IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

Supreme Court Ref. No: 26/09
Magistrate's Serial No: 27/08
Review Case No: B/DH3625/08

14 April 2009

Magistrate
ROODEPOORT

THE STATE v ERIC SIKAKANE

REVIEW JUDGMENT

MOSHIDI J.

INTRODUCTION:

[1] This matter was placed before me on review by the Aspirant Magistrate at Roodepoort.

[2] The grounds for review were articulated by the Aspirant Magistrate in her covering letter as follows:

"I have noted the following irregularities and note same for the Honourable Judge's attention:

1. That the sentence imposed is incompetent as it stands. It should have read :-

> "Fined R2000.00 or 6 months imprisonment, half of which is suspended for 5 years on condition that the accused is not again convicted of assault, committed within the period of suspension;

2. That I had inadvertently failed to appraise the accused of his review rights and appeal rights."

THE FACTS OF THE MATTER

[3] Briefly stated, the facts were as follows: The accused, who elected to conduct his own defence, was charged in the court below with the offence of assault with intention to do grievous bodily harm. This was indeed the charge put to the accused at the commencement of the trial.

[4] Prior to dealing with the plea of the accused, and what transpired thereafter, it was essential to point out what follows. The reasons advanced by the Aspirant Magistrate for the review are not the only reasons. There was indeed another reason. This pertained to the correctness of the conviction itself. This Court deemed it necessary to deal with the conviction *mero motu* as discussed below.

[5] The accused pleaded guilty to the charge. He was duly questioned by the Learned Magistrate in terms of the provisions of section 112 (1) (b) of the Criminal Procedure Act, No 51 of 1977. Notwithstanding the fact that the answers provided by the accused during questioning by the Learned Magistrate did not amount to an unequivocal admission of the offence, (assault with intent to do grievous bodily harm), and the fact that the state prosecutor in fact accepted a plea of common assault, namely, assault with intent to do grievous has the Learned Magistrate nevertheless proceeded to convict the accused as charged namely, assault with intent to do grievous bodily harm. In this regard, the record read: "The court is satisfied that you have admitted all the elements, you are then found guilty as charged on the plea of guilty" This finding of Learned Magistrate was clearly incorrect and therefore incompetent. For the sake of illustration, the record of the proceedings page 3 lines 22 – 24, reflected the accused's reply to questioning as follows: "So as I was resting on the bed again she kept on talking and all that. This is when I pushed her with my foot on the thigh. I didn't actually kick her". Further exchange between the Learned Magistrate and the accused revealed the following:

"**Court**: and do you admit that you were intentionally assaulting her with the intent to cause grievous bodily harm?

Accused: I wasn't intending to assault her. I just pushed her off. I was trying to stop her from talking because I really already stopped talking about it she carried on talking" (record page 4, lines 6 – 10)

THE APPLICABLE LAW

[6] It is trite law that in principle, there was a clear distinction between common assault and assault with intention to do grievous bodily harm. In respect of the latter, the Learned author, CR Snyman, In "Criminal Law"4th edition at page 435, said "All the requirements for an assault set out above apply to this crime, but in addition there must be intent to do grievous bodily harm….. It is simply the intention to do such harm that is in question." The position was succinctly set out in **S v Dipholo** 1983 (4) SA 757 (T) at 760, where the court summarized the situation as follows: "**On a charge of assault with intent to do grievous bodily harm, the question arises whether the state has proved beyond reasonable doubt that the accused had the required intent (to do grievous bodily harm). That is a question of fact which must be decided on the basis, inter alia, of the following factors: (a) The nature of the weapon used and in what manner it was used ; (b) The degree of forced used and how such force was used; (c) The part of the body aimed at; and (d) Also the nature of the injury, if any, which was sustained"** .In S v Mbelu 1966 (2) PH. H.176, the Honourable Miller J said: "Now where the court is confronted with the problem whether if should draw the inference that an assault was accompanied by this particular intent it usually has to rely on four main factors which provide the index to the accused's state of mind. I am not suggesting that these four factors are exhaustive; I do suggest that in the large majority of cases these are the

factors which provide a guide to the accused's state of mind. They are, first, the nature of the weapon or instrument used; secondly, the degree of force used by the accused in wielding that instrument or weapon ; thirdly, the situation on the body where the assault was directed and fourthly the injuries actually sustained by the victim of the assault ……" See also **S v Mdau** 2001 (1) SACR 625 (W).

[7] In the present matter, and for what may become relevant latter, there was no weapon or instrument used by the accused. The charge sheet alleged that he kicked her. He said he did so kick her on the thigh with his foot. There was no evidence of a wound. In my view, the Learned Magistrate had two options. She could, on the evidence either have convicted the accused of common assault, as accepted by the state prosecutor, or entered a plea of not guilty in terms of section 113 of the Criminal Procedure Act No 51 of 1977. However, later, after hearing evidence in mitigation and aggravation, the Learned Magistrate appeared to realise the error in the conviction. On page 11lines 11-18 of the record, the following exchange between the Learned Magistrate and the prosecutor appeared:

"Court: Before I pass a sentence earlier on the state did ask the court to find the accused guilty of assault common rather than assault GBH is that correct?

Prosecutor: That's correct your worship.

