REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
CASE NO: A459/2008
JUDGEMENT DELIVERED: 17 JUNE 2008

REVIEW CASE NO: 51/2007/SM
HIGH COURT REF NO: 841/07
CASE NO: B120/2007
MAGISTRATE: CAROLINA

IN THE MATTER BETWEEN:

THE STATE

VERSUS

DAVID DECEMBER NGUBENI ACCUSED

JUDGMENT

POSWA, J

BACKGROUND

[1] The accused person, an adult male aged 40, was charged with assaulting his wife. Although the handwriting on the charge sheet is

not quite legible, he is accused of having assaulted her, on 23 April 2007, by hitting her on her face with his fist. On the charge sheet, it is reflected that the date of his arrest is 24/06/2006 and that of his first appearance is 26/04/2007. There must be an error or two with regard to the recorded date of his arrest. It must be 24/04/2007. At his trial, he was sentenced to a period of imprisonment of 12 (twelve) months, which was wholly suspended for a period of 5 (five) years, on condition that he did not commit an offence of assault during the period of suspension. The case was referred to the High Court on automatic review, in terms of s302 of the Criminal Procedure Act, 51 of 1977 (the Act).

[2] On appearing before the Magistrate, in the Magistrate's Court, on 26 April 2007, the accused person pleaded guilty to the charge. It is on record that he had been informed of his rights to representation, in terms of, *inter alia,* s35(3)(f) and (g) of the Constitution of the Republic of South Africa 108 of 1996 (the Constitution) and that he

declined services of a legal practitioner even at the expense of the state.

[3] When the case came before the reviewing judge, a query was forwarded to the Registrar of the High Court, for complains to the Magistrate, on 14 May 2007. The query is requisite thus:

"*The Honourable trial Magistrate is respectfully requested to deal with the following issues:*

1. *On what charge was the accused convicted – common assault or assault to do grievous bodily harm?*

2. *In view thereof that the accused was a first offender at age 40, and that the complainant insulted him, and that she sustained no serious injuries, and that she was hit twice in the face with an open hand, is the sentence not excessive?*

3. Is this not a case where the accused ought to have been convicted of common assault and sentenced to a warning, as a first offender?"

[4] The Magistrate duly replied to the query, in his letter dated 21 May 2007, which reads as follows:

"*1. I would like to answer the Honourable Review Judge query as follows:-*

2. I refer the Honourable Review Judge to the annexure of the original Hand written recorded where the state preferred a charge of Assault against the accused and upon questioning in terms of section 112(1)(b) of At 51 of 1977 as amended, the court convicted the accused of the charge.

3. Assault charge is less serious to assault with intent to do grievous bodily harm and the court convicted the accused of assault.

4. A.D. SENTENCE –

4.1 The victim of the assault in this matter is accused wife. Although other incidents (sic) of violence against the complainant were unreported, the accused used to assault his wife on several previous occasions and that came out when the state ***addressed (sic) the court****. (My emphasis.)*

4.2 The accused therefore ***has a previous conduct of violence against his wife*** *and therefore could not be treated simply as a fist offender. (My emphasis.)*

4.3 The sentence which the court imposed (sic) should not encourage other (sic) like minded (sic) offenders to resort to violence, hence the court impose (sic) a wholly suspended sentence.

4.4 The victim of the assault is a woman a defenceless (sic) person.

4.5 I hope this would answer the Honourable Review Judge's (sic) query."

FACTS

[5] It is against the above background that the matter comes to me for review. Apart from his right to legal representation, the accused person's rights with regard to the conduct of a trial were explained to him. He pleaded guilty to the charge. The Magistrate questioned him in terms of s112(1)(b) of the Act. He informed the Court that the

complainant is his wife by customary law and that they have four children. He further stated that he assaulted the complainant with open hands twice on her face. He added that, apart from slapping the complainant on her face, he did not assault her in any other manner. He stated that he does not know whether she sustained any injuries in consequence of the assault. He admitted that he wanted to injure her grievously and that he knew that it is unlawful to assault another person. Asked why he assaulted her he answered:

"*It just happened.*"

The Magistrate thereupon convicted him, passing a verdict of:

"*Guilty.*"

It was recorded that Mr Ngubeni had no previous convictions.

