REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

18/03/2016 MH Phatudi
DATE SIGNATURE

DATE: 18/03/2016.

(on which review judgment is handed down)

High Court Review Case No: 88/2015
Magistrate Court Dzanani: Case No: A533/15

In the matter between:

THE STATE

and

SIGIDIMA GUDANI **Accused**

REVIEW JUDGMENT

PHATUDI AJ

[1] **INTRODUCTION:**

1.1 The accused in this case has been charged with one Count of Assault with intent to do grievous bodily harm. The offence allegedly took place on or about 02 October 2015 at or near Tshitavha Village, District Dzanani.

1.2 At the commencement of the trial proceedings, and before he was invited to plead to the charge, accused elected to conduct own defence. A plea of Not Guilty was entered on his behalf after a brief inquiry conducted in terms of section 112(1)(b) of Act 51 of 1977, from which it became apparent that he had a defence, one of self-defence. The admissions he made during the said inquiry were, with his consent, recorded as formal admissions under the provisions of section 220 of the said Act.

1.3 The accused was found guilty as charged after closure of the defence case. The conviction followed the evidence of a single witness, the Complainant in this instance[1].

The Court found the evidence of the complainant to be "clear and satisfactory" in all material respects[2], and therefore reliable. In adopting the approach aforementioned, the Court below was guided by the cautionary sound echoed in S v Chabalala[3] when the court emphasized that Section 208 of Act 51 of 1977 should only be applied when the evidence of a single witness is "clear and satisfactory" in all material respects.

[1] Pp 28 & 29 , Record
[2] P29, line 10, Record
[3] 2003(1) SACR 134 (SCA) Para 15

1.4 As to the accused's version, the trial Court found his evidence fraught with contradictions, and beyond reasonable doubt, false. Furthermore, the accused, on his own version, during his plea, admitted having assaulted the complainant with "one stone" in what he termed a private defence. After weighing and evaluated the evidence in its totality, the Court *a quo* correctly so, in my view, convicted the accused as charged.

1.5 The conviction, absent, any alleged irregularity cannot therefore be faulted.

[2] **AD SENTENCE:**

2.1 On sentencing the accused, the Court imposed an imprisonment term of two(2) years and six (6) months without an option to pay a fine[4].

2.2 The matter was referred to this Court for a review. Makhafola J who attended to review the matter, raised pertinent concerns about the severity of the sentence taking into account that the accused was a first offender. I consider it unnecessary to re-capture the queries raised therein for the purposes of this judgment on review.

[4] P42, line 10, Record

2.3 Both the trial Court and the office of the Director of Public Prosecutions ("DPP") were invited to lay comment and/or inputs on the matter, especially on the sentence imposed.

The office of the DPP in its concluding remarks submitted that in considering the personal factors of the accused cumulatively, the imposed sentence is a "bit harsh" (own emphasis). I am in agreement with this sentiment.

[4] It is a general principle of our law that the sentencing powers are pre-eminently residing within the judicial discretion of the trial Court. The appeal or reviewing Court should be slow to interfere with the sentence of the sentencing Court, unless there has been a patent error or misdirection on the law or facts, or where there has been an irregularity that vitiates a conviction. These observations are well vested in case law and provide solid guidance.

[5] There is no doubt that the court below correctly followed the principles enshrined in S v Zinn and S v Rabie[5] when it performed a balancing act in relation to the accused's personal circumstances, when selecting a suitable sentence[6]. The trial court in fact took it upon itself to extract from the accused and placed on record such balancing or mitigating factors before it meted out the penalty it did.

[5] 1969(3) SA 57 (A); 1975(4) SA 855 (A) at 857 D-E.
[6] Pp30-31, Record, See also P34

[6] I must remark however, that the court below ought to have accepted that apart from being a first offender and that he was young at 19 old years, these factors weighed heavier in his favour for purposes of extenuation. Failure to have considered these factors was a misdirection. Over emphasis of seriousness of the offence, weighed in isolation and elevated as an aggravating factor was, to my mind, clearly a grove error.

See , P37, line 10-20, Record.

[7] Furthermore, the Curt below clearly erred when it sought to have considered extraneous considerations not before Court, for instance, that the accused was "supposed to [have] been charged with Attempted Murder because he assaulted the complainant on his dangerous part of the body".

See Para 2 P38, line 10, Record

[8] On a semblance of these errors and/or misdirections, which degenerated into grave irregularities, this Court is at large to interfere with the sentence imposed. The sentence as the DPP correctly observed, was "a bit harsh" in the circumstances. It is liable to be corrected and set aside as follows:

COURT ORDER

1. **The sentence imposed of 2(two) years and 6(six) months' term of imprisonment without the option to pay a fine is set aside and replaced with the following:**

   "The accused is sentenced to 12(twelve) months imprisonment".

2. **The sentence is antedated to 06 October 2015.**

MG PHATUDI
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

AML PHATUDI
JUDGE OF THE HIGH COURT