

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

23/05/2016
Case number: A309/2016

In the matter between: -

CELUMUSA PHUNGULA

APPLICANT

Versus

THE STATE

RESPONDENT

REVIEW JUDGMENT

BRENNER AJ

- [1] This matter came before me by way of automatic review, in terms of section 302 of the Criminal Procedure Act, 51 of 1977.
- [2] The accused was charged before the Vereeniging Magistrates' Court with malicious damage to property and assault. It was alleged by the State that, on 28 January 2016, near Wheelers Farm, Emfuleni, the accused had intentionally damaged a Samsung cell phone valued at R1 000,00, belonging to the complainant, Nontobeko Ngema. It was further alleged that he had assaulted the complainant by hitting her with open hands.
- [3] The accused was not legally represented at the trial. He pleaded not guilty and was convicted on both counts and sentenced on 23 March

2016. His sentence was, for the count of malicious damage to property, R1000,00 or 3 months' imprisonment, and on the count of assault, a fine of R2 000,00 or 4 months' imprisonment. The effective sentence was therefore R3 000,00 or 7 months' imprisonment.

[4] Albeit that the complainant was a single witness for the State, her evidence was consistent and reliable in all material respects. She testified that the accused had confronted her on the day at around 15h00 along the road in the neighborhood where both she and the accused lived. He blocked her way, telling her he wanted to see her that evening. He was romantically interested in her. When she asked him to move away, he slapped her with an open hand and pushed her. He took her cell phone and threw it on the ground. She had not repaired it and was unable to use it. She testified that this was not the first time the accused had assaulted her.

[5] In testifying in his own defence, the accused maintained that he had only "poked at" the complainant and that he had not taken her phone. Under cross-examination, he conceded that he may have assaulted the complainant with his fist.

[6] I am satisfied that the accused was correctly convicted. The complainant's evidence was credible and plausible, while the accused's

evidence that he was being framed by the complainant was improbable. His concession concerning assaulting the complainant with his fist was significant.

- [7] Concerning sentence, however, I respectfully consider same to be shockingly inappropriate and plainly not in accordance with justice. The accused was a first offender. The accused testified in mitigation that he was 29 years of age, with no children. He performed temporary work on building sites and earned about R600,00 per week. He lived with his mother and 2 siblings. He had a grade 10 education. He was pertinently asked if he could pay a fine and he replied that he could afford a fine of R300,00. He said he wanted to become a security guard.

- [8] I align myself with the statement in **S v Sithole 1979 (2) SA 67 (A)** at page 69 G:

“When a Court has decided that a convicted person ought to be afforded the opportunity of staying out of jail by giving him the option of paying a fine, it should not impose a fine which to its knowledge or belief is utterly beyond the means of such person to pay.”

- [9] Considering that the evidence indicated that the accused earned about R2 400,00 per month, the trial Court should have appreciated that a fine of

R3000,00 was outside the bounds of his financial capabilities. Moreover, in *casu*, the value of the damaged phone was R1000, 00, and no serious physical harm was caused to the complainant. On her version, she was slapped in the face. Bearing in mind all mitigating factors, including that the accused was a first offender, a suspended sentence should have been imposed. Since both counts involved one incident, they should be taken together for purposes of sentence.

[10] I would make the following order:

[10.1] The sentence is set aside;

[10.2] On both counts 1 and 2, taken together for purposes of sentencing, the accused is sentenced to six months' imprisonment, wholly suspended for 5 years on condition that he is not found guilty of malicious damage to property or assault, committed during the period of suspension.

A handwritten signature in black ink, consisting of a series of loops and curves, positioned above a horizontal line.

T BRENNER

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

16 May 2016

I agree

A handwritten signature in black ink, appearing to read 'Pretorius', is written over a horizontal line.

C PRETORIUS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

It is so ordered.