

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

Review No.: 126/2004

In the review between:

THE STATE

and

PONKI FOKANE

CORAM: **WRIGHT *et* VAN DER MERWE, JJ**

JUDGMENT BY: **VAN DER MERWE, J**

DELIVERED ON: **25 MARCH 2004**

[1] The accused in this matter was charged in the Magistrate's Court for the district of Witsieshoek, held at Makoane, with assault with intent to do grievous bodily harm. It was alleged that the accused hit the complainant with a bottle on the head.

[2] At the trial the accused was assisted by a legal representative. The accused pleaded guilty to this charge. He was thereafter found guilty as charged. No questioning in terms of section 112(1)(b) of

the Criminal Procedure Act, No.51 of 1977 (“the Act”) took place nor was a written statement handed in in terms of section 112(2) of the Act. On 6 February 2003 the accused was nevertheless sentenced to nine months imprisonment.

[3] The record reached the offices of the Registrar for purposes of review only on 27 January 2004. Reasons for conviction and sentence requested in terms of the provisions of section 304(4) of the Act on 28 January 2004, reached the Registrar on 17 March 2004. In these reasons the Magistrate explained that the matter was not sent for automatic review as the accused was legally represented, and that it was sent for review after judicial assessment officers discovered that the sentence was incompetent. The Magistrate confirmed that the accused must have already served the sentence by then.

[4] The Magistrate states that the accused assaulted a member of the police who acted in the execution of his duties and that accused therefore committed a serious crime. It must be accepted therefore that the Magistrate was of the opinion that the offence merits punishment in terms of section 112(1)(b) and not in terms of

section 112(1)(a) of the Act. It follows that the conviction and sentence of the accused must be set aside on review on the ground that the provisions of section 112(1)(b) or 112(2) were not complied with. Despite the fact that the accused had already served the sentence and despite the inconvenience thereof, section 312 of the Act obliges me to remit the case to the Magistrate and to direct that the Magistrate comply with the provisions of section 112(1)(b) or 112(2) of the Act. If the accused is sentenced afresh, the sentence that he had already served will obviously be a very important consideration.

- [5] The conviction and sentence are set aside and the matter is remitted to the Magistrate. The Magistrate is directed to comply with the provisions of section 112(1)(b) or 112(2) of Act No.51 of 1977.

C.H.G. VAN DER MERWE, J

I CONCUR

G.F. WRIGHT, J

/scd