



IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG: PRETORIA DIVISION)

**Date: 25/09/2009
Case no.:a842/09**

Magistrate:

NKOMAZI

Review Case no.: 15174/09

High Court Ref. No.: 1030

THE STATE VS XOLAM VELIZULU

REVIEW JUDGMENT

WEBSTER J

1. The accused was convicted in the district court, Tonga, of assault with the intent to do grievous bodily harm and sentenced to "six (6) months or R1 000 (One Thousand Rand) fine wholly suspended on condition that the accused is not found guilty of committing the same offence committed during the period of suspension", having pleaded guilty. The accused's explanation regarding the assault was that he had hit the complainant with a belt about eight or nine times. There is no evidence on what the belt was made of, the force used, the injuries, if any, that the complainant sustained or where she was struck.
2. When the matter was considered on automatic review a query was directed to the trial Magistrate to comment on the issues raised in *S v Dipholo* 1983(4) SA 757 T. The trial Magistrate conceded candidly that he had relied on other

decided cases and had not followed the guidelines in the above authority. He conceded, upon reconsidering the issues that he may have erred in convicting the accused of assault with the intent to do grievous bodily harm "...as opposed to common assault". I agree totally with the trial Magistrate in this regard.

3. It appears from the record that the complainant and the accused had been lovers and had been living together at the time of the incident. Their relationship had been terminated after the incident. The cause of the assault was the complainant's "...infidelity and sleeping around with other men" which had "provoked" the accused.
4. It is this court's considered view that referring the matter to the trial court for the reconsideration of sentence may work a greater hardship for the accused should he be now in employment or not within the trial court's jurisdiction. All the aggravating and mitigating factors are on record and this court is therefore in as good a position as the trial court to pass sentence.
5. **The following order is made:**
 1. **The conviction on assault with the intent to do grievous bodily harm is set aside. In its place is substituted the following: "The accused is found guilty of assault common".**
 2. **(i) The sentence of the court *a quo* is set aside. In its place is substituted the following:**
 - (ii) The accused is sentenced to a fine of R500 (Five Hundred Rand) or 3 (three) months' imprisonment wholly suspended for 2 (two) years on condition that the accused is not convicted of assault or any offence of which violence is an element committed during the period of suspension.**

**WEBSTER J
JUDGE IN THE HIGH COURT**

I agree.

**POTTERILL AJ
ACTING JUDGE IN THE HIGH COURT**