

SOUTH AFRICA / JUDGMENT

S v Mashibye (A939/2005) [2005] ZAGPHC 292 (1 August 2005)

[2005] ZAGPHC 292

COURT

High Courts - Gauteng

BEFORE

I W B De Villiers, W J Van Der Merwe

CASE / FILE NUMBER

A939/2005

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A939/2005

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 01/08/2005

UNREPORTABLE

Magistrate

MALAMULELE

Case No: B33/2005

High Court Ref No: 1784

THE STATE V THOMAS MASHIBYE

REVIEW JUDGMENT

DE VILLIERS, J

The accused, a man aged 38 years, was charged in the magistrate's court for the district of Malamulele, held at Malamulele, with contravening section 1(a) of the Witchcraft Suppression Act 3 of 1957 in that on or about 12 December 2004 and at Peninghotsa, Malamulele district, he wrongfully and intentionally indicated on George Shivuri as a wizard.

The accused pleaded not guilty and was unrepresented. He was found guilty and sentenced to ten years imprisonment.

When the matter came before me on review I asked the magistrate a number of questions concerning the conviction and the sentence which he has graciously answered.

In my view, the magistrate correctly found that the accused indicated the complainant as a wizard. It appears, however, that the accused was “extremely drunk” when he did so (44: 22-24).

This was the evidence of Mr China Samuel Hlungwane, a defence witness, whom the magistrate described as a very impressive and unbiased witness (77:17 21). Hlungwane also testified that

the complainant and two other men whom the accused indicated as wizards on the same occasion said they did not care at all about what the accused had done “because he was under the influence of liquor”.

In reply to my questions in regard hereto, the magistrate says that the memory of the accused of the events was very accurate and that his clear narration of the incident drove the court to conclude that the accused was able to formulate an intention and to appreciate the wrongfulness of his acts.

In the light of Hlungwane’s evidence the state has, to my mind, not proved that the accused’s faculties to appreciate the wrongfulness of his act were unimpaired by the liquor he had consumed.

Section 1(1) of the Criminal Law Amendment Act, 1 of 1988, provides that in such a case an accused “shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act”.

The accused’s conviction should accordingly be set aside and substituted by a conviction in terms of section 1(1) of Act 1 of 1988.

As far as sentence is concerned, section 1(ii) of Act 3 of 1957 provides for a fine or imprisonment for a period not exceeding ten years.

Indicating someone as a wizard is an extremely serious offence and needs to be severely punished. However, the accused was extremely drunk when he indicated the complainant as a wizard. According to Hlungwane the complainant and the other two men whom the accused had indicated as wizards said they did not care at all about what the accused had done because he was under the influence of liquor. These factors must be taken into account in mitigation. It is also to be noted that the accused has no previous convictions.

In my view, a sentence of four years imprisonment, half of which is suspended on suitable conditions would be an appropriate sentence in all the circumstances.

Senior State Advocate K A Koalepe and Deputy Director of Public Prosecutions, M I Thenga are thanked for their assistance.

The following order is granted:

The conviction is set aside and is substituted by a conviction in terms of section 1(1) of Act 1 of 1988;

The sentence is set aside and substituted by a sentence of four (4) years imprisonment, half of which is suspended for five (5) years on condition that the accused is not found guilty of a contravention of section 1 of Act 3 of 1957 or of section 1(1) of

Act 1 of 1988, committed during the period of suspension.

The sentence imposed in terms of the previous paragraph hereof is, in terms of section 282 of Act 51 of 1977 antedated to 22 March 2005.

I W B DE VILLIERS

JUDGE OF THE HIGH COURT

I agree

W J VAN DER MERWE

B33/2005

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Prepared on 11 October 2026 · Esheria