

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH-AFRICA

Review no: 265/2011

In the matter between:

THE STATE

and

WILLIAM VRIES

CORAM: VAN ZYL J *et* DAFFUE J

JUDGEMENT BY: DAFFUE J

DELIVERED ON: 26 MARCH 2012

1] This matter came before us by way of automatic review in terms of the provisions of Section 302 read with Section 304

of the Criminal Procedure Act 51 of 1977.

2] The accused was convicted by the Magistrate of Ficksburg on 20 April 2011 on a charge of assault with intent to do grievous bodily harm and on 10 May 2011 sentenced to pay a fine of R6 000-00 or to undergo 12 months imprisonment. A further 6 months imprisonment was suspended on certain conditions. The magistrate also declared the accused unfit to possess a firearm in terms of Section 103 (2) of Act 60 of 2000.

3] The matter was initially placed before Van Zyl J, who queried the conclusion arrived at by the magistrate in convicting the accused. The magistrate responded fully for which we thank him.

4] Van Zyl J put the following questions to the magistrate:

“2. Although the judgment was clearly very thoroughly considered, can the conclusion be correct? I mention a few aspects:

2.1 Is it not more probable that the fight ensued as a result of the circumstances as testified by the accused than those alleged by the complainant?

- 2.2 Why would the crowd have attacked the complainant if he was not the aggressor who started the fight and who actually assaulted the accused?
- 2.3 Are there not explanations evident from the evidence for the contradictions between the evidence of the accused and his witness?
- 2.4 In making certain negative inferences from the accused's failure to put certain facts to the complainant regarding the events, was due weight attached to the fact that the accused was not legally represented?
- 2.5 Could the J88 pertaining to the case which the accused opened against the complainant, not have possibly provided corroboration for the version of the accused? Should the court not have assisted the unrepresented accused by ascertaining whether the State would not have conceded to the handing in of the J88 as an exhibit? Alternatively and in the interest of justice, should the court not have called the doctor as a witness?"

5] The magistrate responded as follows:

- "2.1 No, because I have found the complainant to be a truthful witness unlike the accused. For example the complainant did not hide

the fact that he is the one who started assaulting the accused with a clenched fist during the first fight. Further, after looking at the circumstances of this particular case as a whole I found beyond reasonable doubt that the accused's version is false mainly because of his afterthoughts, contradictions between the accused's testimony and that of his witness. For example I found it to be an afterthought on the part of the accused, his failure to put to the complainant the main reason for this fight. (According to the accused the complainant was bitter because the ladies that accused found sitted (sic) with the complainant at the tavern were more friendlier to the accused than the complainant and the complainant then told the accused that the accused was undermining him). When he was asked by the prosecutor about his failure to put this question to the complainant, he did not give a satisfactory answer. I also view it as a serious contradiction, the accused's testimony that he was hit five times by the complainant and this happened very fast whereas the accused's witness testified that the accused was hit nine or ten times by the complainant and this lasted for about ten to fifteen minutes.

- 2.2 The only probable explanation for the crowd to attack the complainant is because according to complainant the crowd stays at zone 1 and the accused also stays at zone 1 so the crowd was taking the accused's side and the complainant stays at zone 2. (Please see: page 123 of the transcribed record).

2.3 No, because there are serious disparities between the evidence of the accused and that of his witness. For example the accused says he was hit five times very fast by the complainant whereas the accused's witness says the accused was hit nine or ten times and it lasted for about ten to fifteen minutes.

2.4 Yes due weight was attached that accused was not legally represented. I say so because despite the fact that the accused was unrepresented, he diligently and effectively conducted his defence. He cross-examined the complainant thoroughly on very relevant aspects of the case. I even commented during my judgment that the accused sounded like a person who has a legal background. (Please see: page 103 of my judgment). The accused also did not use the services of an interpreter and his command of the language was perfect. Furthermore the meaning and purpose of cross-examination was explained to the accused and he understood therefore he was fully aware of what was expected of him during cross-examination of state witnesses. (Please see page 9 to 10 of the transcribed record).

Further, the manner in which the accused conducted his cross-examination indicates that he clearly understood what was expected of him during cross-examination of the complainant hence I find his afterthoughts to be inexcusable.

2.5 The complainant admitted from the onset that there was a fight between him and the accused on the night in question. Therefore the injuries sustained by the accused during the course of this fight were never in dispute. Whether the accused's J88 had been admitted or not would not have taken the accused's case any further. Hence therefore I submit that it was not imperative for the court in the circumstances to call the doctor."

