

CASE NO. : CA&R67/97

DATE : 4 SEPTEMBER 1998

IN THE HIGH COURT OF SOUTH AFRICA

(BISHO)

In the matter between:

MZAMO FUMA

and

THE STATE

---

JUDGMENT:

10

EBRAHIM, J:

In this matter the appellant lodged an appeal against his conviction and sentence in the court a quo on a charge of assault with intent to do grievous bodily harm. The sentence imposed by the magistrate was a fine of R3 500,00 plus a further period of six months' imprisonment which was suspended for a period of five years on condition that the accused was not again convicted of assault with intent to do grievous bodily harm committed, clearly, during the period of suspension and for which he was sentenced to imprisonment without the option of a fine. For whatever reason the appellant, who was represented by a firm of attorneys when the appeal was lodged, has not proceeded with the appeal and consequently there is no appearance on his part. However, in view of the court's inherent powers to review any proceedings in the court a quo and where the court feels that justice has not prevailed, the court is free to deal with the matter on review.

20

Mr Kristafor, who appears for the State, has sought to have the matter dismissed on the point in limine that the appellant had not filed heads of argument and in the notice that he has served he has indicated also that in his

30

submission/ ....

submission the appellant does not have a reasonable chance of success on appeal. After enquiry by the court on appeal Mr Kristafor quite rightly was constrained to concede that justice had not prevailed in terms of both the conviction and the sentence imposed on the accused.

The assault of which the accused was convicted arose out of an exchange of words, it appears, that occurred in the charge office of the police station. Both the complainant and the accused are policemen. Although the complainant says that there was no reason for the assault it seems to me improbable that the assault would have taken place without either some exchange having taken place in terms of which the accused may have felt slighted or on the basis where the accused may have been under the influence of alcohol and have taken offence at something which was said relatively innocuously. Be that as it may, it is difficult to envisage that the assault would have taken place entirely unprovoked or entirely without any semblance of a reason therefor. 10 20

The complainant, who testified, indicated that he had ward off a number of fist blows from the complainant. One or more of those blows penetrated his defence and resulted in his nose being bloodied and some swelling to his face. He stated further that he did not seek medical treatment the same day but only proceeded to the doctor on the following day.

The State called a further witness who substantiated the assault and basically substantiated the version of the complainant in that the accused had assaulted him with his fists. 30

There was no medical report before the court nor was

the/ ....

the doctor who, it appears, treated the complainant called to testify.

The court accepted the evidence of the complainant insofar as both the assault is concerned and the injuries he sustained and consequently convicted the accused by natural process rejecting the version of the accused.

It should be observed that the prosecutor, in addressing the court, indicated that he was seeking a conviction simply of common assault even although the accused had been charged with assault to commit grievous bodily harm. 10

The submission of the attorney representing the accused was, of course, that there were contradictions etcetera and that the court should not convict the accused.

I am satisfied on the evidence that the accused had committed a crime. However, it was not one of assault with intent to commit grievous bodily harm. The offence that he made himself guilty of is common assault. It may serve us well to look at the guidelines that have been enunciated in determining whether an assault amounts to assault with intent to commit grievous bodily harm or is simply common assault. These guidelines were set out in the matter of S v MAPASA 1972 (1) SA 524 (E). The relevant quotation appears at 525 where the learned Judge of Appeal, Hart AJ, referred to a case of S v MBELU 1966 (1) PH H176 from which he extracted the guidelines which had been enunciated there and I quote as follows: 20

"Where the court is confronted with the problem whether it should draw the inference that an assault was accompanied by this particular intent, it usually has to rely on four main factors which provide/ .... 30

provide the index to the accused's state of mind. I am not suggesting that these four factors are exhaustive. I do suggest that in the large majority of cases these are the factors which provide a guide to the accused's state of mind. They are, first, the nature of the weapon or instrument used; secondly, the degree of force used by the accused in wielding that instrument or weapon; thirdly, the situation on the body where the assault was directed; and, fourthly, the injuries actually sustained by the victim of the assault." 10

The learned Judge proceeds further and says that he respectfully agrees with those guidelines but, correctly, says that these are not exhaustive and then proceeds to add the following at 525F:

"I would add that questions as to the age and physical condition of the participants are relevant as also the manner in which any instrument for which an assault is committed is used. It seems to me that in this case the elements of torture were present." 20

We need not go into the facts any further of those matters but I think the guidelines speak for themselves and I find myself in respectful agreement with those.