Court: So I just want to rectify that earlier on I indicated that the accused has been found guilty however I did not indicate whether for assault GBH or for assault common. **THEREFORE ACCUSED IS FOUND GUILTY OF ASSAULT COMMON**"

The Learned Magistrate thereafter proceeded immediately to deliver judgment on sentence. The second finding of the Learned Magistrate on the conviction was undoubtedly in conflict with the earlier finding. The earlier finding, as stated above, was unequivocally a guilty finding as charged (assault with intent to do grievous bodily harm). The record therefore revealed two conflicting verdicts. This was clearly irregular,

THE VIEW OF THE DIRECTOR PUBLIC PROSECUTIONS

[8] As was the practice in this Division, I had earlier referred the matter to the Director of Public Prosecutions (South Gauteng High Court) for their comment. See in this regard S v Hlungwane 2000 (2) SACR 422 (T),at page 426 g-j. The response of the Director of Public Prosecutions, through advocates K.R Mathenjwa and M. Mophatlane, was not only rather prompt, but also invaluable, for which I was grateful. They were of the view, firstly, that the conviction was not in accordance with law, as the questioning of the Learned Magistrate proved the offence of common assault. In regard to the appropriate sentences, the Director of Public Prosecutions was of the view that this court was of liberty to consider a competent sentence for domestic related common assault. I remained greatly indebted to the Director of Public Prosecutions. I was also in complete agreement with their comments. The

conviction ought properly be altered to that of common assault as reflected below.

THE ISSUES REFERRED FOR REVIEW:

[9] The Aspirant Magistrate's request for the review of the sentence she imposed as irregular was less problematic. There was in essence a slight difference in the wording of the sentence imposed and that which the Aspirant Magistrate intended to impose. The sentence imposed read: "Fined to R2000.00 or six months imprisonment half of which is suspended for five (5) years on condition that accused is not convicted of assault or attempted assault committed during the period of suspension. Section 103 of Act 2000 accused still fit to posses a firearm" The Aspirant Magistrate on review proposed the following:

"Fined R2000.00 or 6 months imprisonment, half of which is suspended for 5 years on condition that the accused is not again convicted of assault, committed within the period of suspension". The complainant testified for the state in aggravation of sentence. She was married to the accused. They stayed together. The reason that led to the incident was the complainant's disapproval of the accused staying away from home over weekends during which the complainant heard that he was in the accompany of young females at a public place. The complainant, a nursing sister, had confronted the accused about these allegations.

[10] The personal circumstances of the accused revealed that, at 36 years of age, he had a clean criminal record. The union between him and the complainant bore two minor children. The accused was employed as a technician at a company called Spectrum Holdings. He earned a gross salary of R21000.00 (twenty one thousand rand). He showed remorse by pleading guilty. He told the Aspirant Magistrate that he will never repeat the conduct. The record of the proceedings suggested that the Aspirant Magistrate sentenced the accused on the basis of a conviction of common assault, and not assault with the intention to commit serious bodily harm. This was also apparent from the state prosecutor's address before sentence. As stated earlier, the Aspirant Magistrate confirmed later, that the conviction was one of common assault. In the light of the above factors, this Court on review, was of the view that the sentence imposed was just and equitable save for the conditions attached thereto. This will be altered as contained in the order below. The conditions were rather too wide. See S v Benn; S v Jordaan; S v Gabriels 2004 (2) SACR 156 (c)

[11] The final issue that required attention was the Aspirant Magistrate's admitted omission at the end of the trial to inform the unrepresented accused of both his review and appeal rights. These matters were not addressed by Director of Public Prosecutions in their comments.

[12] As the sentence imposed was clearly reviewable, the Aspirant Magistrate was indeed obliged to inform the accused of such review procedure as provided for by Sections 302 and 303 of Criminal Procedure Act

No 51 of 1977. In terms of the latter **Act,** the accused was also entitled to be informed of the right to appeal against both the conviction and sentence imposed. Further more, section 35 (3) (o) of the Constitution (Act 108 of 1996) provides as follows:

“Every accused person has a right to a fair trial, which includes the right – of appeal to , or review by, a higher court” The omission to inform the accused, especially an unrepresented accused, can and indeed does, in most cases, lead to serious miscarriage of justice. However, in the instant matter, having regard to the particular circumstances as sketched above, this Court was of the view that the omission did not in any way cause prejudice to the accused. He pleaded guilty. He showed remorse. I was advised by the Senior Magistrate at Roodepoort recently that the accused had infact already paid the fine and was not in custody. Further more, the matter was in any event subsequently forwarded to this Court on review. The fine imposed was in my view not excessive or unreasonable in the circumstances, especially in the light of the prevalence of domestic related violence sometimes with fatal consequences. It may well be a good practice for clerks of the courts to in any event, forward to the High Court reviewable matters where inexperienced or trainee magistrates, such as in the instant matter, were involved in cases.

THE ORDER ON REVIEW

[13] In the result, I make the following order:

1) The conviction is altered to one of guilty of common assault.

2) The accused is sentenced to a fine of R2000.00 (two thousand rand) or six months imprisonment, half of which sentence is suspended for a period of five (5) years on condition that the accused is not convicted of assault, committed during the period of suspension;

3) In terms of the provisions of section 103 of the Firearms Control Act, 60 of 2000, there will be no declaration of unfitness to possess a fire-arm in regard to the accused.

_____

DSS MOSHIDI
JUDGE OF THE SOUTH
GAUTENG HIGH COURT, JHB

I agree:

_____

N PANDYA
ACTING JUDGE OF THE
SOUTH GAUTENG HIGH
COURT, JHB