.

The fine had to be within the means of the accused or one he was capable of raising by whatever means that are available to him (See S v Lekgoale 1983(2) SA 175 at 176E; S v Mlalazi 1992(2) SACR 673; S v Heilig 1999(1) SACR 379 at 386).

The fine of R6 000 suggests that it was imposed without regard to the fact that the accused could pay it. It was imposed without taking into account that it was way beyond the accused's means. The learned Magistrate clearly misdirected herself. This court is obliged to interfere and does so.

The conviction is confirmed. The sentence imposed is set aside. The matter is remitted to the trial Magistrate for her to conduct a proper investigation of the accused to pay a fine and to impose one that is consistent with the views expressed above. Should the accused be without the means to pay a fine either immediately or instalments or one that is deferred the Magistrate is ordered to consider the imposition of a non-custodial sentence such as community service.

G. WEBSTER
JUDGE IN THE HIGH COURT

I agree.

D S S MOSHIDI
ACTING JUDGE IN THE HIGH COURT