EVALUATION OF THE MAGISTRATE'S JUDGMENT AND RESPONSES TO THE QUERIES OF VAN ZYL, J:

6] The magistrate found complainant to be an honest witness whilst the accused's version was found to be false. Although a court on appeal or review will not often disregard credibility findings of the court a quo, this can and should be done if it is apparent from the record that such finding was based on a misinterpretation of the evidence. In *casu*, the following was either ignored, or undue weight was given thereto:

6.1 Accused gave a clear plea explanation, stating that he was actually assaulted by the complainant, that he sustained injuries to such an extent that he became unconscious and

was taken to hospital. He also mentioned the fact that there was a pending matter wherein he was the complainant and the complainant *in casu*, the accused. He alleged that the complainant was assaulted by a crowd after he had been injured by the complainant and that the attack on him occurred approximately 22H30 to 23H40 on the 27th of November 2010 and not the early hours of 28 November 2010 as alleged in the charge sheet. He was released from the local hospital at about 01H20 on the 28th November 2010. He confirmed his plea explanation when he testified, save for the fact that he did not have personal knowledge of the assault by the crowd on complainant. On complainant's version he and the accused were involved in a fight which took place about 02H20 on the 28th of November 2010. If the magistrate allowed the J88 pertaining to the injuries suffered by the accused, the objective evidence forthcoming from this document might have shown when accused was treated and it might have corroborated the version of the accused. In so far as the accused wanted the document to be handed in as an exhibit, the reasonable deduction to be made from that is that he was of the opinion that the information contained in the document would corroborate his version. I shall deal later

herein further with the magistrate's refusal to accept the J88.

6.2 The complainant drank half a bottle of whiskey the night before the incident occurred, but wanted the court to believe that he was only "mildly drunk" or just mild. According to the accused, complainant was drunk. His version as to the state of sobriety of the complainant appears to be more probable, bearing in mind how much complainant had consumed according to complainant's own version.

6.3 Notwithstanding the fact that according to the version of complainant there were no disputes or any animosity between them, accused, on complainant's version, did the unthinkable by taking the glass from which complainant was drinking his whiskey and exited therewith from the tavern. It is highly improbable that:

(a) accused would have done that bearing in mind that it was undisputed that security guards were present and customers were not allowed to remove glasses from the premises,

(b) complainant did not object and/or followed the accused immediately to confront him,

(c) accused would have exited from the tavern for an unknown and inexplicable reason, while on his way back to the entrance and when complainant made his appearance, to drop the glass and to start insulting complainant, grabbing him on his clothes without there being any animosity whatsoever between the parties.

7] It is highly improbable that the crowd would have attacked complainant with “samboks” and “knopkieries” after he had been seriously injured in his face by accused as described, causing him to fall down. It is just as improbable that he did not sustain any further injuries through the actions of the crowd, armed with dangerous weapons such as “samboks” and “knopkieries”.

8] Prior to the altercation and inside the tavern complainant was in the company of a certain Geoff, who is also a friend and relative of the accused. Complainant was evasive pertaining to the accused’s questions in this regard and the fact that the

three of them often socialized together in the past. Accused's version was that he met with complainant and Geoff prior to the altercation and that they were in the company of two ladies unknown to him, but apparently friends of Geoff and complainant. One of the ladies was extra friendly towards him and he speculated in evidence that this might have angered complainant and that this was the reason why complainant followed him when he went outside the tavern, accusing him that he was undermining him whereupon complainant started assaulting him. This version is much more probable than the version of complainant, alternatively and at best for the state, just as probable.

- 9] The magistrate incorrectly found that accused's version was fraught with afterthoughts, improbabilities and contradictions. The two so-called afterthoughts relate to his failure to put to complainant in cross-examination that two ladies were in the company of complainant and Geoff when he arrived at the tavern and secondly that complainant accused him of undermining him before he started his assault. Too much should not have been made of this. Firstly, the accused was undefended and although he did a relatively acceptable job in

cross-examination for a lay person, it is apparent from the record that he had his shortcomings in defending himself. He, *inter alia*, stated that “I am not well experienced in terms of maybe these procedures” and conceded that he was not an expert. This is also evident from his inability to prove the statement of the complainant before cross-examining him on the contents thereof. The fact of the matter is that he put it to the complainant that they, he, complainant and Geoff, were friends and that they often socialized and had drinks together. Complainant’s evasive responses on more than one occasion that he did not know created the impression that he denied that the accused socialized with them at the tavern before the altercation occurred. Technically speaking, and if complainant was cross-examined by an experienced lawyer, he might have put accused’s full version to complainant. On the other hand, it might just as well be argued that it wasn’t necessary to do so in the light of the apparent denial that the three people were friends and that the accused was in the presence of the other two that night.

10]The magistrate incorrectly interpreted accused’s response when he was asked by the prosecutor why he did not put the

issue of the ladies to complainant. Accused did in fact put it to complainant that the two of them were together with Geoff that night. In so far as he did not put to complainant that they were also in the company of two ladies, he stated that he thought that he would mention that in his evidence. The reference to speculation had nothing to do with the fact that the accused did not mention the presence of the ladies, but this was added to indicate that he wasn't sure why he was attacked by complainant and merely speculated that it could be because of the over-friendliness of one of the ladies towards him.