[6] Although the Magistrate did not state what he convicted Mr Ngubeni of, it must be assumed that it was of common assault, with which he was charged. Indeed, nothing to the contrary appears from the Magistrate's response. As I have already indicated in the background given herein, the Magistrate convicted Mr Ngubeni to twelve (12) month's imprisonment in the manner I have detailed. In litigation, Mr Ngubeni had mentioned that he has four children, that he has employment, that he earns R850-00 per month, that his wife, the complainant, was unemployed and, as I have already indicated, that she insulted him. No inquiry was addressed by the Magistrate or the Public Prosecutor as to precisely when and how the alleged insult on him had been perpetrated by the complainant. In his address with regard to sentence, the Public Prosecutor is recorded as having said the following:

"The offence is serious and prevalent. The complainant is half blind and she is a sickly person. The complainant said that she had been

subjected to abuse for a long time."

Although the records does not state this, it can be assumed that she was referring to "abuse" by Mr Ngubeni. Thereafter Mr Ngubeni asked for a suspended sentence.

[7] Returning to the Magistrate's response to the query, the following should be noted:

"Although Mr Ngubeni stated that he wanted to injure his wife grievously, the Magistrate, to his credit, does not mention that as an aspect aggravating the assault."

He was, in that regard correct, in that an accused person's evidence to the effect that he intended to do grievous bodily harm on the complainant does not, without much ado, where the charge is that of common assault, mean that the admission should be taken into

account, with regard to sentence when the conviction is of common assault. The accused person's admission in that regard does not alter the charge from that of common assault to that of assault with intention to do grievous bodily harm.

[8] There is no doubt that the Magistrate seriously misdirected himself and that he committed a serious irregularity in considering the Public Prosecutor's utterances, during the State's address on sentence, based on information in the dockets as evidence of "*other incident[s] of violence against the complainants*" that were unsupported. Moreover, in that regard, the Prosecutor, himself, did not inform the court that the information in his docket is that, Mr Ngubeni, in the cause of the alleged "abuse" of the complainant, had assaulted her. Abuse could have been in the form of something less than assault, such as swearing at her and generally making her uncomfortable.

[9] It follows, therefore, that the response in 4.2 of the Magistrate's letter is inadequate. There is simply no justification for the Magistrate

saying Mr Ngubeni "could not be treated simply as a first offender", it having been recorded that the State "proves no SAP 69", which obviously means no previous convictions.

[10] Similarly, the response in 4.3, with regard to the Court, in sentencing Mr Ngubeni, wanting to "impose" a sentence which, as I think was intended to mean, would discourage other persons in his position from resorting to violence.

[11] It is remarkable that the Magistrate says, in 4.4 of his letter, that "the victim of the assault is a woman, a defenceless person" was not mentioned in his judgment when he sentenced Mr Ngubeni. It must, in my view, however, be accepted that the Magistrate could not have been unmindful of that glaring fact, which brings me to an important aspect, i.e. what the appropriate sentence is, on the facts of this case.

[12] At this stage, I should refer to the response from the Director of Public Prosecutions, dated 22 August 2007. It is in response to the reviewing judge's letter of 13 July 2007. I quote extensively from that response as follows:

"*5. A sentence of caution and discharge is the lightest possible sentence permitted by the law (Vide: s v Magidson 1984 (3) SA 825 (T)) and has the effect of an acquittal with the difference that the accused has a criminal record. It is submitted that such a sentence thus befits minor offences.*

6. A sentence of cautionary discharge has been imposed in certain cases of assault. See for example, S v Human 1991 (1) SACR 340 (E) where the accused struck a single blow on the complainant's chest during an argument with the complainant.

7. Domestic violence is however viewed in a more serious light by

the legislature, which deemed it fit to enact the Domestic Violence Act 133 of 1993 [should be 116 of 1998] in this regard. [The legislature actually enacted the Prevention of Family Violence Act, in 1993, later substituted by the Domestic Violence Act in 1998.] Although the accused was not charged with a contravention of the Act, it does not deter from the fact that the assault was essentially an act of domestic violence by a husband against his wife.

8. *The rationale behind a stricter approach to domestic violence relates to the ramifications that such offences have on families, particularly children, as well as society. It has been said that such behaviour leads children to believe that violence is an acceptable manner of dealing with problems or stress or to gain control over another person, it perpetuates patriarchy within a society and consequently the subordination and haplessness of the victims.*

9. In addition, domestic violence is a contravention of the constitutionally entrenched right to be free from all forms of violence whether derivative from a public or a private source. In S v Baloyi 2001 (1) SACR 81 (CC) 87, the Constitutional Court emphasized that the State is under a series of constitutional mandates which oblige it to protect the right of all persons to be free of domestic violence.

10. Domestic violence is prevalent and on the increase and courts have a duty to impose sentences that will deter future offenders (Vide S v Bergh 2006 (2) SACR 225 (N) 233). It is respectfully submitted that a sentence of a caution and discharge will fail to address the gravity of the offence and will not serve to deter repetitive conduct. Accordingly therefore, it would be an inappropriate sentence. In my submission, a sentence of a wholly suspended term of imprisonment aptly reflects the

gravity of the offence, serve (sic) as deterrence, and also afford (sic) the accused an opportunity to rehabilitate.

11. However, the sentence of twelve months imprisonment, albeit wholly suspended, is excessive particularly in view of the fact that there is no evidence that the complainant suffered injury, that the accused is a first offender and the sole breadwinner of the family. A sentence in the region of R1 000-00 or three months' imprisonment wholly suspended for three years on condition that the accused is not convicted of the offence of assault within the period of suspension would fit the crime and the criminal.

12. Accordingly therefore, it is submitted that the sentence be set aside and substituted as suggested above or with a similar sentence."

[13] That was the view expressed by State Advocate S Mahomed. Advocate H M Meintjes SC had a concurring view as follows:

"I agree with the submission made. In addition it should be added that the magistrate misdirected himself in taking into account the "evidence" placed on recorded by the prosecutor by way of submission in aggravation of sentence. The following was said: 'The complainant is half blind and she is a sickly person. The complainant said she had been subjected to abuse for a long time'. These are relevant factors that warrants (sic) a heavy sentence such as the one imposed. However, unless admitted by the accused it should have been properly proved. Given the misdirection, interference is warranted and the sentence should be set aside. Rather than substituting it with an inappropriate one, the matter should be returned to the magistrate in terms of section 304(2)(c)(ii) and (V) of Act 51 of 1977 to hear such evidence as might be appropriate and relevant to sentence and then to impose sentence afresh. Such course

is especially called for given the weighty considerations pertinent to the domestic violence situation in hand."

[14] Concerns raised by both counsel from the Deputy's Office are appropriate. Domestic violence is, indeed, prevalent and on the increase. It is also true that Courts have a duty to impose sentences that would deter future offenders, as stated in *S v Bergh, supra.* I shall return to this judgment in due cause. It is also true that certain aspects of *S v Baloyi, supra*, always have to be borne in mind when dealing with domestic violence.

[15] It is, in my view, however, important not to confuse the circumstances pertaining in *S v Baloyi* with those in an ordinary case where one is charged with common assault, albeit involving domestic violence. In *S v Baloyi*, the complainant laid a charge of assault against her husband. The police advised her to obtain an interdict in terms of the Domestic Violence Act no 133 of 1993 (the Act), which preceded the

current **Domestic Violence Act,** no 116 of 1998. An interdict was granted by the Magistrate, ordering the appellant not to assault the complainant and their child and also not to prevent them from leaving or entering the joint home. A warrant of arrest for appellant was also granted but suspended in terms of the Act, pending the return day. The appellant, having been served with the interdict, allegedly assaulted the complainant again and threatened to kill her. The appellant was arrested and brought before the Magistrate for an inquiry into the alleged breach of the interdict. After hearing evidence from both the applicant and appellant, the Magistrate convicted the appellant to for violating the interdict**.** The appellant appealed against the conviction and sentence, primarily on the basis that the Act was unconstitutional. The alleged unconstitutionality related with the fact that the Act in s35, provided that an accused person who, unlike the appellant in the case before me, had failed to appear in court on a date on which he was supposed to appear could be dealt with in terms of

S170(2) of the Criminal Procedure Act 51 of 1977. That section provides that, in such a situation, the Magistrate's Court may, where a person has failed to appear in Court, on due date or failed to remain in attendance at Court on such date;

"*in a summary manner inquire into his failure so to appear or so to remain in attendance,* ***unless the accused satisfies the court that his failure was not due to fault on his part,*** *convict him of the offence referred to in subsection (1) and sentence him to a fine not exceeding R300-00 or to imprisonment or for a period not exceeding three months."*

It was submitted, on the appellant's behalf, that the section imposed a reverse **onus,** contrary to the provisions of s35(3)(h) of the Constitution of the Republic of South Africa, 1996 (the Constitution), which stipulates that every accused person "has a right to a fair trial

which includes the right to be presumed innocent, to remain silent, and to refuse to testify during the proceedings."

[16] The appellant's appeal was upheld by the Transvaal Provincial Division, whose decision was vested by the Constitutional Court. That aspect of the case is not relevant for present considerations and I shall, therefore, say no more about it.

[17] In the course of its judgment, the Constitutional Court made an elaborate comment about domestic violence, also making reference to a number of overseas authorities. The following, which is not exhaustive of all that was said by the Constitutional Court is a summary of what emerges from the judgment in respect of domestic violence.

(1) Domestic violence cuts across class, race, and culture in general. It is often concealed and frequently goes unpunished.

(Para. 10, page 341).

(2) The imperative for legislating on family values derives from s12(1) of the Constitution, which reads:

> "*Everyone has the right to freedom and security of the person, which includes the right –*
>
> *(c) to be free of all forms of violence from either public or private sources. …"*

The legislature, by making reference to "private sources" indicates its awareness that, as Sachs, J in giving the judgment of the Court, puts it: "[*S]erious threats to security of the person arise from private sources."* (Para. [11], 87e). Section 12 of the Constitution is to be read with section 7(2) of the Constitution, which reads:

"7(2) The State must respect, protect, prevent and fulfil the rights in the Bill of Rights."

In this regard, Sachs, J states:

"*Read with s7(2), s12(1) has to be understood as obliging the State directly to protect the right of everyone to be free from private or domestic violence. Indeed, the State is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom of security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way."* (Para. [11], 87e-88(a).)

(3) Domestic violence "both reflects and reinforces patriarchal domination, and it does so in a peculiar brutal form" (Para. 12, page 442).

(4) Sachs, J's observations in the following excerpt are, in my view, particularly important. He states:

"*The non-sexist society promised in the foundational clause of the Constitution, and the right to equality and non-discrimination guaranteed by s9, are undermined when spouse-batterers enjoy impunity. In the words of White, J in United States v Dixon et al ...*

> *'Realisation of the scope of domestic violence .... "the single largest* ***cause of injury to women****," … has come with difficulty, it has come late."*
>
> ***The ineffectiveness of the criminal justice system*** *in*

> *addressing family violence intensifies a subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The generalisation of the individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of* ***systemic sexist behaviour*** *are normalised rather than combatted. Yet it is precisely the* ***function of constitutional protection*** *to convert misfortune to be endured to injustice to be remedied.*

[13] In seeking to remedy the injustice, the legislature was acting compliance with South Africa's international obligations. Freedom from fear is one of the fundamental rights identified in the preamble to the Universal Declaration of Human Rights (948) who speaks of:

'… the advent of a world in which human beings shall enjoy

freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.'

The Declaration of the Elimination of Violence Against Women specifically enjoins member states to pursue policies to eliminate violence against women. In this regard the member states undertake to pass legislation to punish violence against women. It is important to note that freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedom. The Convention on the Elimination of Discrimination Against Women imposes a ***positive obligation on states to pursue policies of eliminating discrimination*** *against women by, amongst other things, adopting legislative and other measures which prohibit such discrimination. Similarly the African Charter on Human and People's Rights obliges signatory states to ensure the elimination of discrimination against women. These*

> *injunctions are directly relevant to the present matter: when interpreting the Act the Court must prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with it."* ***(My emphasis added, in paras. (12) and (13).)***

[18] These observations by Sachs, J as summed up above, are, in my view, paramount for a proper appreciation of the problem of domestic violence. What was not mentioned by the Constitutional Court in *Baloyi (supra),* however, is the peculiar problem with regards to domestic violence perpetrated by men who come from an African provisional background. I mention this because it is general knowledge that, traditionally, African custom divides the societal roles of members of a community according to gender-belonging. Under normal circumstances, according to African traditions, males occupy a dominant position in society. That includes an obligation to

literally look after females and children. Even so, male-folk are not expected to bully or terrorise woman-folk and children. The need for such, does not, traditionally, arise because both women and children do not, ordinarily, challenge the authority of the men folk. Cultural institutions like the initiation ceremonies teach the values to young men. Such values include respect for women-folk and care for children, ensuring their well-being. In a normal African family, the position of the senior male *vis-à-vis* the rest of the family caused disturbance to the rest of the family and there was no justification for the husband to assault his wife or wives. Polygamy was, of course, also normal and caused no discomfort to the wives. It placed social obligations to the husband in respect of the "houses".

[19] That kind of African customary life is, however, a thing of the past in its truest form. With the adherent of Christianity and monogamy, including the need for the man to provide for the family by way of seeking employment, instead of relying on his cattle, and wives

occasionally also having to seek employment to augment means of living for the family. The pure traditional customary way of life has disappeared. Unfortunately, some relics thereof remain, including the dominant position of the male, i.e. patriarchy.

