

**FORM A**  
**FILING SHEET FOR EASTERN CAPE JUDGMENT**

026/2004 ECJ NO :

**PARTIES:** THE STATE

and

ANDILE NYUMBEKA

Accused no 1

BONGANI MTSHUKWANA

Accused no 2

REFERENCE NUMBERS -

- Registrar: 20040845

DATE HEARD: N/A

DATE DELIVERED: 9 SEPTEMBER

JUDGE(S): LEACH AND PLASKET JJ

CASE INFORMATION -

- *Nature of proceedings* : CRIMINAL REVIEW

- *Topic:* CONDITIONS OF SUSPENSION OF SENTENCE FOR ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION)**

**CASE NO:20040845  
DATE DELIVERED:9/9/04**

In the matter between

**THE STATE**

and

**ANDILE NYUMBEKA**

**Accused no 1**

**BONGANI MTSHUKWANA**

**Accused no 2**

**JUDGMENT**

**PLASKET, J:-**

- [1] The accused were convicted, correctly, of assault with intent to do grievous bodily harm, in the Magistrate's Court, Dordrecht.
  
- [2] The assault was a serious one and the complainant sustained serious injuries. Accused number 1 had struck the complainant with an iron rod and accused number 2 had stabbed him with a garden fork. With justification, the prosecutor, in his address on sentence, stated that the accused had attacked the complainant 'as if they were killing a snake'.
  
- [3] The magistrate accepted that the assault was a serious one, stating that it bordered on attempted murder. It appears that it was only the youthfulness of the accused that saved them from a more severe sentence than the one imposed, namely 24 months imprisonment of which eight months were suspended for five years 'on condition that

both accused are not convicted of assault where a dangerous weapon is used, committed during the period of suspension'.

- [4] Froneman J queried the condition of suspension. His query was in the following terms:

'Why is the condition of suspension limited to assault with a dangerous weapon? If the need was to make the condition more restrictive, should the condition not rather have related to a further offence of assault for which unsuspended imprisonment was imposed?'

- [5] In his response, the magistrate accepted that the conditions of suspension required 'modification'. He has suggested, with reference to *S v Gwele* 1991 (1) SACR 107 (Tk), 108j that the sentence be suspended subject to the condition that the accused 'are not convicted of assault or any offence involving violence to the person of another committed during the period of suspension for which they are sentenced to imprisonment without the option of a fine'.

- [6] I am of the view that the magistrate's concession that the term of suspension requires 'modification' is a concession that is properly made: it is too vague and there would be a danger that an accused, particularly an unlettered accused, may not properly understand what conduct will bring the condition of suspension into operation. (Note that accused 1 is poorly educated, having left school during the course of standard five.) To the extent set out in Froneman J's query it is necessary to interfere with the sentence and I propose to do so by using the terms of suspension that Davies AJ applied in *S v Gwele* supra (although, no doubt, other formulations could also be settled upon).

[7] The following order is made:

- a) The convictions of the accused are confirmed.
- b) The sentences imposed on the accused are set aside and replaced with sentences of 24 months imprisonment of which eight months imprisonment is suspended for a period of five years on condition that the accused are not convicted of assault or any offence involving violence to the person of another committed during the period of suspension, for which the accused are sentenced to imprisonment without the option of a fine.
- c) The sentence is backdated to 21 May 2004.

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**C PLASKET**  
**JUDGE OF THE HIGH COURT**

I agree

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**LE LEACH**  
**JUDGE OF THE HIGH COURT**