11]The magistrate was wrong in finding that the accused evaded his questions pertaining to his sobriety. In my view the matter was fully and comprehensively dealt with by the accused. The magistrate erred as well in respect of his alleged contradiction with reference to the phone call made to his girlfriend. Although the accused replied in the negative when asked whether he called his girlfriend, he immediately in his next answer gave a logical explanation and that is that she was not answering the phone and he presumed it was because of the noise which was quite loud inside the tavern. What he obviously wanted to convey was that there was no contact

between them and that he in fact tried to contact her telephonically, but did not succeed.

12]The fact that Joseph, with whom accused spoke prior to the altercation, did nothing to stop the fight is not so strange. It is common knowledge that many people turn a blind-eye to events such as assaults as they do not want to get involved.

13]The different versions of accused and his witness is not of such nature that the magistrate could find that the witness “actually brought the accused’s case to its knees”. It is apparent from the evidence that they did not discuss the matter and concocted a common story. It is improbable that any person witnessing an assault would be able to count the blows and more so, to later on give a precise description of the altercation. No evidence was tendered in respect of visibility outside the tavern. Also, no two people are expected to give exactly the same account of an incident such as a fight or altercation between two people. Observations do differ. This is experienced often, not only in court, but in everyday life. Accused did not testify that he was struck five times as the magistrate mentions, but that “it was about 5”. His witness

did not testify that the accused was struck nine or times. He said “ek skat dit so 10 of 9”, clearly indicating an estimate. According to the accused this assault took place within seconds whereupon he fell to the ground. His witness referred to a period of ten to fifteen minutes. There is no indication that this person has any idea of time. The court could not have made a negative deduction in respect of this apparent contradiction under the circumstances. On the probabilities, and even if approximately ten blows were thrown, it would not have taken ten to fifteen minutes, meaning that there was more than a minute in between blows. A fight in such slow motion is just not probable. However, that does not mean that the witness lied, but his version should probably be ascribed to his possible unsophistication. He was not questioned by the magistrate to establish whether he has any idea on the duration of ten to fifteen minutes. It is often found that even sophisticated people have difficulty in the estimation of time and distance.

14]In so far as accused was not corroborated by his witness in respect of whether the accused conversed with Joseph outside the tavern, it should be in borne in mind that the

witness was socializing with friends and listening to the music. His attention was probably not on the accused all the time. The fact of the matter is that he witnessed the altercation and assault on the accused. Accused's version is not only corroborated substantially by him, but his version is also in line with complainant's version that he hit accused with clenched fists.

15]The accused's witness clearly mentioned that he did not look at the accused when he fell down although he was in the vicinity of the person that phoned for an ambulance. The magistrate erred in blaming him for not seeing that the accused was bleeding or that there was blood on the tar road. If he really wanted to assist accused in his defence he could just as well testified about extensive bleeding.

16]The accused explained that he, save for the facial injuries which he described fully, sustained injuries to his ribs. His witness testified after the accused fell down, he was kicked several times (three or four times) by the complainant in the ribs. The medical examination as recorded in the J88 would have reflected the extent of the injuries sustained. The

magistrate's comments that the acceptance of the J88 would not take the matter any further are unfortunate. Complainant did not admit that accused was injured as alleged by him and in fact testified that he was unaware of the injuries. The facial injuries might have been found to be sustained through an attack with clenched fists, but these were never admitted. Injuries to the ribs could have been ascribed to kicks. If such injuries were reflected in the J88 of accused, complainant's version would have been shown to be clearly false. Accused was of the view that the J88 would support his version. It so often happens that J88's are admitted as exhibits on behalf of the state by consent of the accused's representatives. In stead of making it so difficult for the accused, the magistrate should have come to accused's assistance and requested from the prosecutor whether he would agree to the J88 being handed in and if not, the reasons for such refusal. As a last resort, and in the event of the prosecutor objecting, the magistrate should have called the doctor to testify, even if the matter had to be postponed. Such action would have gone a long way to ensure that justice was served. The magistrate's failure is so serious that, even ignoring the other factors mentioned herein, the conviction cannot stand.

17]On complainant's version he and accused were fighting each other with their bare hands and he was using clenched fists. He made no mention that he was hit with fists. He could not give any explanation as to where the bottle came from with which accused him. The magistrate ascribed this either to the fact that complainant had already consumed half a bottle of whiskey when the incident occurred, or that it could not be expected of him to observe each and every movement of the accused during the struggle. The magistrate should have found that pertaining to all the events, the complainant was to such an extent under the influence of alcohol that the reliability of his total version was seriously undermined. Objectively speaking, one would have expected the two people fighting each other to be very alive for each and every movement of the other in order to stay of any offensive and to attack when required. The complainant's failure to give an explanation in respect of the bottle is, together with all other aspects referred to herein, an indication of his improbable, if not false, version.

CONCLUSION:

18]The complainant, being a single witness, gave a version which cannot be described as clear and satisfactory in every material respect and his version was in fact not corroborated at all. Accused's version on the other hand is much more probable. The magistrate should have found that there was a reasonable possibility that the accused's version was substantially true. Consequently, he should have been acquitted.

19]Wherefore the conviction and sentence are set aside.

J. P. DAFFUE, J

I concur:

C. VAN ZYL, J

