

IN THE HIGH COURT OF SOUTH AFRICA
[TRANSCVAAL PROVINCIAL DIVISION]

CASE NO. LR 69/2008/MPM High

Court reference No.1951

A175/09

6 March 2009

MAGISTRATE : GIYAN!

In the matter between:

STATE

And

ENOCH MASHELE

ACCUSED

The accused, a 23 year old male, was convicted of assault with intent to do grievous bodily harm and sentenced to twelve months' imprisonment by the magistrate's court. Giyani. The matter came before me on automatic review.

The facts of the assault were as follows: On 7 June 2008 the accused had an altercation with the complainant and a fist fight ensued between them, in the process of which the accused produced a knife. He stabbed the complainant on the arm. He was treated at a local clinic. Describing his injury, the complainant stated that *"when you put a finger and it appeared on the other end..."*

The prosecutor did not produce the medical form, the so-called J88, to corroborate the injuries on the complainant.

I am satisfied with the conviction of the accused. However, I was not happy with the magistrate's attitude to sentence. On page 27 of the record, the magistrate, after the prosecutor proved no previous convictions, said the following to the accused.

" Any reason why you should not be sent to prison?"

The accused then placed the following factors in mitigation Of sentence; he was employee' at the Department of Human Resources (sic) and earned R3 000.00 per month. He had one child, whom he was maintaining by buying clothes for the child.

In a terse outlay of the sentence, the magistrate said the following:

" In passing sentence I have taken into account that you are a first offender and also that the reason for stabbing the complainant is farfetched... you acted like a bull in a supermarket, just decided to bash everything.

And you were just fortunate that the knife just got his upper arm because you could have killed him. So I have decided that the following sentence will suffice bearing in mind that you are employed but sometimes people who acted (sic) like you are dangerous. So I have decided that 12 months will suffice"

On perusal of the record, I directed a query to the Director of Public Prosecutions regarding sentence, and the magistrate's remark referred to in paragraph 4 above. I did so in terms of the *proviso* to section 304 (2) of the- Criminal Procedure Act, 51 of 1977, as I was of the view that the matter was of sufficient urgency. The accused is currently in

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8] Advocate Mudau. the State Advocate, with whom Advocate De Beer SC. the Deputy Director of Public Prosecutions agrees, is of the view that the learned magistrate misdirected himself by imposing imprisonment without the option of a fine. He further recommends that the sentence be set aside and replaced with one of a fine of R2000.00 or twelve months imprisonment.

9] I agree with the above proposition. In his sentence , the learned magistrate seemed to have adopted a view that direct imprisonment was the only sentencing option available. He was clearly wrong. A court must, before sentencing, consider all options, including , but not limited to , direct imprisonment. In the present case, there is evidence that the accused is gainfully employed. The option of a fine should have been explored. By failing to consider all sentencing options, the magistrate misdirected himself.

10] Regard being had to the totality of factors in this review, I am of the view that a proper sentence would be the one proposed by the State Advocate. In the premises I **make** the following order:

The sentence imposed by the magistrate is set aside and replaced with the following:

*"The accused is **sentenced** to R2 000.00 or 12 months' **imprisonment,***

T M MAKGOKA
ACTING JUDGE OF THE HIGH COURT PRETORIA

I agree
M W SIMEKI
JUDGE OF THE HIGH COURT PRETORIA

