

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 207/08

In the review between:-

THE STATE

versus

BANGANI ABRAM APOOLS

CORAM: MOCUMIE, J *et* MOLEMELA J

JUDGMENT BY: MOCUMIE, J

DELIVERED ON: 13 AUGUST 2008

REVIEW JUDGMENT

- [1] The accused appeared in the Magistrate Court, Botshabelo on a charge of assault with intent to do grievous bodily harm. He was convicted as charged and sentenced to 2 (two) years imprisonment. The provisions of section 4(1) of the Dangerous Weapons Act 71 of 1968 (*“the Dangerous Weapons Act”*) were invoked as the presiding officer found no circumstances justifying a lighter sentence than the prescribed 2 (two) years imprisonment. I was of the view

that the sentence was too harsh and sent a query to that effect. The presiding officer has since responded.

[2] The facts are summarily as follows: On 1 January 2008 the complainant and his friends were from a tavern in the early hours of the morning when they met with the accused. The accused tried to take one of the women in the complainant's company. When the complainant reprimanded him, the accused instead stabbed him twice with a knife. The attack was unprovoked contrary to what the accused attempted to put across.

[3] It is trite that sentencing is a function that lies within the discretion of the trial court. See **Rex v Mapumulo and Others** 1920 AD 56; **S v Rabie** 1975 (4) SA 855 (A); **S v Barnard** 2004 (1) SACR 191 (SCA). A Court of Appeal or review is not entitled to interfere with the imposed sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably. See **S v Pillay** 1977 (4) SA 531(A) at 534H–535G. Amongst other varying factors depending from one case to another it may be a misdirection for the presiding officer to overemphasise the seriousness of

the offence and underemphasise the personal circumstances of the offender which would then warrant the court on appeal or review to interfere.

- [4] The accused is a 19 year old first offender. He is not married and has no dependant. He finished school in 2005 in Grade 9 and has been unemployed for three years. Both his parents are still alive. He has no previous convictions. Alcohol played a role as both the accused and the complainant and his friends has earlier on during the same day been at a tavern in Botshabelo.
- [5] The presiding officer was of the view that a suspended sentence was not appropriate nor was correctional supervision or a fine for the fact that *inter alia*

“4.1.1 ... die afgelope 16 jaar aan diegene wat skuldig bevind word aan geweldsmisdade swaar gestraf sal word, het heel duidelik op dowere ore geval.”

“4.1.2 ... en alhoewel die persoonlike omstandighede steeds in ag geneem word, word sy betaalvermoë nie. In die onderhawige geval is ek van mening dat ‘n boetevonniss onvanpas is.”

Nowhere in the judgment does he indicate that he gave the accused an opportunity to address him on whether he can afford to pay a fine or raise funds to pay the fine to be imposed.

- [6] Regrettably it would seem as if some presiding officers in Botshabelo where the Dangerous Weapon Act is still applicable have made it a rule that every accused who is convicted of assault with intent to do grievous bodily harm in their court is sentenced to the prescribed minimum sentence of two years imprisonment irrespective of the different circumstances. The same observation was made in the unreported Review Case No. 1135/2005 of **G H Bloem AJ** and **Cillié J** delivered on 7 October 2005.

- [7] It is wrong to impose sentences not only to please the community but to sacrifice an individual accused with favourable mitigating factors at the altar of deterrence. Each accused that appears before the court is an individual, with his or her own unique circumstances which can never be the same as the next accused who has committed a similar offence. Consistency in the imposition of sentences to send

a message that the commission of a particular offence will not be tolerated should not be allowed to displace the discretionary powers of a presiding officer in imposing individual, effective and appropriate sentences.

[8] I am strongly convinced that it is important to re-emphasise as I have done before that, however, serious the offence may be, it is irregular to proceed from the assumption that imprisonment was the only appropriate sentence as is clear from the presiding officer's *ex tempore* reasons for sentence and his comments to my query. See **S v Du Toit** 1979 (3) SA 846 (A) at 857H – 858A.

[9] The presiding officer has misdirected himself in concluding that a prison sentence without an option of a fine, correctional supervision or any other option provided for by the CPA was the only suitable sentence to impose on a 19 year old first offender in these circumstances. A court dealing with a case involving a young offender whose moral culpability cannot be compared to that of an adult should approach punishment as far as possible from a point of view of the potential for rehabilitation and care. In **S v Nkosi** 2000

(1) SACR 135 (W) guidelines were laid down for the sentencing of young offenders for both serious and less serious offences.

[10] This is a typical example which the court in **S v Pillay** had in mind. A misdirection which is not just a mere misdirection but one which vitiates the decision on sentence. In future the presiding officer is advised to seriously consider the provisions of section 290(2) and (3) of the CPA and cases relevant thereto as well as the salutary approach set out in **S v Z en Vier Andere Sake** 1999 (1) SACR 427 (E) at 430f which can be of great assistance and guidance in the consideration of an appropriate sentence in cases of young offenders.

[11] In the circumstances I make the following order:

ORDER:

11.1 The conviction is confirmed.

11.2 The sentence of 2 (two) years imprisonment imposed by the presiding officer on 27 March 2008 is set aside and is substituted by the following:

***“R 1200,00 (One thousand two hundred rand) or 8
(eight) months imprisonment”***

B.C. MOCUMIE, J

I concur.

M.B. MOLEMELA, J

/sp