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**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R 135/2014**
DATE HEARD: **25/01/2016**
DATE DELIVERED: **29/01/2016**

In the matter between:

GERT DE BRUIN

Appellant

and

THE STATE

Respondent

Coram: Olivier J et Pakati J

JUDGMENT

Olivier J

[1.] The appellant appeared in the Magistrate's Court, De Aar, on charges of assault (count 1) and of having contravened a protection order (count 2)¹. In count 1 it was alleged that the appellant had on 15 January 2013 assaulted Mrs De Bruin, his wife. In count 2 it was alleged that on 17 January 2013 the appellant had "*assaulted, shouted the complainant (sic) and threw her with stones and threatened to kill the complainant*"².

¹ In contravention of the provisions of section 17(a) of the **Domestic Violence Act, 116 of 1998**.

² The complainant once again having been his wife.

- [2.] The appellant pleaded not guilty to both counts. Apart from admitting the existence and his knowledge of the protection order, as far as count 2 was concerned, he denied all the other allegations.
- [3.] At the close of the case for the prosecution the appellant was discharged³ on count 1⁴.
- [4.] The appellant was eventually convicted on count 2, on the basis of having assaulted the complainant by throwing her with a stone. He was sentenced to 3 years imprisonment, conditionally suspended for a period of 5 years.
- [5.] The appellant at a later stage applied for leave to appeal against his conviction and sentence, as well as for condonation for the late filing of that application. The Magistrate, Mr Abrahams, removed the application from the roll because the appellant's attorney had not filed a power of attorney.
- [6.] The application was then re-enrolled at a later stage. The Magistrate found that there was no satisfactory explanation for the failure to file the application for leave to appeal timeously and dismissed the application for condonation on that basis.
- [7.] The appellant was eventually on petition granted leave to appeal against his conviction and sentence.

³ In terms of section 174 of the **Criminal Procedure Act**, 51 of 1977.

⁴ Although his attorney had applied for his discharge on both counts.

- [8.] Although the Magistrate did, in considering the application for condonation, make reference to the need to have regard to the prospects of success of an appeal when considering an application for condonation⁵, he failed to do so. He did not even so much as refer to the evidence and to his findings. As will appear from what follows, the prospects of a successful appeal on the merits by far outweighed any criticism that could be levelled against the explanation proffered for the delay⁶.
- [9.] Both the application in the Magistrate's Court and the appellant's petition included an application for leave to appeal, as well as the grounds of appeal. It would therefore in the circumstances not really have made sense to make a direction as envisaged in section 309C(7)(b)(ii) of the **Criminal Procedure Act**. Another possible approach on petition, and having found that condonation should have been granted, would have been to direct that the appellant (once again) approach the Magistrate for leave to appeal⁷. In view of the Magistrate's conduct towards the appellant during the trial, and to which I will revert at a later stage, this would in my view not have been appropriate.
- [10.] As regards count 2 the prosecution presented only the evidence of the complainant about the alleged incident at the house of the appellant and the complainant. According to her the appellant had arrived at home in an intoxicated state. There was an altercation

⁵ Compare **Van Wyk v S; Galela v S** [2014] JOL 32436 (SCA) para [14]; **S v Ntskoane** 1976 (2) SA 401 (O) at 404A

⁶ Compare **S v Senkhane** 2011 (2) SACR 493 (SCA) para [27]

⁷ Compare the provisions of subsection 7(b)(i) of section 309C of the **Criminal Procedure Act**.

between the two of them about the appellant closing or locking a door. She struck the appellant on his foot with a stone and ran away. The appellant then threw a stone at her. She ducked and the stone hit her on her hip, causing a bruise. She called the police and when they arrived the appellant was arrested.

