

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Review No. : 145/2013

In the review between:-

THE STATE

and

MZIMKHULU MOSES MUKUWANE

CORAM: MOLEMELA, J *et* PHALATSI, AJ

JUDGMENT BY: PHALATSI, AJ

DELIVERED ON: 14 NOVEMBER 2013

- [1] This is an automatic review in terms of section 302 of the Criminal Procedure Act, 51 of 1977 (“the CPA”). The accused was charged and convicted of assault with intent to do grievous bodily harm on 23 April 2013 and sentenced to three years imprisonment on 26 April 2013.
- [2] The State led the evidence of two state witnesses, namely the complainant, Elisa Tatia Hlatswayo and her daughter, Ntombizodwa Susan Labase. The complainant testified that she was asleep in her home when she was woken up by noise in the kitchen. When she was about to stand up, a male person entered her bedroom and stabbed her with a

screwdriver. She screamed and called her daughter, who was asleep in the other bedroom, to help her. Her daughter met the assailant in the passage and said "Seun, what do you want here." The assailant then left the house. She identified the accused as Seun, who stabbed her with a screwdriver. She further testified that she sustained two stab wounds, one on her left hand and another one on her left chest. She was taken to hospital where the wounds were washed and stitched. Hereafter the State handed in the medical report, J88, as exhibit, by agreement with the accused. The doctor was not called to testify.

- [3] Ntombizodwa Susan Labase testified that she was asleep when she was woken up by the screaming of her mother. She stood up to go and find out what was wrong and along the passage she met the accused. She enquired what the accused wanted in her parental home and he said he was looking for his girlfriend. He thereafter left. She knows the accused very well and she was drinking alcohol earlier that night with him and his (the accused's) girlfriend. The incident happened at between 02h00 and 03h00 in the morning of 2 March 2013.
- [4] The accused testified and in essence just denied that he was the person who assaulted or stabbed the complainant. He therefore put identity in dispute. The court, however, rejected his version and convicted him. I am satisfied that the accused was correctly convicted on the evidence before the court.

- [5] When it comes to sentencing, I can do no better than to quote the magistrate verbatim, as this was done in only one paragraph, as follows:

“In giving sentence accused the Court will take into consideration your personal circumstances as for the purpose of sentence you are regarded as a first offender that you still young about 25 years old and further that you are fortunate that you are not charged and convicted of housebreaking with intend to assault and assault, but accused this is a very serious offence that you have been convicted of.

The Court will have no option but to give you a term of imprisonment, your sentence will be as follows, in terms of Section 276(1)(i) of the Criminal Procedure Act 51/1977 you are sentenced to **THREE (3) YEARS IMPRISONMENT**.”

- [6] Based on what is said in this paragraph, the accused was sentenced to three years imprisonment, the maximum sentence that the court can impose. In the medical report, the doctor stated that the patient sustained lacerations on left hand and left breast (my own emphasis). This finding of the doctor clearly contradicts the evidence of the complainant, who testified that she sustained stab wounds, which were stitched. The court dismally failed to enquire and to take into consideration all the personal circumstances of the accused. The only serious aggravating circumstances that I can find in this case, are that the complainant is of advanced age (61 years old) and that she was attacked in the sanctity of her home.

[7] In any offence involving the use of violence, the seriousness of injuries sustained by the complainant will always be a factor to be taken into consideration in aggravation or mitigation of sentence. *In casu*, the medical report shows that the complainant suffered lacerations of 1 cm on the breast and 3 cm on the hand. This can hardly be regarded as serious injuries. The accused is 25 years of age and the evidence reveals that he had been drinking alcohol before the incident. He is a first offender and supports his mother, siblings and two minor children. I am of the view that the sentence imposed by the magistrate is wholly inappropriate in the circumstances and that this court is entitled to interfere therewith. I therefore find that the appropriate sentence should have been one of 18 (eighteen) months imprisonment, 6 (six) months of which is suspended on condition that the accused is not found guilty of a similar offence within five years from the date of sentence.

[8] Consequently, I make the following order:

8.1 The conviction is confirmed.

8.2 The sentence imposed by the court *a quo* on the accused is set aside and replaced with the following:

“the accused is sentenced to 18 months imprisonment, 6 (six) months of which is suspended for a period of five years, on condition that the accused is not found guilty of assault committed within the period of suspension.”

- 8.3 The sentence is antedated to 26 April 2013, being the date on which the accused was sentenced in the court *a quo*.

N.W. PHALATSI, AJ

I concur.

M.B. MOLEMELA, J

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