

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

21/5/2015

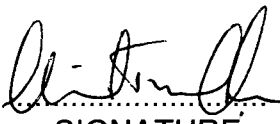
CASE NO: A54/15

In the matter between:

DOUGLAS MALULEKE

Accused

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	<u>19/05/15</u> DATE	 SIGNATURE

THE STATE

JUDGMENT

Tuchten J:

- 1 This matter came before me on automatic review. The accused was convicted in the magistrate's court with the crime of assault with intent to cause grievous bodily harm. It was alleged that the accused, a 19 year old first offender, had assaulted the 21 year old male complainant by hitting and kicking him and "batting him with a hat".
- 2 The accused pleaded guilty but, on questioning by the magistrate, it emerged that while he admitted inflicting the violence alleged upon the

complainant, as a result of which the complainant lost two teeth, the accused claimed that he had acted in self-defence. The magistrate then properly entered a plea of not guilty but after evidence had been led, rejected the allegation of self-defence and convicted the accused as charged.

- 3 In mitigation of sentence, the accused told the magistrate that he did not have parents and was not employed but lived with his brother who supported the family by doing piece jobs. The accused promised that he would not offend again. The accused showed, in my view, remorse.
- 4 The magistrate sentenced the accused to a fine of R4 000 or two years imprisonment. In his remarks on sentence, the magistrate did not refer to the personal circumstances of the accused or investigate his ability to pay a fine. The magistrate focussed exclusively on the severity of the offence and observed that

I was going to send you straight [to prison] with no option of a fine. Maybe as a first offender you might repent and change.

The magistrate explained to the accused that he was entitled to apply for a deferral of payment, ie to be allowed to pay the fine in instalments.

- 5 When the matter came before me I had doubts about the appropriateness of the sentence. I asked the magistrate for his views. The magistrate responded that he accepted that the accused was unable to pay a fine but that it was a problem in his court that offenders always said they were unable to pay fines, even when able to do so. He pointed to the disparity in physical strength which he observed between the accused and the complainant. The complainant, the magistrate remarked, looked like a child in comparison to the accused who was well built for his age. He said that he would not have a problem if the sentence were reduced in severity but asked that the sentence should not be wholly suspended as it would not have a deterrent effect.
- 6 The crime was committed in a rural context. This is relevant because I quite strongly doubt that there would be enough work for the accused's brother to raise what is in context a very large sum of money to keep the accused out of jail. I take into account too the views of the magistrate in relation to the effect likely to be produced

in the community which the magistrate serves by a wholly suspended sentence.

7 I sought and was provided with the views of the DPP on the matter of an appropriate sentence. The DPP cogently set out the principles applicable to a case such as the present. The DPP pointed out that when an accused is afforded the chance to pay a fine, the fine imposed should be within the means of the accused and constitute a realistic option. That does not mean that the fine must be within the immediate financial means of the accused, who may be expected to suffer some financial hardship in order to raise the money for the fine. On the other hand, a serious crime (like the present) should not be made to look trivial by the imposition of too small a fine.

8 Balancing all relevant considerations, the DPP suggests the sentence be reduced to a fine of R2 000 or 6 months imprisonment, half of which is suspended on suitable conditions. I agree.

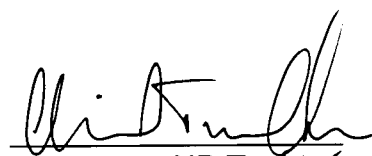
9 I make the following order:

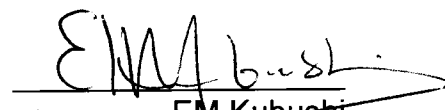
1 The conviction imposed upon the accused is found to have been in accordance with justice and is confirmed.

- 2 The sentence imposed upon the accused is found not to have been in accordance with justice. It is set aside and replaced with the following:

The accused is sentenced to pay a fine of R2 000 or, in default of such payment, to suffer imprisonment for a period of six months. Half of this sentence is suspended for five years, on condition that the accused is not convicted of an offence involving the use of deliberate violence committed during the period of suspension.

- 3 The sentence imposed on review is antedated to 20 February 2015.


NB Tuchten
Judge of the High Court
19 May 2015


EM Kubushi
Judge of the High Court
19 May 2015