



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal No.: A223/2016

In the appeal between:

MOSINYA ANNAH LENKOANE

Appellant

and

THE STATE

Respondent

CORAM:

REINDERS, J *et* LEFENYA, AJ

JUDGEMENT:

REINDERS, J

HEARD ON:

28 AUGUST 2017

DELIVERED ON:

7 SEPTEMBER 2017

- [1] The appellant, who was legally represented, was arraigned before the District Court at Kroonstad on the following charges:

Count 1: Contravening sec 17(a) read with sec 1,5,6,7 and 17 of the Domestic Violence Act 116 of 1998.

Count 2: Assault with the intent to cause grievous bodily harm.

Count 3: Malicious injury to property.

- [2] On 14 April 2016 Appellant pleaded not guilty to the charges but was convicted as charged and sentenced as follows:

Count 1: R 1 000.00 or 4 months imprisonment, suspended for 5 years on conditions.

Count 2: R 1 000.00 or 4 months imprisonment, suspended for 5 years on conditions.

Count 3: R 2 000.00 or 8 months imprisonment, suspended for 5 years on conditions.

- [3] Leave to appeal against the convictions and sentences was refused by the trial court but granted on petition by this court in respect of both convictions and sentences.

- [4] Heads of argument on behalf of the State was prepared by Ms Moroka but Ms Sekoena appeared before us in court. The

State does not support either the convictions or the sentences imposed by the trial court.

[5] The complainant in respect of all three charges is Mr Lereko David Lenkoane (Mr Lenkoane), the husband of the accused. The appellant stood accused of contravention of a protection order in that she called Mr Lenkoane a bitch, assaulting him by hitting him with an iron bar and damaging the windows of a property with such damages to be in the amount of R 1 800.00 Mr Lenkoane was a single witness as to these incidents (the “incidents”) which, according to the indictments, took place on 29 December 2015.

[6] An application of the necessary caution in respect of a single witness requires, in essence, that the court satisfy itself that despite the defects, shortcomings and contradictions in such evidence, the truth has been told and that the complainant’s evidence is trustworthy.

See: ***S v Sauls*** 1981 (3) SA 180 (A)

[7] The magistrate in his judgment indicated that he was “not going to repeat the evidence before court”. From a reading of the record the upshot of Mr Lenkoane’s evidence was that he was estranged from the appellant and stayed at his parental home at the time of the incidents. Around 19h00 on that day he heard windows breaking outside the house and on stepping out of the house he was struck by appellant on the head with an iron bow. Three windows were broken and he

obtained a quotation (Exhibit "A", "the quotation") for repair of the windows, amounting to R 1 800.00. After going to the police he went to hospital the next day and the findings of the medical practitioner were recorded on a J88 (Exhibit B, "the J88"). No credibility finding on the testimony of Mr Lenkoane was made by the court a quo in its judgment, but the magistrate indicated that corroboration for the complainant's evidence could be found in "much more aspects that (*sic*) only other witnesses."

- [8] On the papers and in oral evidence by Mr Reyneke it was contended that the court a quo erred in convicting the appellant in respect of each of the charges against the appellant. He alluded these, submitting that the contradictions in the evidence of Mr Lenkoane are materially affecting his credibility and reliability to such an extent that I can find that the court a quo erred in accepting the evidence of Mr Lenkoane.
- [9] In his evidence-in-chief Mr Lenkoane testified that he was lying in bed on 29 December 2015 when the incidents occurred. This was confirmed by him after a question posed by the prosecutor, and also according to his statement in relation to the incidents. After being confronted with the date of the quotation being 29 December 2015, he changed his version during cross-examination and indicated that the accident actually occurred on 28 December 2015. Hereafter he confirmed that the incident occurred on the 28th and that he only went to the police on the 29th.