[20] In the circumstances, most of African families that still adhere to traditional customary life, according to how they were brought up live a hybrid way of life, in which male dominance that is typical of a traditional way of life still prevails. Against this resilient patriarchal role of the male, as head of the family, is a fast-growing emergence of the notion of equality of genders, which means that more and more African women do not accept, as used to be the case in the past.

[21] Unfortunately, the very Constitution which, according to the Constitutional Court, is the tool for change, is hardly known amongst the very people whose cultural beliefs and actions have to be changed. The once-a-year “six weeks of non-violence to woman” campaign is

certainly not the sort of measure required to educate such a large section of our society of the need to abandon its traditional notions and practices and to accept the constitutional rights of women and children to be treated as equals. What is more, the media, which is currently utilised for what little public education, is conducted is accessible to a large number of members of the African community.

[22] Many households have no radios, let alone television sets (TV's). Many important educational programmes are not broadcast at the so-called prime times, because they are not financially rewarding. Many an African accused of abusive conduct against his family does not fully appreciate why what he did, when dealing with what he thinks was delinquent behaviour by his wife or daughter, becomes criminal conduct. I am not say "unconstitutional" because that concept does not exist in his vocabulary. As Constitutional Court points out in *Baloyi, supra*, the State has an obligation to ensure that the grounds that it has created for adequate protection of women and children.

That cannot be done only through the courts and by increasing sentences for offenders. It is imperative that those most likely, in account of their cultural background, to be prime offenders. That can only serve to increase membership of the category of human beings who have resided themselves in the belief that "the law is an ass" and that it is there merely to persecute them. I am not unmindful of the fact that Mr Ngubeni told the court that he knew that it was an offence to assault someone. He was not, however, talking about the provisions of the Constitution or of the Domestic Violence Act. Having campaigns of educating both male and female members in African communities, more especially rural areas, is extremely urgent. They must be taught about the need to move away from their traditional way of life and about relevance of the Constitution. Otherwise, punishment by the courts will largely continue to be seen as one of the relics of the oppression of black people, being practised by the present regime. That might even result in courts losing their dignity and respect in the eyes of such communities.

[23] Equally important is the need to ensure that the relevant State departments fully appreciate the sentiments expressed by the Constitutional Court in *Baloyi, supra*, about public violence. In that regard, it is essential that both the police and public prosecutors understand the purpose for which the Prevention of Family Violence Act respectively, were enacted and its successor, the Domestic Violence Act as explained in *Baloyi, supra.* As it is, in the present case, the fact that the accused person was merely charged with common assault, resulted in a belated attempt, the prosecution, to make use of the provisions of the Prevention of Family Violence Act. This, in spite of the police not having relied on the provisions of that Act. [Incidentally, the relevant provisions of Domestic Violence Act (ss 6 and 7) were rescinded by s 21 of the Domestic Violence Act. The latter must be the statute the Director of Public Prosecution's office had in mind in its responses to the enquiries raised by the reviewing judge.) It could never have been the intention of the

Legislature that a person who is charged with common assault should be dealt with as if he or she was a culprit in terms of the provisions of the Domestic Violence Act.

[24] Whilst, therefore, I agree with the sentiments expressed by Meintjies SC of the Office of the Director of Public Prosecutions, one must, in passing sentence in this case take into account that the accused person was merely charged with assault – not charged with assault to do grievous bodily harm or dealt with in terms of the provisions of the Domestic Violence Act. The passing of sentence has, therefore to be consistent with the facts placed before the court.

[25] An accused person's intention must be measured against the nature of the injuries sustained by the victim, if any. There is no doubt that the accused person in this case would have been charged with assault to do grievous bodily harm to the complainant if she had sustained serious injuries. As it is here, there is no evidence of injuries, let

alone serious injuries. Moreover, even if the complainant did, in fact, sustain serious injuries, the Magistrate was not entitled to deduce, from whatever factors, including Mr Ngubeni's evidence that he intended to injure his wife grievously, that the accused person is guilty of conduct not properly placed before him or her. In my view, the plea in this case was appropriately received, in view of the charge and the accused person's admission of all the essential elements of the offence of assault.

[26] A custodial sentence of twelve months with or without the option of a fine, for common assault, is in my view, excessive and induces a sense of shock. The Magistrate misdirected himself in, at least the following respects. Firstly he accepted the Public Prosecutor's say so that "*the complainant said that she had been subjected to abuse for a long time,"* there being no such evidence. Secondly, having thus misdirected himself, he dealt with the accused person as though he had repeatedly committed such assaults on the complainant.