- [11.] Const N E Tshaya, who attended the complaint and arrested the appellant, testified that the appellant had asked the complainant whether she had called the police for him and that he had promised that he would come back for her. She also testified that the complainant had reported to her that the appellant had kicked her.
- [12.] The prosecution presented no other evidence in respect of count 2, despite the fact that according to the complainant the incident would have been witnessed by their neighbour, and to an extent also by their 28 year old daughter.
- [13.] According to the appellant he arrived home sober. There was an altercation between him and the complainant and he then left with his friend, Mr Matthews Botma. When he returned the complainant was unhappy about the fact that their son had disappeared with money she had entrusted to him. The appellant went to sleep. The police then arrived and arrested him.
- [14.] In his judgment the Magistrate found that the complainant had been a poor witness who had not been able to furnish a coherent version of the events of the particular day. The Magistrate went on, however, to point out that not every error made by a witness would

impact on the witnesses' credibility. According to the Magistrate the complainant had, despite not having been able to commit to any detail in this regard⁸, and despite not having been able to explain how her ducking to avoid the stone hitting her head had ended in the stone hitting her on her hip, remained consistent in her version that the appellant had thrown a stone which had hit her on her hip. It appears as though the Magistrate had, on the basis of this line of reasoning, concluded that the complainant had indeed been a credible witness in this respect.

[15.] The Magistrate criticised the appellant for not being able to explain why the complainant would falsely implicated him. The Magistrate also found that it had been put to the complainant, in cross-examination on behalf of the appellant, that there had been nobody at home when the appellant arrived there, and that this was inconsistent with the appellant's evidence.

[16.] It is trite that a court of appeal will not readily interfere with the factual and credibility findings of a trial court. It will, however, do so where they are clearly wrong, and especially where they are not exclusively based on the demeanour of a witness, but rather on the evidence which appears on record⁹.

[17.] The Magistrate's reasoning that the credibility of the complainant was not affected by the so-called "*errors*" in her evidence is at odds with his finding, in the ruling in the application in terms of section

⁸ Like where the appellant got the stone from.

⁹ Compare **Minister of Safety and Security and Others v Craig and Others** NNO 2011 (1) SACR 469 (SCA) para [58]

174 of the **Criminal Procedure Act**, that *“the evidence is of such a bad quality that the credibility of the witnesses is seriously affected”*.

- [18.] The Magistrate reasoned, in his judgment and with regard to the quality of the evidence of the complainant and of the appellant, that *“die beste van die slegste ... is die feit dat die klaagster volhou dat sy met die klip aangerand is”*, and found that therefore the appellant had thrown the stone at the complainant.
- [19.] Such an approach would have been completely wrong. The mere fact that the complainant had persisted with her allegation of having been hit by a stone would not have been decisive in itself and it would not have rendered irrelevant the criticism against her evidence about how exactly that had happened. The complainant initially, for example, claimed not to have known where the appellant was when he threw the stone at her, which led to the Magistrate asking her how she would then have known when to duck. Like with many other questions, she avoided answering this one. In re-examination the complainant contradicted herself by claiming to have seen the appellant throwing the stone.
- [20.] The Magistrate failed to deal with the complainant’s inability to explain how a stone which had been on its way to hit her against the head, had ended up hitting her on the hip. He also failed to take into account the complainant’s obvious attempt to adapt her evidence to a version that she had, instead of ducking, actually jumped up. This was not initially the complainant’s evidence. Her evidence was that she was running away from the appellant when

she was hit with the stone. When the possible explanation that she had jumped up was offered to her in cross-examination, she “jumped” at the opportunity and promptly adapted her evidence to this effect.

- [21.] This is really a perfect example of a case where a witness’s lack of credibility, and the poor quality of the witness’s evidence, is apparent from the record.
- [22.] The Magistrate also failed to consider the fact that the complainant had, on her own version, not mentioned the bruise on her hip to the police. This would have been the obvious thing to do if it had been precisely that bruise that had led to her calling the police.
- [23.] The poor quality of the complainant’s evidence is exacerbated by the fact that neither the evidence of the neighbour nor the evidence of the complainant’s daughter was presented. At the stage when the appellant’s case was closed, there was no reason on record for the conspicuous failure of the prosecutor to call any of these people to testify.
- [24.] The complainant emphatically denied that the appellant had during the alleged incident threatened to kill her; this while the charge included an allegation to this effect. Her evidence that only one stone was thrown at her, was also inconsistent with the allegation in the charge that the appellant had thrown stones (plural) at her. These allegations could only have come from the evidence at the

disposal of the prosecutor, and most probably from the statement of the complainant.

[25.] When the appellant's attorney attempted to cross-examine the complainant on the contents of that statement, presumably because they were inconsistent with her evidence, the complainant alleged that she had never been given an opportunity to explain to the police what had happened on the particular day and that whatever the police official had written in the statement did not come from her. The police official was never called to testify and the statement was never admitted into evidence.

