IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION

NOT REPORTABLE A485/2005

DATE: 25/4/2005

Magistrate:

MOTETEMA

Review Case No. M557/2004
High Court Ref:362

THE ST ATE v BEN MASTER MOHLALA

REVIEW JUDGEMENT

MOSHIDI AJ

This matter came before me by way of automatic review.

The accused was charged with two (2) counts, namely assault with intent to do grievous bodily harm and crimen injuria in the Magistrate's Court district of Nebo held at Motetema. He was not legally represented and despite his plea of not guilty, he was on the 14/1/2005 convicted. The only portion of the record dealing with the Magistrate's

judgement on sentence was as follows: "Sentence three thousand rands (R3000.00) or four (4) months imprisonment. Both counts taken as one for purpose of sentence". I was prompted as result to request the Magistrate's reasons for judgement on the sentence imposed as well as the reasons for the conviction. Such reasons are now at hand for which I am indebted to the Magistrate.

The accused, a fifty (50) year old, and the complainant a thirty (30) year old female at the time, were neighbours at the time of the incident. The complainant testified that on the 23/8/2004 at about 08h30 the accused came to her house in order to buy achar. Thereafter an argument ensued between the accused and the complainant. The argument was about the complainant's cell phone previously taken by the accused's child but which the accused had undertaken to replace. The accused became irritated when the complainant insisted on him fulfilling his obligation regarding the cell phone. He repeatedly called her by her private parts before and after he left her premises. On his return to her house the accused, in the words of the complainant, "He fisted me in my face, grabbed and pulled me by my hair, he pummelled me and I fell on my back ... he fisted me four times - being my right ear and on my left shoulder and on top of head. The fourth blow landing on my left breast.I was injured - I felt bodily pains. I consulted a doctor at Marble Hall ...I am now healed and I do not have any scars"

In cross examination the complainant insisted that the accused had assaulted her. However, she conceded that the accused had discussed the cell phone replacement with

her brother to which she objected, and that she labelled the accused "Not man enough" she also conceded that she had an exchange of insults with the accused. She had threatened the accused with the Scorpions if he did not return the cell phone. The medical doctor testified that he had examined the complainant on the 24/8/04. He found a swelling on the left pavietal region and tenderness on the right flank and neck and bruises on the left elbow. The complainant was also two (2) months pregnant. He treated her for the injuries, on the same occasion only. The complainant's younger sister, Mapule Nkgudi also testified and confirmed the argument between the accused and the complainant over the cell phone, that the pair grabbed each other and that as the accused had pinned down the complainant, the accused's wife arrived and separated the two. The accused testified in his own defence. He went to the complainant's house in order to buy achar on the 23/8/2004. The complainant confronted him about the cell phone. He told her that he had already discussed the issue with her brother to which the complainant objected. When the accused threatened to absolve himself from the cell phone liability as it was not taken by him personally but his child, the complainant in turn threatened to enlist the help of the Scorpions to attach the accused's property. After the complainant had labelled him "not man enough" the accused became angry and returned to her yard. He reached her, raised up his hand, she grabbed him, he over powered her, she fell. His wife arrived on the scene and separated the fighting. The accused denied assaulting the complainant. In cross examination, the accused testified that the complainant injured herself on the elbows when she fell. However, he could not account for her other injuries. During questions by

the Magistrate the accused testified that he understood the words "not man enough" to mean that his male organs were not functional. He also confirmed that he undertook liability to replace the cell phone to the complainant which cell phone was taken by his son. The accused's wife, Doris Mohlala, testified and confirmed that she found the accused stooping over the complainant on the ground whilst the complainant was holding the accused by the collar. She grabbed the accused and removed him from the complainant. That was the totality of the evidence. Thereafter, the Magistrate pronounced as follows: "Verdict: Guilty on both counts". Once more this kind of judgement, on the merits motivated me to request the Magistrate's reasons for judgement on conviction.

I initially had serious reservations about the correctness of the convictions on both counts as well as the sentence imposed. Subsequent to the receipt of the Magistrate's reasons for judgement, as stated above, I felt somewhat vindicated as my initial reservations remained and were not dissipated by such reasons. I shall deal with these shortly. As far as the second count was concerned, that was the count of crimen injuria, there appeared to me to be, no difficulty in sustaining the conviction. I must remark here that nowhere in his judgement no reasons for judgement did the Magistrate deal with this count at all. The two witnesses, Mapule Nkgudi and Doris Mohlala, the accused's wife, did not testify about this count. However, the complainant was explicit that the accused called her by her private part (vagina), not once, but repeatedly. In addition, when questioned by the

Magistrate in terms of Section 115(2) of the Criminal Procedure Act, No. 51 of 1977, (The Act), the

Accused admitted that he swore at the complainant by calling her by her vagina. Although legally unrepresented, the accused also agreed for such admission to be noted in terms of Section 220 ofthe Act. In his book "Criminal Law" Fourth Edition CN Snyman at page 453 described crimen injuria as follows:" Crimen injuria consists of the unlawful, intentional and serious violation of the dignity or privacy of another" . In the instant case, I am satisfied that the utterances of the accused to the complainant entailed all the elements of the crime, in particular that it constituted an injuria and clearly an aggression, on the dignitas of the complainant. See in this regard S.v. Mombers 1970 (2) 68 (CPD). It follows that this conviction on the second count must stand.

As far as the conviction on the first count is concerned, that is the assault with intent to do grievous bodily harm, I had and still have reservations whether this count had been proved beyond reasonable doubt against the accused, once more, both witnesses referred to above did not witness the actual assault on the complainant. The accused denied it. The complainant was the only witness in this regard. The complainant herself, was not entirely convincing in this regard. She too, like the accused was aggressive. She admitted only in cross examination, that she also insulted the accused. It is probable on the accused's version that she labelled him "not man enough". On her own version, when cross examined on this aspect she testified: ' I asked you what type of a man are you- you

accepted liability, on damages caused by your child but suddenly turn around and not make good the damages ". When questioned further on this aspect and as follows: " I even asked you that you hear yourself - that it is an insult to call me not man enough" Her reply was: "I remember that" .These utterances by the complainant must have angered the accused, as he indeed testified subsequently.

A careful analysis and scrutiny of the Magistrate's reasons for judgement on this count, revealed that the Magistrate had misdirected himself on at least two (2) occasions, to such an extent that I felt compelled to interfere with this conviction- See S v Ndlovu 1998(1) SACR 599 (WLD). In the first place, the Magistrate in his reasons for judgement stated: "In his plea explanation he created an impression that he did not yet harm her- as he is still to beat the hell out of her". Clearly this assumption by the Magistrate was not supported by the evidence at all. What the accused actually said was "As far as I am concerned I have not yet assaulted her". This could mean that the accused never assaulted the complainant as he in fact disclosed in his 115(2) statement and subsequently confirmed in his evidence. To have interpreted the statement to mean that the accused was still of the intention to assault the complainant, was not justified and absurd. Secondly, the Magistrate in his reasons for judgement said the accused "stole the mobile phone and watch the victim ..... ". Once more, this finding was not supported by the evidence at all. In this regard, the complainant clearly testified about the phone as follows: " His child took it from home with a watch and sold same and the accused offered to pay damages".

To suggest that it was the accussed who stole these items, was a misdirection by the Magistrate. In fact, the accused never testified about any theft of these items. It appeared that the accused, as the father of the child who took the complainant's phone and watch, merely offered to compensate the complainant.

In a further attempt to justify the conviction, the Magistrate referred me to the cases of R v Maradze and Another, 1958 (3) and Rv Bonifasi and Another, 1958(3) SA (SR) and S.v Joseph 1964(4) SA 54 (SR) as well as Madikare 1990(1) 337 (W). Unfortunately, the latter case could not be traced in any Law Reports under its given citation. In the Maradze case (Supra) at page 544 (c-d), the following was stated: " an accused can be convicted of assault with intent to do grievous bodily harm though no serious injury at all is caused the complainant, if the requisite intent is present. Similarly, though the degree of violence used may be great and the injury caused the complainant considerable, the accused may be guilty only of common assault if the evidence shows that he did not have the requisite intent to do grievous bodily harm as for example, if he had received sufficient provocation to negate the intent ..., or if the accused was too drunk to form the requisite intent". The facts of the instant case could clearly be distinguished from the two cases referred to in the Maradze (SUPRA) cases. In the latter, both the accused threatened to stab their victims with knives. There also was no evidence of any provocation on the part of both accused. In the case of Joseph (SUPRA) the accused drove his motor vehicle towards the traffic officers. In casu, it was common cause that no weapon was used by

the accused. In addition, the accused testified that he became angry when the complainant called him "not man enough". This the complainant did not dispute emphatically. The complainant was at least twenty (20) years younger than the accused. Clearly, the accused was provoked by the complainant's utterances aforesaid. The accused denied that he had assaulted the complainant. She was the only eye-witness on this aspect. The other witnesses did not see the assault. The Magistrate has not furnished any grounds, both in his original judgement and in his reasons on the assault charge. In this regard, the magistrate was faced with two mutually destructive versions on the assault. He must have assumed that the complainant was a satisfactory witness, which she was not. It is suggested that the proper approach in this regard should have been that advanced in S v Mattioda 1973 3(1) PH .H 24 at 49. In casu, there was no suggestion at all that the accused's version could not have been reasonably possibly true and he ought to have been granted the benefit of the doubt and acquitted. In the light hereof, as well as the misdirections outlined above, this court was entitled to interfere in the conviction on the charge of assault with intent to do grievous bodily harm and cause same to be set aside. The charge of crimen injuria appeared to be in order. The accused admitted guilt on this count and such conviction ought to stand. However, the accused's personal circumstances were such that I was not convinced that he ought to be removed from society. At his age of fifty (50) years he was a first offender, married with seven (7) children. He had offered to repay the complainant's phone on behalf of his son, even though he was unemployed.

In my view, a wholly suspended imprisonment sentence for this particular contravention would have the necessary effect and deterrence.

Prior to this judgement and on the 18/2/2005 I had issued an order for the immediate release of the accused as I was unpersuaded that he must be in prison any longer than necessary. I trust that the order was executed.

I accordingly propose to make the following orders:

1. The conviction and sentence on the count of assault with intent of causing grievous bodily harm are hereby set aside;

2. The conviction on the count of crimen injuria is hereby confirmed;

3. The sentence imposed on the count of crimen injuria is hereby set aside and substituted with the following sentence: " The accused is sentenced to a fine of R1200.00 or six (6) months imprisonment which is wholly suspended for three (3) years on condition that the accused is not convicted of crimen injuria committed during the period of suspension"

D S S MOSHIDI
ACTING JUGDE 0F THE HIGH COURT

I AGREE

W J HARTZENBERG
ACTING DEPUTY JUDGE-PRESIDENT