

A459/09

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION)

DATE: 25/5/2009

Not reportable

1/1/2009

High Court Ref no: 187

Magistrate's Serial No: 11/2008 (Bloemhof)

Review case no: A478/2008

In the matter between:

THE STATE

and

DANIEL MOJAINA

REVIEW JUDGMENT

RABIE J :

1. The accused was convicted on 17 December 2008 on a charge of assault with the intent to do grievous bodily harm. He was sentenced to a fine of R1000.00 or 10 months imprisonment, wholly suspended for five years on condition of that he is not convicted of an offence of assault with intent to cause grievous bodily harm or assault common or indecent assault committed during the period of suspension. The accused was furthermore declared unfit to possess a firearm.
2. When the matter came on review before me, I made certain enquiries relating to the question whether the accused was properly convicted or whether he should

have been convicted of common assault. I furthermore queried the issue of sentence and the declaration in terms of section 103 of Act 50 of 2000.

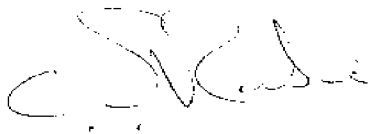
3. The magistrate responded to the query and I am indebted to him.
4. The facts of the matter are rather scant. The charge against the accused was that on the 30 November 2008 in the district of Bloemhof, he assaulted the complainant by slapping her with an open hand with the intent of causing her grievous bodily harm. From the evidence of the complainant it appears that the assault was unprovoked but not much more of any note or relevance can be gleaned from her evidence. The witness who testified also did not contribute in any meaningful manner except to confirm the assault by way of a slap.
5. The accused himself, when he testified, merely admitted that he slapped the complainant and the matter was left at that.
6. It was consequently not clear why the accused had been convicted of the more serious form of assault namely assault with the intent to do grievous bodily harm. There was no evidence as to where on the body of the complainant the accused slapped her. There was no evidence as to the degree of force applied and the manner in which it was applied. There was also no evidence as to the injury, if any the complainant sustained as a result of the assault. There was mention of an injury but that clearly did not relate to the assault by the accused.

7. In his response to this court's query the magistrate conceded that the conduct of the accused did not constitute an intent to cause grievous bodily harm but merely that of common assault.
8. Regarding sentence this court asked the question whether a fine of R1000.00 is commensurate to a sentence of 10 months imprisonment and whether there is not an imbalance between the two sentences. Furthermore whether the sentence was not too harsh having regard to the nature of the assault, the fact that there were no injuries, the fact that the accused was a first offender, the fact that he was 18 years of age, the fact that he earned a meager wage, and having regard to the other circumstances of the case.
9. The question was also asked as to the *ratio* for the condition relating to community service which was imposed for the suspension of the sentence and more particularly how service at the Bloemhof Magistrate's Court could be regarded as service for the benefit of the community. It was also asked what the accused would have done under the supervision of Mrs Burton.
10. In his response the magistrate deemed the fine commensurate with the prison term "especially as it is suspended". He conceded, however, that the sentence may have been too harsh in the circumstances. The magistrate further explained the issue of community service at the Bloemhof Magistrates' Court and the role of Mrs Burton.

11. In my view the magistrate erred in imposing the sentence which he did. Having regard to the nature of the offence, the interest of society and the interest of the accused as well as the victim, a fine of R1000.00 is shockingly inappropriate. Furthermore, the sentence of 10 months imprisonment which the accused will have to serve if he is unable to raise the fine, is not only totally disproportionate to the fine but in itself creates a sense of shock.
12. The fact that the sentence was wholly suspended does not cure the defect that the sentence was shockingly harsh. It is simply wrong for a court to impose a harsher sentence than is called for in the circumstances of the particular case merely because the whole of the sentence is to be suspended.
13. Regarding the declaration in terms of section 103 of Act 60 of 2000 the magistrate respondent to this court's query regarding the considerations for declaring the accused unfit to possess a firearm in future by saying that he regarded the offence as inherently violent in nature and that however minimal such an order should be made.
14. In my view there is no justification for the declaration made by the magistrate. The accused is still a relatively young person and a first offender. Nothing is known as to how it came about that he slapped the complainant. It was furthermore only one slap on an unknown part of the body which could not have been particularly serious. In these circumstances I am of the view that the declaration in terms of section 103 which constitutes a rather drastic inroad on a person's rights, was not justified.

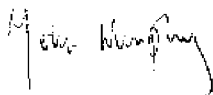
15. In the result I make the following order:

- 1 The conviction and sentence and declaration in terms of section 103 of Act 16 of 2000 are set aside and replaced by the following
"The accused is convicted of common assault and sentenced to a fine of R100.00 or 14 days imprisonment."
- 2 If the defendant had paid the fine originally imposed or any part thereof, the clerk of the court *a quo* is ordered to reimburse the defendant accordingly.



C.P. RABIE
JUDGE OF THE HIGH COURT

I agree



J. MURPHY
JUDGE OF THE HIGH COURT