

IN THE HIGH COURT(BISHO)CASE NO.: CA&R66/2001DATE: 22 FEBRUARY 2002

In the matter between:

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KING MGWEBA

versus

THE STATE

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EX TEMPORE JUDGMENT

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EBRAHIM J:

This matter has come before us as an appeal against the conviction of the appellant of the offence of common assault and the sentence that was imposed, namely a fine of R800-00 or in default thereof a period of imprisonment of 6 months of which half was suspended for a period of 2 years on certain conditions.

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The notice of appeal that was filed on behalf of the appellant is clearly improper in that it fails to set out the grounds upon which the appellant has appealed against his conviction or the sentence that was imposed. For this reason the appeal <sup>could be</sup> ~~was~~ struck from the roll. I do not intend to expand on that, but suffice to say there is ample authority for the fact that unless a notice of appeal sets out grounds for appeal that it does not constitute an appeal and should therefore be struck from the roll.

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However, we have for the sake of justice decided to deal with this matter by virtue of the Court's inherent powers of review. Our reason for doing so is that the conviction was clearly improper and cannot be

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sustained.

I do not intend to recount the evidence in full that was led before the Court a quo, but suffice to say that the complainant alleged that the appellant had assaulted her by smacking her and either kicking her or trampling on her foot. She was the only witness led by the State. The appellant in his testimony denied that he had assaulted the complainant in any way whatsoever. The learned magistrate then exercised her powers to call a witness and proceeded to do so. This witness indicated that he was not aware of any problem relating to an assault that had arisen between the complainant and the appellant.

The basis upon which the magistrate has convicted the accused is that she said that she believed the story of the complainant and found the version of the appellant not to be reasonably possibly true. The magistrate has made certain other comments, but suffice to say that on this basis the conviction was improper.

The Court was faced with two conflicting versions, both of which were as probable as the other. Whatever suspicions the magistrate may have had or whatever sympathy she may have had with the appellant, it did not amount to proof beyond a reasonable doubt on the basis of the evidence that was tendered.

It is evident from the magistrate's reasons, as furnished after the supposed notice of appeal was lodged, that she had great sympathy with the complainant because of the fact that a brick had fallen on the complainant's foot and that she had therefore been injured. Indeed, the magistrate's reasons centred entirely on the fact that the appellant was most unsympathetic towards the complainant, and, for this reason, the magistrate was of the view that the appellant's story was not reasonably

possibly true. She therefore believed the complainant.

There is no basis for such a finding at all. As I have indicated the one version is as probable as the other and the magistrate, whether she personally disbelieved the appellant, was not in a position to make the finding that his story was not reasonably possibly true. 5

In the circumstances it is clear that the conviction and sentence should be set aside and on that basis by virtue of the powers of review I find that the conviction and the sentence are to be set aside. 10

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Y EBRAHIM

JUDGE : BISHO HIGH COURT

PICKARD JP:

I agree. The conviction and sentence are set aside. 15

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B de V PICKARD

JUDGE PRESIDENT : BISHO HIGH COURT 20