

SOUTH AFRICA / JUDGMENT

S v Nkosi (A973/13) [2013] ZAGPPHC 364 (28 November 2013) [2013] ZAGPPHC 364

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo, V V Tlhapi

CASE / FILE NUMBER

A973/13

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

Case no.: A973/13

Date: 28 November 2013

Not Reportable

Not of interest to other judges

MAGISTRATE:.....MHLANGA N L

District:.....KANYAMAZANE

High Court Ref No:....719.14

Magistrate Serial No:..12/13

Review Case No:.....56/13

THE STATE

and

BHEKIN KOSI.....RESPONDENT

REVIEW

KHUMALO J (TLHAPI J concurring):

[1] This matter came before me on automatic review in terms of s 304 of the Criminal Procedure Act 51 of 1977 (as mended) (“the Act”). The accused was on 9 May 2013 convicted of assault with intent to do grievous bodily harm in the magistrate for the district of Nsikazi and sentenced to a fine of R5 000 (Five Thousand Rand) or 5 months imprisonment of which R3 000 (Three Thousand Rand) or 3 months imprisonment was suspended for a period of 3 years on condition accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension. The effective sentence was a fine of R2 000 (Two Thousand

Rand) alternatively 2 months imprisonment. He appeared in person without legal representation.

[2] The matter was first served before my brother Matojane J and he directed a query to the Magistrate on 13 August 2013, enquiring if:

“The accused is a first offender and has shown genuine remorse. He has indicated to the court that he is unemployed and would obviously not be in a position to pay a fine that has been imposed. Shouldn’t the court have imposed a wholly suspended sentence?”

Are we to assume that the family of the accused will be able to raise the necessary amount to pay the fine?”

[3] On 15 October 2013, the Registrar received a response from the learned magistrate stating that:

“The interest of justice, the seriousness of the offence and also the mitigating factors of the accused, one of them being that the accused pleaded guilty to the offence. This proves that the accused was remorseful about his actions.

I feel that the sentence is reasonable and proper under the circumstances taking into consideration the interest of justice and the seriousness of the offence.

I also feel that the accused should feel that what he did was wrong and also that he must pay for his wrong doings, by serving part of the sentence.”

[4] From the record, it appears the Accused got into a fight in the street with his girlfriend’s brother who then ran into the complainant’s place, a nearby tavern. The complainant, holding a pick handle, with a group of people came out and started fighting with the accused. His girlfriend’s father pulled him away and took him to his house. They followed him there so he ran away to his own house. He took a rake and went back to complainant’s place. Everybody ran away, when they saw him except for complainant. So he hit the complainant once or twice on the head with the rake and ran away.

[5] In mitigation he indicated that he is 29 years old, unmarried, unemployed, looking for employment and maintains himself through piece jobs that he sometimes gets from friends. He does not know how much fine he can pay because he is unemployed. It was confirmed that he is a first offender and remorseful for what he did.

- [6] It is obvious that the accused could not afford a fine, let alone the fine imposed. The learned magistrate, regardless of accused's inability to pay, imposed a sentence of a fine as his aim as he indicated, was to make sure that the accused serves part of the sentence. So he knowingly imposed the imprisonment sentence with an option of a fine knowing that accused will not afford to pay the fine and in all likelihood end up in prison. The accused was therefore not offered a genuine alternative to imprisonment.
- [7] Every person has a right to a just and fair process of the law and also entitled to be released from cruel and unusual punishment. The Constitution in s 12 prohibits cruel, inhuman or degrading punishment and the deprivation of any person of life, liberty, or property without due process of the law. The courts have decided that the purpose of a fine is to keep the offender out of jail and for the fine to accord with the requirements of justice it must be commensurate with the means of the offender; *S v Molala* 1988 (2) SA 97 (T) at 98D; *S v Ncobo* 1988 (3) SA 954 (N) at 955F; *S v Sekoboane* 1997 (2) SACR 32 (T). It is therefore cruel and contrary to the interest of justice to indirectly impose incarceration through excessive fine to an indignant person. More so, the person of the offender (his ability to pay) should play an important determinative role in deciding whether or not to impose a fine.
- [8] The learned magistrate overemphasised inappropriately the seriousness of the offence and the interest of justice and unfairly overlooked the personal circumstances of the accused, contrary to the triad principle of sentencing embraced in *S v Zinn* 1969 (2) SACR at 537 (A) that requires a balanced reflection of the three factors when determining a suitable sentence. His conduct constitutes a disturbing misdirection that warrants interference with the sentence imposed. See *M v S* (A45/09 [2010] ZAFSHC 12 (4 February 2010)).
- [9] It is trite that sentencing is within the trial court's jurisdiction to pronounce upon, however it should result in judicious pronouncements. Where the contrary has resulted due to a court's failure to exercise its jurisdiction judicially, it would be appropriate to interfere; See *S v Rabie* 1975 (4) SA 855 (A) at 857D-G. The court a quo's misplaced emphasise on the retributive theory with punishment being an end in itself, and the deliberate imposition of an excessive fine (inconsiderate to accused's circumstances) to ensure alternative sentence is served amounted to an injudicious exercise of the discretion and a gross irregularity. Remittal in this instance would be inappropriate.

[10] Under the circumstances, I would make the following order:

....[10.1] The sentence imposed in the court a quo is set aside and substituted with the following in its stead,

"Accused is sentenced to 5 months imprisonment wholly suspended for a period of 5 years on condition accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension."

N V KHUMALO

JUDGE OF THE HIGH COURT

I concur and it is so ordered

V V TLHAPI

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