

SOUTH AFRICA / JUDGMENT

S v Ngwenya and Another (A93/13) [2013] ZAGPPHC 40 (11 February 2013) [2013] ZAGPPHC 40

COURT

North Gauteng High Court, Pretoria

BEFORE

G. Webster, R.G. Tolmay

CASE / FILE NUMBER

A93/13

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO:A93/13

Magistrate:NSIKAZI

Review Case no.: A551/2012

High Court Ref. No.: 1246

DATE:11/02/2013

THE STATE VS REMEMBER NGWENYA & ANOTHER

REVIEW JUDGMENT

WEBSTER J

1. The two accused were convicted in the Magistrate's Court, Kabokweni, of assault with the intent to do grievous bodily harm and sentenced to a fine of three thousand Rand (R3000) or six (6) months' imprisonment wholly suspended for three (3) years on condition that they were not convicted of assault to do grievous bodily harm committed during the period of suspension. The matter is before this court on automatic review.
2. Accused 1 pleaded guilty to the charge but upon questioning by the Court the plea was changed to that of not guilty. Accused 2 pleaded not guilty.

3. It was common cause that the incident followed upon a soccer match at which the complainant's team 'won' the prize money. A dispute arose from this. The accused who were officials of the losing club approached the complainant demanding that he hand over the money. Accused 1 had an open okapi knife and stabbed the complainant between the shoulder blades.
4. The complainant attended the Themba Hospital. The J85 form completed by the doctor who attended the complainant indicates that the complainant sustained a one (1) centimetre injury "...on the left shoulder. On the schematic figurine on the J88 form the injury is depicted on the outer left side arm in line with the left nipple and not between the shoulder blades.
5. It is my considered view that the conviction was correct. The only problem I have is with the sentence imposed by the trial Court.

Before dealing with that issue I wish to preface it with an observation that has been noticeable in the fines imposed by the Magistrate's Court. In most assault cases the fines imposed are either R3000 or R6000 regardless of the injuries suffered by the victim and regardless of the accused's ability or inability to pay such a fine.

6. It is my understanding that a trial Court, having decided to impose a fine it is duty bound to consider what the appropriate amount is. As a starting point a fine is imposed when the trial Court is of the considered view that the convicted person should be kept out of prison. In practice and in keeping with the deterrent objective of a sentence the amount has to be commensurate with the seriousness of the crime (*S v Haufika* 1975(2) SA 541 (A) at 548B). The vexing question in this case is whether the fine imposed by the trial Court is appropriate.
7. The accused ages are recorded in the J15 as 20 years and 13 years. The first sentence on the judgment on sentence reads as follows:

"This Court will take into consideration that both of you are still very young and that you are still attending school..."

The trial Court having correctly decided that imprisonment was inappropriate in this case shut his mind to the consequences of a subsequent conviction for assault (*S v Ntlele* 1993(2) SACR 610 (W)). It is an accepted practice in our law that a fine should not be fixed at an amount beyond the means of the accused. In casu there was no enquiry into the ability of the accused to pay the fine with the assistance of their families or from any other sources. It would be unrealistic, in my view, to assume that the accused would be able to raise the R3000 in the future, should that become necessary. It has been held that the imposition of a fine beyond the means of an accused is tantamount to a refusal to determine an appropriate fine.

8. There are additional sentencing options the trial court failed to investigate. These include i.a. community service be it at a police station or a trauma unit at a hospital or the very restorative justice already initiated and settled by the parents of the victim and the accused.
9. Despite evidence having been tendered that the elders of the accused had reached an agreement with the victim's parents that the accused (helped probably by their parents or guardians) pay the victim a 'fine' of R600 and further that R250 of that amount had already been paid the trial Magistrate overlooked this "sentencing option" entirely. Strangely, he found that the sentence he imposed was "...blended with mercy". This remark appears to have been made tongue in cheek for that amount may be well beyond the means of the accused or their parents or guardians. The trial Magistrate overlooked an opportunity to advance a sentencing option that was well-known in African culture and that is restorative jurisprudence which normally takes the form of the cleansing of the home of the victim of a crime or violation of the integrity of the home of another particularly of people living together by the payment of a fine. As matters stand it might very well be the case that the elders who had reached the agreement mentioned above may have regarded their restorative measures as having been superseded by the sentence imposed by the Court.
10. The sentence of R3000 appears to be arbitrary and excessive. There is no evidence of any treatment having been given to the complainant which would have helped to determine how serious the injury he sustained was. Consequently it is not possible for this Court to consider what an appropriate sentence is without all the facts in the matter. The only and appropriate measure is to refer the matter back to the trial Court for the proper evaluation of an appropriate sentence.
11. It is accordingly ordered that the sentence imposed on the accused be and is hereby set aside. It is ordered that the matter be and is hereby remitted to the trial Court for the proper adjudication of the appropriate sentence along the lines referred to above.

G. WEBSTER

JUDGE IN THE HIGH COURT

I agree.

R.G. TOLMAY

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Prepared on 9 October 2026 · Esheria