

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

Review Case No.: 959/2005

In the case between:

THE STATE

and

BEN MOKUBE KAPAPA

CORAM: HATTINGH, J *et* VAN DER MERWE, J

JUDGEMENT: VAN DER MERWE, J

DELIVERED ON: 15 SEPTEMBER 2005

[1] The accused in this matter was charged with common assault. In the charge sheet it was alleged that the accused assaulted a Dr. Riaan Olivier at Group 4 Prison in Bloemfontein by hitting him on the shoulder with a sock containing a bar of soap.

[2] The accused pleaded guilty, was duly convicted and

thereafter sentenced to a 12 months imprisonment. The conviction is in order but the sentence, for the reasons that follow, in my view clearly not.

[3] During questioning in terms of Section 112(1)(b) of Act Nr. 51 of 1977, the accused fully explained the circumstances leading to the commission of the offence in question. This was accepted by the prosecutor. The accused said that he had killed a person and that that caused him problems. He said that he could not sleep at night, the deceased person troubled him at night, as he put it. He was then taken to the complainant, apparently a medical doctor. His perception was that the complainant was unwilling to assist him. Upon his return to his unit in the prison, the accused decided to commit suicide. He cut himself and also attempted to hang himself, as a result of which he was taken to the prison hospital.

[4] The following morning the accused was called to see the

complainant in his office. In the office, the accused, who was obviously in a seriously troubled emotional state, was unhappy with the attitude displayed by the complainant. An oral altercation ensued as a result of which the accused was taken from the office of the complainant. While sitting outside the office of the complainant, waiting to be taken back to a section of the prison referred to as Broadway, the complainant passed him, greeted him and said that he should

ĩ°ĩ. gaan loop slaap lekker in die Broadway.”

This remark angered the accused to the extent that he hit the complainant with the sock containing a bar of soap. He hit the complainant once and the complainant was not injured. He said that he hit the complainant because the complainant was supposed to assist him, but refused to do so.

- [5] The accused has two previous convictions of assault and two of murder. He was convicted of all these offences on 9

May 2000. On each of the charges of assault he was cautioned and discharged and on each of the murder charges he was sentenced to 15 years imprisonment.

- [6] The crime in question is a minor one, bordering on *de minimis non curat lex*. It was committed in circumstances that required that compassion and mercy be extended to the accused. In my judgment these matters by far outweigh the fact that the accused has the previous convictions referred to above. The sentence of 12 months imprisonment in this case is startlingly inappropriate and must be replaced with a caution and discharge.

- [7] In the result the conviction is confirmed but the sentence set aside and replaced with the following:

The accused is cautioned and discharged.

C.H.G. VAN DER MERWE, J

I concur.

G.A. HATTINGH, J

/em