

A 729/09

IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG PROVINCIAL DIVISION, PRETORIA

High Court Reference Number: 461/09

In the matter between:

11/01/2009

THE STATE

Versus

LUCKY SIBIYA

Accused

REVIEW JUDGMENT

1. The accused was correctly convicted by the Magistrate's Court for the district of Nkomazi of contravening section 17(a) read with sections 1, 5 and 7 of the Domestic Violence Act 116 of 1998.
2. He was sentenced to twelve months imprisonment of which eight months were conditionally suspended for a period of three years.
3. The accused had been prohibited by a Protection Order issued on the 24th October 2009 from assaulting, threatening or harassing the complainant, his former girl friend with whom he has a child.
4. Although the order was never produced in evidence it was common cause throughout the proceedings between the State and the accused that such an order had in fact been issued and served upon the accused.

5. The magistrate correctly held that it had been proven beyond reasonable doubt that the accused contravened this order a week after it was issued by harassing the complainant, demanding to see his child and by slapping the complainant twice in the face.
6. On review, the then acting reviewing Judge enquired from the presiding magistrate why he had regarded direct imprisonment as the only option.
7. The magistrate replied that the accused had flouted the law quite deliberately and had invaded the victim's right to privacy in a fashion that was so serious that imprisonment was the only option.
8. The accused informed the court before sentence that he had been employed as a security guard earning R 1 500,00 per month, out of which funds he was supporting his six siblings who are still at school. This employment was lost when he was suspended after having been charged. It was clear that he would lose this work if he went to jail.
9. In the light of the fact that the accused's evidence in this regard was not challenged it is difficult to fathom what good the trial court expected to come from a short term of imprisonment imposed on a young first offender who was obviously experiencing difficulties in controlling his emotions after the relationship with his girlfriend broke up.
10. The accused will almost certainly struggle to find new employment after a prison term that was too short for any rehabilitative programs to be made available to him, but long enough to taint him with the brush of being a jailbird and to expose him to the bad company of experienced criminals.
11. Having lost his job he will be unable to support his child and his siblings and may be forced to seek the company of those whose acquaintance he made behind bars to find a mode of existence.
12. Our courts have often emphasized that short terms of imprisonment do more harm than good, of which the present instance is a textbook example. Unfortunately these admonishments appear to be largely

ignored by the turning of a blind eye to the negative consequences that the accused's loss of employment in these days of dire economic straights has for the victim and society alike as a result of the injudicious application of a sentencing option that should be reserved for offenders who are a real threat to society, and not to young hotheads who have not yet learnt to act with restraint.

13. A suspended sentence – or an attempt to impose a sentence based upon an application of the principles of *ubuntu* by effecting a reconciliation between the victim and the offender (See *Liversage v S*, not yet reported, Case No A4/2007 North Gauteng) - would have been a more effective punishment. It would have served both as a warning to the offender and it would at the same time have allowed him to come to his senses while still being able to fulfill his financial and socially responsible commitments to his child and his siblings.
14. Unfortunately, the accused has by now served his time and the fact that his sentence will be substituted with a more suitable one will have no practical effect.
15. The court is indebted to adv Lakhli-Hatia, Deputy Director of Public Prosecutions, and State Advocate S R Sibara for their comments. Their proposal in regard to an appropriate sentence is accepted.

The following order is made:

1. The conviction is confirmed.
2. The sentence is set aside and substituted with the following:
"Three months imprisonment wholly suspended for two years on condition that the accused is not convicted of contravening section 17 of Act 116 of 1998, of assault or assault with the intent to cause grievous bodily harm, committed during the period of suspension and for which the accused is sentenced to direct imprisonment."

Signed at Pretoria on this ⁴ day of August 2009.

E Bertelsmann
Judge of the High Court


E. Bertelsmann
(Judge of the High Court)