[27] In my view, this Court, as is the case with the Magistrate's Court, has to take into account precedent with regard to sentences in matters of common assault. In *S v Mokgalaka* 1993 (1) SACR 702 (A), the appellant, a 50 year old male, had a 19 year old previous conviction for murder the assaulted a female who was his superior – by punching and throttling her. No medical evidence of any injuries sustained by the complainant was led. The complainant he was sentenced to twelve months imprisonment, of which six months were suspended for a period of five years, on usual conditions. The Appellate Division set aside that sentence and substituted therefor one with twelve months imprisonment wholly suspended for five years. It held, *inter alia*, that "the magistrate ought to have taken into account, in the appellant's favour, that provocation of some kind or another could have led to the assault". Whilst I find the court's eagerness to accommodate a reason or reasons, that was or were not advanced by the appellant for the assault puzzling, the fact is that the appeal related to, *inter alia,* a

sentence of twelve months' imprisonment for assault with intent to do grievous bodily harm. Whilst the appeal against conviction was discussed, that against sentence was upheld. The sentence was replaced with that of 12 months' imprisonment fully suspended for five years. In *S v Mabunda* 1990 (1) SACR 105 (T) the appellant had caused a serious wound on his wife, the complainant, which required hospitalisation, with a slasher. He was convicted of assault to do grievous bodily harm, as charged. On appeal the sentence of ten months' imprisonment was reduced to a fine of R250-00 or six months' imprisonment, whilst a further six months' imprisonment was wholly suspended for three years. The Court held that "*the sentence was disproportionate to the crime committed and to the person of the appellant."* Unfortunately, this case is reported only as a head note, together with four others, under the heading "SUMMARIE OF CASES OF SENTENCE". It is not possible to say what other factors were considered by the Court of Appeal when considering the appeal against sentence and what is meant by "*the person of appellant"*.

Judging by what is currently happening, I cannot say that the Prevention of Public Violence Act, had been in existence by them would have been resorted to by the prosecution. The facts of the case are, in my view, just the facts that call for the use of, now, the Domestic Violence Act. What is important for the case before me is that a sentence of ten months' imprisonment for assault with grievous bodily harm was reduced to a fine of R250,00 or six months' imprisonment. Due to the judges in that case, Schabort, J is now sitting in the SCA. But for the legislature intervention in respect of domestic virtue, it cannot be said that the sentences referred to in this judgment are to be used as guides on what sentences to pass in cases of common assault.

[28] What is worse in the present case, apart from the absence of injuries on the complainant or lack of mention thereof, there is no evidence of even the nature of the assault perpetrated by the accused person in assaulting her and he is a first offender. This is a reflection on the

prosecution's of appreciation of the current emphasis on the victims' constitutional rights, including the need to use the constitutional tool provided, the Domestic Violence Act. It is trite that sentence must fit the crime, the criminal and society. It must also deter the criminal from committing a similar offence. Although I have mentioned in detail the danger of using the court as being the only or the primary source of educating society, there still is a role to be played by the courts by passing appropriate sentences, in the circumstances before them. I do not agree with the suggestion by Advocate Meintjies that *"the matter should be returned to the magistrate in terms of section 304(c)(ii) and (v) of Act 51 of 1977 to hear such evidence as might be appropriate and relevant to sentence and then to impose sentence afresh*." I am of the view that that would serve no purpose, especially in view of the fact that all the facts that should have been considered by the magistrate were before him and he placed them on record. Courts, in general are concerned about disposal of cases as soon as possible. It should, therefore, in my view, be only in cases where it is

avoidable to remit the case to the Magistrates' Court in order for the interests of justice to be met, that that should be done. The accused persons are entitled to finality and I find myself in agreement with the sentence suggested by Adv. S Mahomed, of the Director of Public Prosecution's Office. Consequently I make the following order:

1. I am not satisfied that justice was done in every regard in the current case.
2. The conviction of the accused person, Mr David December Ngubeni, of common assault, as such, is confirmed.
3. The sentence is set aside and the following is substituted therefor:

"Payment of a fine of R1000-00 or imprisonment for a period of three months, which is wholly suspended for a period of three years on condition that the accused person is not convicted of assault within the period of suspension."

_____
J N M POSWA
JUDGE OF THE HIGH COURT

I agree

_____
JUDGE OF THE HIGH COURT
N M MAVUNDLA