

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A210/11

In the appeal between:-

AN NTSIELO

Appellant

and

THE STATE

Respondent

CORAM:

C.J. MUSI, J *et* PHALATSI, AJ

HEARD ON:

5 MARCH 2012

JUDGMENT BY:

PHALATSI, AJ

DELIVERED ON:

15 MARCH 2012

[1] This is an appeal against the decision of the magistrate for the District Court of Kroonstad.

[2] The appellant was charged with assault with intent to do grievous bodily harm and was convicted on the said charge on 4 August 2010. She appeals against her conviction only, with leave from the Court *a quo*.

[3] The State led the evidence of the complainant, Ms N.C. Ntsala, who testified as follows:

- 3.1 She received an invitation from the appellant to accompany her to Bethlehem.
- 3.2 She was picked up at her house by both the appellant and the latter's friend by the name of Patricia Mohanwe.
- 3.3 About 17 km from Kroonstad on the road to Steynsrus, the appellant indicated that she wanted to go to a bathroom to relieve herself.
- 3.4 The appellant then showed the complainant a cellphone with her (the complainant's) numbers thereon and told her that the cellphone is that of her husband, Valentine Senkhane. She wanted to know why the complainant is phoning to or is being phoned from the cellphone.
- 3.5 The appellant stopped the car, went outside and took a sjambok (whip) from the car boot and hit her all over her body with it.
- 3.6 They got back into the car and drove back to Kroonstad. Along the way back, the appellant was swearing at her and saying she is used to taking other

women's husbands.

3.7 Under cross-examination, she denied that she fought or threw stones at the appellant or that the appellant was acting in self-defence when she hit her.

3.8 It was further put to her that the other wounds were as a result of being hit by Valentine Senkhane, the previous night, but she denied it.

3.9 The State then handed in J88 as well as photos of the complainant depicting her injuries, as exhibits.

[4] The next witness for the State was Patricia Mohanwe.

4.1 She testified that she was in the vehicle with the appellant when they went to fetch the complainant at her house.

4.2 When the complainant approached the car, she noticed that she (the complainant) was limping and her face was swollen.

4.3 They went up to Ventersburg the appellant stopped the car and said she wants to go to the bathroom.

4.4 Appellant asked her to alight from the vehicle as she wanted to discuss something with the complainant in her absence.

- 4.5 She went out of the car and a moment later, when she looked back, the complainant was busy fighting the appellant and at that time, the appellant was retreating.
- 4.6 The appellant then went to the boot of the car and took out a sjambok. The complainant had picked up stones and was throwing them at the appellant.
- 4.7 The appellant took out the sjambok, because she was overpowered by the complainant.
- 4.8 The appellant hit the complainant twice with the sjambok.
- 4.9 The appellant wanted to leave the complainant there, but she pleaded with her that she cannot leave the complainant so far from home, where there is no transport. They all three got into the car and took the complainant home.
- 4.10 The prosecutor then made an application either to discredit the witness or to have her declared a hostile witness, in that her evidence in court differed with what she had stated in her statement to the police. To this end, the police officer who took the statement testified and the witness' statement was accepted as an exhibit. The court, however, dismissed the application to have

the witness declared a hostile witness.

4.11 In her statement, the witness only states that Adeline (appellant) was hitting Pinkie (complainant) with the sjambok. This is contrary to what she testified in court, that the appellant was defending herself against the complainant, who was throwing her with stones.

[5] The State then called Ms M.M. Ntsala, the complainant's grandmother, who testified that she saw the complainant on the morning before she left with the appellant on that day. She said the complainant was bathing in her (witness') bedroom and she had no injuries.

[6] The complainant's mother, Ms M.A. Morabe, was also called by the State as a witness. She testified that the appellant called her and told her that she had assaulted her daughter. The appellant wanted to meet her so that they could discuss this matter. She met with the appellant and complainant at the witness' parental home. She saw that her daughter was badly assaulted with a sjambok. When she enquired from appellant why she (the appellant) did not phone her before assaulting the complainant, the appellant's response was

that this witness was not in her shoes, implying that the witness could have done the same.

[7] The State closed its case and the appellant closed the defence's case without testifying herself or calling any witnesses on her behalf.

[8] I have deliberately quoted the evidence of the two state witnesses in full, as it is the appellant's contention that, in view of the contradiction between the versions of the complainant and Mohanwe, on behalf of the State, the State did not discharge its onus to prove the guilt of the appellant beyond doubt, nor negating the appellant's defence of private defence.

[9] It was further argued that there were no grounds on which the court *a quo* could reject or ignore the evidence of Mohanwe as being fabricated or unreliable.

[10] I must point out that no criticism was levelled against the evidence of the complainant, nor the complainant's credibility as a witness. In fact, on the contrary, Mr. Pienaar, who

appeared on behalf of the appellant, conceded that the complainant's evidence is reasonable and/or plausible, but argued that the evidence of Mohanwe is equally reasonable and/or plausible.

[11] I now proceed to deal with the two versions, the probabilities and the reasonableness or not, thereof.

11.1 The evidence of the complainant that the appellant accused her of having a relationship with her boyfriend, Senkhane, and that that was the reason for the assault, is not contradicted by Mohanwe.

11.2 The evidence of the complainant that she was not assaulted by Senkhane the day before the incident, is equally not contradicted by Mohanwe. The evidence of Mohanwe that the complainant was limping and that her face was swollen, is of no consequence, as it does not negate the fact that the sjambok wounds all over the body of the complainant, as depicted on the photos, were as a result of the assault of the complainant by the appellant. This also negates Mohanwe's version that the appellant only hit the complainant twice with the sjambok. It is also false as

Ms N.N. Ntsala testified that the complainant had no injuries on the morning before she left with the appellant.

11.3 The evidence of Mohanwe that the appellant hit the complainant with the sjambok in self-defence, as when she looked back, the complainant was busy fighting the appellant and the appellant was retreating. I have a problem with this version on two grounds. Firstly, if the uncontradicted evidence of the complainant is that the appellant assaulted her as she accused her of having a relationship with her boyfriend Senkhane, then it is unlikely that she (complainant) could have started the fight, as she had no reason to attack the appellant. Secondly, Mohanwe does not mention this fact in her statement to the police. On the contrary, she corroborates the evidence of the complainant in her statement, where she mentions that “after a while I saw that Adeline (appellant) was hitting Pinky (complainant) with a sjambok”. Her explanation in court that she was in a hurry when she made the statement is equally unconvincing and unreasonable. Firstly, as the police officer who took her statement,

Maton, testified that she was not in a hurry and secondly, that even if she was in a hurry, she should at least have mentioned that it was the complainant who was fighting the appellant, as the hitting with the sjambok, according to her own version, only happened later.

11.4 When the appellant spoke to the complainant's mother she admitted assaulting the complainant. She did not mention anything about being thrown with stones by the complainant.

[12] I therefore, find that the version of Mohanwe, where it is inconsistent with that of the complainant, is unreasonable and false, and stands to be rejected. In any event, she had a reason to change her evidence to suit the case of the appellant, as she was her friend.

[13] The submission, therefore, that there are two versions on behalf of the State, which are equally true, is devoid of any merit and rejected. It is impossible to have two contradictory versions that are equally true.

[14] I consequently find that the appeal of the appellant must fail.

[15] I, therefore, make the following order:

15.1 The appeal is dismissed.

15.2 The conviction and sentence are confirmed.

N.W. PHALATSI, AJ

I concur.

C.J. MUSI, J

On behalf of appellant:

Adv. C.D. Pienaar
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of respondent:

Adv. D.W. Bontes
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

/sp