

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 358/2012

In the review between:

THE STATE

versus

THABO RADEBE

CORAM: LEKALE, J *et* MHLAMBI, AJ

JUDGMENT BY: LEKALE, J

DELIVERED ON: 21 FEBRUARY 2013

[1] On 9 December 2011 the accused appeared before the Magistrates' Court at Tsheseng, Witsieshoek and was convicted of and sentenced to a R2 000,00 fine or 5 (five) months imprisonment wholly and conditionally suspended for five years for assault with intention to do grievous bodily harm.

[2] The matter, thereafter, served before Matlapeng AJ on automatic review and he directed, *inter alia*, the following query to the trial magistrate:

- “(a) This case was finalized on 9 December 2011 and the record of the proceedings reached the Registrar of this Court only on 9 October 2012. Is there any reason for this inordinate delay?**
- (b) Is the period of suspension namely 5 years not too onerous taking into account the mitigating factors the learned magistrate found to exist? Is a shorter period of suspension not appropriate?”**

[3] The learned magistrate has since responded, for which I am grateful, that:

- “a. The transcribed record took some time to return from the transcribers.**

The matter was discussed on several occasions with the Court Manager and court clerk, (See Court Manager / Court Clerk’s response attached).

- b. I am of the view that the period of suspension is not too onerous.**

Evidence suggests that this took place in a tavern. The court is on a daily basis dealing with assault / assault gbh cases emanating from a drinking spree in a tavern. Having considered what was stated in S v Balfour (Pg 23 of record), and that there is no suggestion that accused will refrain from attending

taverns, he committed a serious offence with a dangerous weapon and inflicted injuries on complainant I am of the view that the period of suspension is suitable in the circumstances so as to deter accused from committing other offences of this nature and to send a clear message that the court takes these offences seriously and will not be condoned.

If the Honourable Judge is of the view that the sentence is not in accordance with Justice: it can be amended / altered in terms of section 304(2)(c)(ii) of Act 51 of 1977.”

- [4] I am satisfied from the explanation furnished that good cause exists for the delay involved and that all necessary steps were taken to ensure that the record is dispatched timeously to the Registrar of this Court as required by law.

- [5] The maximum period for which a sentence may be suspended is five years. (See section 297(1)(b) of the Criminal Procedure Act (the CPA).

- [6] It is correct, as pointed out by the learned magistrate with reference to case law, that the aim of a wholly suspended

sentence is individual deterrence. (See **S v Balfour** 2009 (1) SACR 399 (SCA) at par [11].)

- [7] In determining an appropriate sentence a trial court is enjoined to strike an appropriate or healthy balance between the nature of the offence, the personal circumstances of the accused and the interests of the society.

- [8] It follows, therefore, that the decision as to the duration of the suspension is advised by the aforesaid triad. (See **S v Van Rensburg** 1978 (4) SA 481 (T) at 483H and compare **S v Nabote** 1978 (1) SA 648 (O) at 650.)

- [9] The determination of an appropriate sentence and the conditions on which it may be suspended as well as the period of such suspension, are all matters of discretion on the part of the trial court which exercises the same judicially with reference to the facts of each case. (See **S v Nkokoto en Andere** 1978 (2) SA 534 (O) at 537A.)

- [10] The accused in the instant matter is 21 years old, reached Grade 10 at school and is unemployed. He is not married and has no children. He was friends with the complainant at the time of the assault. The complainant sustained a stab wound and received medical attention as a result of the

assault. The complainant has forgiven the accused and they are now on good terms. The accused initially tendered a plea of guilty to the charge but the plea was changed after he inadvertently denied unlawfulness.

- [11] It is correct, as the learned magistrate found, that the crime in question is serious and pervasive. It is, however, apparent that the accused has displayed genuine remorse in that he made peace with the complainant before the trial and did not only attempt to enter a plea of guilty at the commencement of the trial. He clearly and fully appreciates the consequences of his actions. (See **S v Matyityi** 2011 (1) SACR 40 (SCA) at 46a - d.)
- [12] It is apparent *ex facie* the response of the learned magistrate that the rationale behind the five year suspension period is to discourage the accused from going to taverns where he is likely to pick up fights. The accused was, however, not charged for visiting taverns. The suspended sentence imposed and the conditions attaching thereto should be connected to the offence charged. (Compare **S v Mjware** 1990 (1) SACR 388 (N) at 389g.)
- [13] There is clearly no connection between the condition that the accused shall not be found guilty of assault and assault gbh and the desire to keep him away from the taverns. It may be laudable for the magistrate to discourage young people from visiting taverns, but the fact of the matter is that the accused has not been convicted of trespassing on taverns. In my

view the period of suspension is not meant to achieve the result which is not connected to the relevant offence. (Compare **S v Nkokoto**, *supra*, at 536F – G.)

[14] In my judgment the five year period of suspension is not appropriate in the circumstances of the instant matter, regard being had to, *inter alia*, the accused's age, the fact that he is a first offender and the genuine contrition shown by him. The period in question is, indeed, onerous and, as such, not in accordance with justice.

[15] I am, further, persuaded by the circumstances of the present matter that the negative condition requiring the accused not to be convicted of assault and assault gbh during the period of suspension casts the net too wide for a young man in the position of the accused and is, as such, unfair insofar as it exposes him to the risk of breaching the same even in the event of a mere slap.

ORDER

[16] In the result the conviction is confirmed.

[17] The sentence is, however, set aside and in its place and stead is substituted the following:

“The accused is fined R2 000,00 or 5 (five) months imprisonment which is suspended in whole for a period of three years on condition that the accused is not convicted of assault with intention to cause grievous

bodily harm committed during the period of suspension.”

[18] The sentence is antedated to run from 9 December 2011.

L.J. LEKALE, J

I concur.

J.J. MHLAMBI, AJ

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