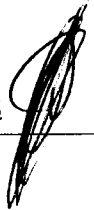




IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <del>YES</del> / NO.	
(2) OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO.	
(3) REVISED. <i>yes</i>	
DATE <i>27/3/2015</i>	SIGNATURE 

*A223/15*  
*31/03/2015*

CASE NO: A393/14

IN THE MATTER BETWEEN:

**HOSEA MOKOENA**

**PLAINTIFF**

**AND**

**THE STATE**

**DEFENDANT**

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**JUDGMENT**

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**LEDWABA, DJP**

1.

[1.1] The accused was arraigned in the magistrates court for the district of

Praktiseer on a charge of malicious injury to property.

[1.2] The accused, who was not legally represented, pleaded not guilty to the charge. After evidence was led the accused was convicted as charged.

[1.3] The presiding magistrate thereafter sentenced the accused to six months imprisonment.

[1.4] In terms of Section 302(1)(a) of Act 51 of 1977 the matter is reviewable in the ordinary course as the accused, having been unrepresented, was sentenced to imprisonment exceeding six months. In terms of Section 304(1) of Act 51 of 1977, the Honourable the Reviewing Judge must decide whether the proceedings were in accordance with justice.

[1.5] Initially the Registrar allocated the review to the Honourable Judge Nobanda, AJ who issued a directive dated 18 September 2014 to order the immediate release of the accused. On 29 September 2014 Nobanda, AJ requested reasons from the presiding officer pertaining to the imposed sentence. It appears that the letter was only received by the magistrate's court on 28 November 2014. The magistrate responded that he was not in a position to respond to the queries as the accused had already been released and any response would only be of academic interest. There is no indication that the

Office of the Director of Public Prosecutions was ever requested to comment as to the order of immediate release of the accused.

[1.6] Of academic interest, the magistrate further stated that the aforesaid order clearly means the Honourable Acting Judge Nobanda has made a finding that the conviction and sentence of the accused must be set aside and her Ladyship will give the reasons later.

[1.7] I think the magistrate was wrong in stating that Nobanda, AJ has pronounced herself on the conviction and sentence of the accused because Nobanda AJ had not yet given her reasons for directing that the accused should be released.

[1.8] The other disturbing factor in this matter is that there is no indication that the Office of the Public Prosecution (DPP) was requested to comment on the release of the accused nor did she discuss the release of the accused with another Judge senior to her before she directed that the accused should be released.

[1.9] The practice of discussing the matter with a senior Judge and/or the office of the DPP is important to avoid the situation that occurred in this matter. The practice has been followed for many years. It is an important and valuable practice because the State is given an opportunity to respond and in most, if not

all, instances the office of the DPP is requested to comment and it complies within a very short space of time and their comment are valuable.

[1.10] Since the acting stint of Nobanda AJ was over in January 2015 the Registrar allocated the matter to the Honourable Judge Molopa-Sethosa and it appears she was in agreement with the sentiments expressed by the magistrate.

[1.11] The matter was forwarded to my office. I then forwarded the matter to the office of the DPP. I hereby thank the office of the DPP for their prompt and sagacious comments.

[1.12] The accused in the matter admitted that he intentionally burned the complainant's clothes, together with the children's clothes and birth certificates.

## 2.

[2.1] The accused was properly assisted by the magistrate and he did not dispute the evidence of Saphira Motlala that he damaged the items as described in the charge sheet. During cross-examination he also admitted that he burned the clothing and other items. It is therefore submitted that the accused was correctly convicted and malicious injury to property.

## 3.

[3.1] The accused was sentenced to undergo six months imprisonment. According to the records (attached) of the Department of Correctional Services, he was released on 18 September 2014. This means the accused served an effective sentence of approximately two months imprisonment.

[3.2] According to the evidence of the accused during mitigation he was unable to pay a fine, and he requested in essence a postponed sentence in order for him to find work and pay a fine. The magistrate was of the view that the accused was “obsessed” and held that direct imprisonment was appropriate. In this regard it is submitted that the queries raised by Nobanda AJ was needed to be addressed by the magistrate.

[3.3] I think the imposed sentence induces a sense of shock and is unduly harsh. As was stated in **S v V 1972 (3) SA 611 (A) 614D – E:**


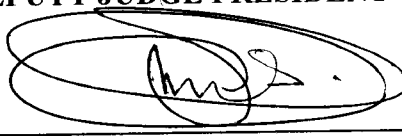
”Punishment should fir the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy; see **S vs Sparks and Steytler** (AD 18 May 1972). The element of mercy, a hallmark of civilized and enlightened administration, should not be overlooked, lest the court be in danger of reducing itself to the plane of the criminal; compare the remarks in **S v De Bruyn en ‘n Ander 1968(4) SA 498(A) at 513E**. True mercy has nothing in common with soft weakness

or maudlin sympathy for the criminal, of permissive tolerance. It is an element of justice itself.”

[3.4] On the circumstances of this case I think an appropriate sentence is that of three months’ imprisonment and one month to be suspended on normal conditions.

**I therefore make the following order:**

1. The conviction is confirmed and is in accordance with justice
2. The sentence is set aside and substituted with the following sentence
  - 2.1 *“Accused is sentenced to three months imprisonment and one month thereof is suspended for three years on condition that the accused is not convicted of malicious damage to property and sentenced to direct imprisonment without an option of a fine within the period of suspension”*
  - 2.2 *The sentence is antedated to the 15 July 2014.*

  
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**A P LEDWABA**  
**DEPUTY JUDGE PRESIDENT**  
  
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**THOBANE, AJ**