[26.] As regards the appellant's evidence, he of course had no duty at all to explain why the complainant would falsely implicate him. Although it is correct that it was put to the complainant that, when the appellant arrived at home from work "*toe is daar niemand by die huis nie*", this should be viewed in context.

[27.] In the first place the statement pertained to the time before the appellant left with Mr Botma, and not to the stage when he returned and when he, on the complainant's version, assaulted her.

[28.] Secondly it is clear from the context that the intention had not been to state that not even the occupants of the house, and more specifically the complainant and the daughter, had been present. The statement that there had been nobody at the house, was part of a broader statement to the effect that the complainant had been

going on¹⁰ about their son with the drug problem, which clearly implied that the complainant had indeed been there.

- [29.] This statement was furthermore followed by a statement that the daughter of the parties had been present when the appellant arrived from work.
- [30.] To have isolated the part about there not having been people at home from the rest of that statement, and from the statements following it, was incorrect and unfair.
- [31.] That the appellant had, upon the arrival of Const Tshaya, asked the complainant whether she had called the police would not, on the appellant's version, have been strange. It would have been just as consistent with the appellant not having done anything to contravene the protection order and being surprised by the arrival of the police. The question would not, as the Magistrate seemed to have found, have justified the inference, to the exclusion of any other reasonable inference, that the appellant had known why the complainant had called the police.
- [32.] In the Magistrate's judgment no mention is made of the fact that the complainant reported to Const Tshaya that the appellant had kicked her, which would of course have been completely irreconcilable with the complainant's evidence about the events of 19 January 2013. On the evidence of Const Tshaya this would have been the only method of assault that the complainant had

¹⁰ "gaan aan"

described to her, and Const Tshaya made no mention of the appellant mentioning anything about being hit by a stone.

- [33.] In my view the evidence as a whole did not by any stretch of the imagination justify a finding, beyond reasonable doubt, that the appellant had indeed thrown a stone at the complainant. The appeal should therefore succeed on this basis.
- [34.] This makes it unnecessary to consider the ground of appeal that the Magistrate had appeared biased. I do however feel compelled to deal with the Magistrate's conduct, albeit very briefly.
- [35.] When the appellant sat down before the complainant started testifying, without having been granted permission to do so by the Magistrate, the Magistrate sarcastically asked him whether he was tired. This despite the fact that the appellant's attorney had explained that she may have been responsible for that. It does not appear whether the appellant was eventually allowed to sit down during the evidence of the complainant.
- [36.] The same thing happened when leave to appeal was applied for. The appellant was under the impression that he could sit, but the Magistrate apparently for some reason expected him to remain standing during the application and asked the appellant's attorney *"Mev Dikabalo is u kliënt siek of is hy moeg..."*.
- [37.] It also has to be said that the Magistrate's choice of language left much to be desired. Words like *"hel"* and *"neuk"* are described in

the **Verklarende Handwoordeboek van die Afrikaanse Taal**¹¹ as words not ordinarily used in mixed company and are not expected in a judgment.

[38.] The most shocking of all, however, was the Magistrate's outburst in his judgment on sentence, when he accused the appellant of being a coward and a so-called "*moffie*". Language like this is completely unbecoming of a presiding officer and must be condemned in the strongest possible terms. What is even more unfortunate is that it appears from the record that people who had heard this in court later repeated the Magistrate's words to ridicule the appellant.

[39.] Then there was also the manner in which the Magistrate questioned the appellant. Most of the Magistrate's question could not by any stretch of the imagination be seen as having been aimed at clearing aspects up. Most of them appeared much more like questions which one would expect in cross-examination. The appellant was confronted about things he had according to the Magistrate not told to his attorney, about things not put to witnesses and about evidence not disputed in cross-examination. In view of the conclusion to which I have already come regarding the appeal and the conviction, it is unnecessary to deal with the Magistrate's questioning of the appellant in any further detail.

[40.] In the premises the following order is made:

¹¹ Odendal and Gouws, 4th Edition, page xviii - xix

THE APPEAL SUCCEEDS AND THE CONVICTION AND SENTENCE ON
COUNT 2 ARE SET ASIDE.



C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I agree.



B M PAKATI
JUDGE
NORTHERN CAPE DIVISION

For the Appellant: Mr A Van Tonder
 Legal Aid South Africa

For the Respondent: Adv J Mabaso
 Office of the Director of Public Prosecutions