A67/2006

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINSIAL DIVISION)

NOT REPORTABLE

HIGH COURT REF NO: 3474

CASE NO: A 307/05

DATE: 30/1/06

Magistrate: Naphuno

In the matter between

THE STATE

V

MATOME JOHN SEROTO Accused

REVIEW JUDGMENT

Bertelsmann, J

1

The accused was convicted by the Magistrate's Court for the district of Naphuno, sitting at Lenyenye on the 07 September 2005, of assault with the intent to do grievous bodily harm. He was sentenced to the payment of a fine of R9000-00 or three (3) years imprisonment.

2

When the matter was sent on review, my brother dealing with the matter requested the Magistrate to comment whether the sentence was not

unduly harsh, and enquired whether other sentencing options were considered. The Magistrate replied that he did not consider other sentencing options, because, as he contends, our law entitles a Magistrate *mero motu* to impose any sentence which he or she deems appropriate.

3

The learned Magistrate also relied upon the decision of S *v De Bruin* 1971(1) *PH* 7, emphasising that there is no standard sentence for a first offender. It should be noted that the accused does not appear to have any income. The Magistrate contested himself with asking the bare minimum of questions before sentencing the accused, thereby failing in his duty to ensure that an accused's personal circumstances are fully investigated prior to sentence. He had no reason to believe that the accused would be able to pay any fine, let alone a substantial one.

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As the far as the imposition of the severe fine of R9000-00 upon an indigent accused was concerned, the presiding officer referred to *R v Motlagomang and others* 1958(1) *SA* 626 *(T).* This was a matter that had strong political overtones. It was based upon racially discriminatory legislation and dealt with a protest by tribal women who had burnt their so-called pass books.

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These women were sentenced to pay fine of 50 Pounds each which was clearly beyond their means, to the knowledge of the so-called Native Commissioner who dealt with the matter. The Court found as a matter of fact that the Native Commissioner had decided to impose a fine that he

knew would not keep the accused out of jail. This the Court of appeal did not regard as excessive under the circumstances.

6

It need hardly be pointed out that this approach to sentencing has little relevance to the position which confronted the learned trial Magistrate in this matter in 2005. In the first instance, the context in which the accused was convicted differs completely from the position in which the accused in the *Motlagomang* case found themselves. Secondly, the imposition of excessive fines on the basis of politically and racially motivated legislation is, thankfully, a matter of the past. Thirdly, there have been a number of judgments in this Division by which the learned trial Magistrate is bound, since the *Motlamogang* decision, pointing out that the imposition of a fine that is clearly and indubitably beyond the means of the accused is a cynical exercise that undercuts the value of the option of a fine, which is normally aimed at giving an accused the chance to avoid incarceration.

7

If the fine is designedly and deliberately beyond the reach of the accused, it gives a cruel twist to the supposed opportunity to escape imprisonment. As Kriegler and Kruger say in the sixth edition of *Hiemstra, Suid Afrikaanse Strafproses on, page* 737; "Dit is vanselfprekend dat die boete wat 'n welgestele oortreder opgelê word baie hoër sal moet wees as een wat 'n armoedige oortreder tref, indien hulle onder die omstandighede van die betrokke misdaad ewe swaar straf verdien ... ons howe erken hierdie beginsel al sedert *R v Frans* 1924 *TPD* 419, waar beslis is dat wanneer die Hof besluit om 'n boete op te lê met die doel om die persoon uit die tronk te hou, die Hof nie sy eie doel behoort te

verydel deur 'n bedrag op te lê wat die persoon nie kan betaal nie. Enkele beslissings waarin hierdie standpunt ondersteun is, is S *v Jansen* 1972 (3) *SA* 86 *(K);* S *v Manwere* 1972 (4) *SA* 425 *(RA);* S *v Sithole* 1979 (2) *SA* 67 *(A);* S *v Ncobo;* S *v Dlamini* 1988 (3) *SA* 954 *(N);* S *v Ntakatsane 1990* (2) *SASV 382 (NK) op 384c"*

8

In S *v Kekana* 1989 (3) *SA* 513 *(T) at 518f,* Kriegler J (as he then was) said that "the discretionary imposition of a fine patently beyond the means of an accused is open to criticism that it is an exercise in futility-if not cynicism" See further S *v Kika* 1998 (2) *SACR* 428 *(W)* and the authorities there quoted.

9

Turning to the merits of the conviction, it was common cause during the proceedings in the Court *a quo* that the accused had assaulted the complainant with a so-called slasher or panga and caused several severe wounds.

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The circumstances under which the attack took place are somewhat unclear. The complainant alleges that the accused called him and demanded that he repair a door, which the complainant refused to do.

11

On the other hand, the accused and his sister alleged that the complainant had somehow come into their homestead and upset their grandmother,

who is apparently mentally challenged. It was alleged that accused had pushed her into a bath.

12

Be that as it may, there was no evidence of a premeditated attack, but more than just a suggestion that the accused was in an emotional state when the attack took place, whatever the cause of that state may have been.

13

Whatever the true reasons for the attack, the complainant was fortunate, as the learned Magistrate correctly remarked, that he was not too seriously injured.

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In the light of these facts, and bearing in mind that the accused was a first offender, the Magistrate severely misdirected himself when he imposed the sentence that he did.

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He ought have to have considered alternatives to imprisonment, although in the present case the severity of the crime the accused was convicted of would probably have led to incarceration for some time.

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The State, represented by Ms Sono, senior state advocate, and adv E Leonard SC, Deputy Director of Public Prosecutions Transvaal, suggests that a part of the sentence ought to be suspended.

I agree. The following order is made:

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following;

   Three (3) years imprisonment, of which one (1) year is suspended for a period of five (5) years on condition that the accused is not convicted of an offence of which violence is an element, committed during the period of the suspension and for which the accused is sentenced to imprisonment without the option of a fine.

E BERTELSMANN
JUDGE OF THE HIGH COURT

R D CLAASSEN
JUDGE OF THE HIGH COURT