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

A466/15

9/7/15

REVIEW CASE NO: A319/2015

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

DATE

SIGNATURE

IN THE MATTER BETWEEN:-

THE STATE

VS

KERNIELS MANIKIE FOURIE

REVIEW JUDGMENT

KUBUSHI,J

[1] The accused, a [.....] year old male, was charged with two counts of assault with intent to do grievous bodily harm in the magistrate court Cullinan. The accused pleaded guilty to the charges and the state accepted the plea. The accused was as a result found guilty on both counts. Both counts were taken together for purpose of sentence and the accused was sentenced to two (2) years effective imprisonment.

[2] The case was marked reviewable in the normal course as laid down in s 302 of the Criminal Procedure Act 51 of 1977 by the trial court and was therefore referred on review to the High Court.

[3] The matter was initially allocated to Strauss AJ, as the reviewing judge. Strauss AJ referred the matter back to the trial magistrate with a query as to whether the sentence imposed was appropriate and in accordance with justice if regard is had to what is stated in *Tankise Mokoena v The State* in appeal 323/2010 Free State High Court Bloemfontein, 9 February 2012. Strauss AJ was also concerned that the record contained no reference to the factors considered by the trial court in mitigation and in aggravation in coming to the sentence imposed, which in her view appeared as if on the face of it the sentence was not in accordance with justice.

[4] In his reply to the query raised by Strauss AJ, the trial magistrate assured Strauss AJ that, even though it does not appear on record, he profiled the accused properly before passing sentence. In aggravation of sentence the trial magistrate took into account the accused's previous conviction of a similar nature. The suspension period in respect of that conviction had not elapsed at the time of the current sentencing (it is due to lapse on 11 October 2016) and the state did not bring an application within fourteen (14) days that the suspended sentence be put into operation. In addition he applied the three factors in *S v Zinn* to come to a founded and personalised sentence. When coming to the merits, he took into account that the accused first assaulted the wife, and when the husband intervened, he also assaulted him. According to the trial magistrate, the husband was 'degraded in the last degree' in that he could not protect his wife. The accused did not use his hands to assault the woman but a stone several times on the head – same applied to the husband. In this regard the trial magistrate referred to the judgments in *S v Pelzer en 'n Ander* 1992 (1) SACR 633 (A) and *S v Molefe* (2005) JOL 14328 (T). Based on these grounds, the trial magistrate was of the view that the sentences on both counts are in order and ought to be confirmed on review.

[5] On receipt of the trial magistrate's response, the matter was referred to the Director Public Prosecutions for comment.

[6] Relying on the judgments in *S v Mareathle and Others* 2008 JOL 22250 (T) and *S v Msimanga and Another* 2005 (1) SACR 377 (OPD) at 381f – I, and the following aggravating circumstances, that:

the accused hit both complainants with stones;

the one complainant is a woman; and

the accused had a previous conviction of the same nature,

the state advocate who was allocated the matter, submitted that the trial magistrate did not misdirect himself in any way in regards to the sentence. He as a result urged that in the light of the seriousness of the offence the sentence should be confirmed.

[7] The state advocate further called on the prosecutors to bring an application for the accused's previous suspended sentence to be put into operation by placing the sentence on the roll and to be put into operation.

[8] The state advocate also proffered the following procedure to be followed by the prosecutors:

- "10.1 Where the sentence to be put into operation was imposed by the same court which imposed the subsequent sentence, the record should be drawn from the clerk of the court, the matter placed on the roll, and the application brought for the imposition of the sentence.
- 10.2 Where the suspended sentence was imposed by another court, the matter should be postponed on a new J15 and the prosecutor should request the clerk of the court to obtain a certified copy of the record of the previous trial.
- 10.3 Where the accused person is detained in a prison, which is conveniently close to the court where the suspended sentence was originally imposed, arrangements can be made with the prosecutor at that court to have the application for the imposition of the suspended sentence heard there. In that case a certified copy of the subsequent trial record should be forwarded to that court."

[9] The state advocate was, however, overruled by the Deputy Director of Public Prosecutions (DOPP) whose opinion is that the sentence appears to be too harsh

bearing in mind that the suspended sentence might also be put into operation. The DDPP's contention is that there is no evidence as to the nature of the injuries sustained by the complainants or the exact circumstances of the incident safe for address by the prosecutor from the bar. The accused avers that he was provoked by the complainant in count 1. Both complainants appear to have been drinking before the incident. Both assault incidents happened in close proximity as to time. In the circumstances it is suggested that a year of the imposed sentence be suspended, so that the effective sentence is one year imprisonment.

[10] The matter was referred to me on return from the DDPP's office for review in chambers.

[11] I am in agreement with the submission by the DOPP that the sentence imposed is too harsh and that part thereof should be suspended. Although the accused has a previous conviction of a similar nature, he, however, pleaded guilty and asked for leniency. He also showed remorse. From the record, it appears that the accused was provoked by the complainant in count 1 which made him angry and he ended assaulting her. Most importantly, there is no evidence of the injuries sustained by the two complainants, if any.

[12] It is, therefore, my view that a period of one year, as suggested by the DOPP, ought to be suspended so that the effective sentence is one year imprisonment.

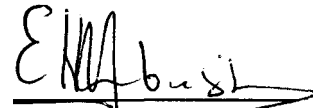
[13] I am also of the view that the previously suspended sentence ought to have been put into operation as suggested by the state advocate. The prosecutor who handled this matter, or any other prosecutor should therefore be ordered to operationalize the suspended sentence.

[14] In the premises I would make the following order:

1. The sentence of two years imprisonment imposed by the Court of the Magistrate Cullinan, is hereby set aside and substituted by the following:

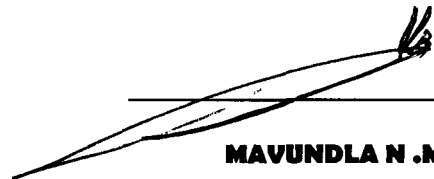
"The accused is sentenced to two (2) years imprisonment. Half of the sentence, that is one (1) year, is suspended for a period of five (5) years on condition that the accused is not convicted of the offence of assault with intent to do grievous bodily injuries or assault within the period of such suspension."

2. The prosecutor is ordered to bring an application to operationalize the previously suspended sentence.



KUBUSHI E.M.
JUDGE OF THE HIGH COURT

I agree and it is so ordered



MAVUNDLA N.M
JUDGE OF THE HIGH COURT