If one looks at the assault that occurred here in the case a quo, there was, first of all, there was firstly not any weapon used. The accused assaulted the complainant with his fists and, on the basis of the evidence before the court there is nothing to suggest that the injuries were grievous or serious in any manner whatsoever. In my view, therefore, the/ .... 30

the finding that the accused was guilty of assault with intent to commit grievous bodily harm is clearly wrong and cannot be sustained. In my view the accused has committed the assault of common assault and that is what he should have been convicted of. I need to stress at this stage that this court on previous occasions has commented on the fact that where assaults are concerned, whether it be physical assaults or assaults arising out of rape or sexual assaults, that a court should be wary of simply accepting the evidence 10 of the injuries as given by the complainant or from observers who were present at the scene or subsequently saw the injured party. There is a need for the court to address its mind to calling for medical evidence or a medical report at the least to seek elucidation on the nature of the injuries. One is mindful of the pressure of work in the magistrate's court, the fact that there are numerous cases that have to be heard, but failure to call such evidence may very clearly lead to an injustice and lead to a situation where an accused is wrongly convicted of a crime which is 20 far more serious than that which was actually committed. The absence of a medical report or any medical evidence here is a factor which weighs heavily and, on the evidence, as I have said, before me I cannot find in any way that the assault was grievous of any kind.

Insofar as the question of sentence is concerned, the magistrate, it is clear, was influenced by the fact that these were two policemen fighting with each other in the charge office in the presence of members of the public and this impacted on the sentence that was imposed. I have no 30 doubt in my mind that this conduct was reprehensible insofar as that of policemen is concerned. They are supposed to be the/ ....

the upholders of law and order. They are supposed to protect people from crime and when you have two policemen who conduct themselves in this manner before the public then it seems to me a censure is almost insufficient and perhaps what should flow from this is some departmental steps to be taken against the particular complainant. I leave that to the authorities to decide if they so wish. But this court, certainly, and I think I speak for my learned Brother, the Judge President, as he has indicted, views this conduct in 10 a serious nature. However, the evidence before the court is that the complainant's nett income was R1 300,00 a month. He is a married individual with three children. He is 34 years of age and a first offender and also the sole breadwinner. The magistrate in his reasons for judgment indicates that the accused earned R13 000,00 per month as a nett salary. I think it is a typographical error, that he actually referred to the amount as being R1 300,00. Whatever the case is the fine that he has imposed of R3 500,00, alternatively six months' imprisonment, does evoke 20 a sense of shock. The magistrate says it does not and it appears that he is obviously coloured by his own view of matters, understandably. He, however, says that even if the amount is considered to be excessive he has ameliorated that by affording the accused an opportunity of paying the fine at the rate of R500,00 per month. In my view this is a misdirection. The fine is not ameliorated by affording a person an opportunity of paying it off over a period of time. The fine has to bear a direct relationship both to the crime and to the personal circumstances of the accused. 30 In my view this fine does neither.

My Brother, the Judge President, has cited an example

which/ ....

which although perhaps is somewhat exaggerated but illustrates the point very clearly. A person with a high income, even if he receives a fine of, as he has indicated R 1 000 000,00 and is afforded twenty years to pay it off will still consider that to be a very huge amount to pay. Whatever the situation, in view of the fact that the conviction of assault with intent to commit grievous bodily harm cannot stand and that of common assault is returned in its place, the sentence has to be proportionate in respect of that as well. In my view the accused is more than fortunate in terms of the sentence that I propose but I consider that he has damaged his prospects of promotion and there are other consequences that may flow. 10

In the circumstances the sentence that I impose is a fine of R300,00 or in default of payment thereof three months' imprisonment. I also impose a further six months' imprisonment which is suspended for a period of three years on condition that the accused is not again convicted of assault committed during the period of suspension. 20

In the result the conviction of assault with intent to commit grievous bodily harm is set aside and a verdict of common assault is returned and the sentence is as I have described.

---

Y EBRAHIM

JUDGE OF THE HIGH COURT

Pickard, JP:

I agree.

\_\_\_\_\_/ ....

---

B de V PICKARD

JUDGE OF THE HIGH COURT