[10] The learned magistrate dealt with this discrepancy as follows:

"And then there is the quotation. Yes the quotation is 29 December, but one can see, anyone can see and this is only hearsay evidence, but what is permissible, and the Court can take notice of it, is that he, the complainant did make plans to get a quotation. But what is hearsay and what we do not have to, or must not speculate about is that it is obvious that the person that made this quotation had to make a mistake on it, because it is from Sakia Modise to Sakia Modise. Obviously that is wrong."

[11] The prosecution did not call the author of the quotation nor did the magistrate. I am of the view that the court a quo misdirected itself materially in speculating about the reason for the discrepancy in the dates which were relevant in respect of the incidents. The appellant stood accused of having committed the crimes on 29 December 2015, and not 28 December 2015. In accepting the evidence of Mr Lenkoane, the court a quo should have found that no convictions can follow on a date which, according to the charge sheets, did not accord with the evidence by the complainant.

[12] In respect of the charge of contravening a protection order, Mr Lenkoane testified in chief that the appellant had accused him of sleeping with different women and being a prostitute. Only after the prosecutor led him in this regard, he indicated that appellant had called him a bitch as indicated in the charge

sheet. Even though it might sound insignificant, in my view this impacted negatively on the credibility of Mr Lenkoane when taking a holistic view of all the discrepancies and inconsistencies in his evidence as alluded to above.

[13] Mr Lenkoane testified that he did not sustain any lacerations from the alleged blow to his head, but it was painful and swollen. He was confronted with the fact that no mention is made on the J88 of any swelling. A close perusal of the J88 indicates that Mr Lenkoane was examined on 30 December 2015. Not only is the conclusion by the doctor illegible, but the sketches therein do not indicate any injuries to any part of the body of Mr Lenkoane and thus does not support the injuries as alleged. The prosecution did not call the doctor to testify on his findings, nor did the court a quo. The magistrate however dealt with this discrepancy as follow:

“And then there is a J88, no one can blame the complainant that no one cannot read what the doctor said there....But there is a word here that one can see, sustained something. It is not for the court to guess, but it is unfair to put it to the feet of the complainant to say that the doctor did not mention something, because something is mentioned, but it cannot be read.”

[14] In this regard the magistrate erred by speculating in favour of the complainant and finding that the J88 corroborated Mr Lenkoane in respect of the charge of assault with the intent to do grievous bodily harm.

[15] In respect of the charge on malicious damage to property, the court a quo found the appellant guilty as charged, with the amount of the damage to be R 1 800. To prove its case the state relied on a quotation in respect of eight windows. Yet Mr Lenkoane testified that only three windows were broken. The magistrate did not even make any mention of this discrepancy. In my view this aspect is indeed important as it impacts unfavourably on the evaluation of the trustworthiness of the evidence of Mr Lenkoane as a single witness.

[16] The appellant must convince us, on adequate grounds, that the trial court was wrong in accepting the evidence of the complainant.

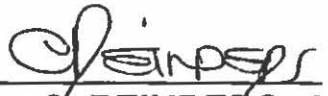
See: *S v Francis* 1991 (1) SACR 198 (A) at 204 d-e.

[17] I am of the view that the matter before us warrants interference with the trial court's evaluation of the testimony by Mr Lenkoane. I have indeed been convinced by the appellant on the grounds as set out herein above, that the trial court erred in accepting the version of Mr Lenekoane and convicting the appellant as charged. The convictions cannot stand and should be set aside. It follows that the appeal against the sentences imposed should also succeed.

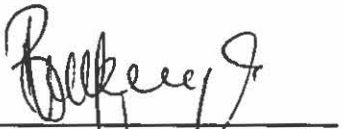
[18] Consequently I make the following order:

18.1 The appeal succeeds.

18.2 The convictions and sentences are set aside.


Q. REINDERS, J

I concur.


B.R. LEFENYA, AJ

It is so ordered.

On behalf of the appellant:

Mr. D. Reyneke
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. M. Sekoena
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN