

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 337/2012

THE STATE

versus

SEABATA PHAKOE

CORAM: RAMPAL, J *et* JORDAAN, J

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 6 DECEMBER 2012

[1] This is an automatic review in terms of section 302 of the Criminal Procedure Act, 51 of 1977. The accused, conducting his own defence, was convicted and sentenced in the Welkom district court on a charge of assault with the intent to do grievous bodily harm under case number A3283/2012.

[2] The accused person's rights to legal representation were duly explained to him at his first appearance and he elected to conduct his own defence. On the 5th of September 2012 the accused confirmed that he still wanted to conduct his

own defence. He subsequently pleaded guilty to the said charge.

[3] The annexure to the charge sheet reads as follows:

“IN THAT upon or about 25/08/2012 and at or near Bambanani, in the magisterial district of Welkom, the accused did unlawfully and intentionally assault Kgomongwe Motseko Mabokoane by hitting her with a steel (sic) with the intent of causing him (sic) grievous bodily harm.”

[4] After the charge was put to the accused by the public prosecutor, the accused confirmed that he understood the charge as read out by the prosecutor. Once again he confirmed his earlier decision to conduct his own defence. The court then proceeded to apply section 112.

[5] The purpose of section 112(1)(b), which is particularly relevant in this instance, was recently re-stated by this court in **S v KHOLOANE** 2012 (1) SACR 8 (FB) at para [5]:

“The purpose of the subsection is to ensure that the accused really admits all the elements of the crime to which he pleads guilty. The questioning strives to protect the innocent from

erroneous convictions based on their own ignorance of the law or improper influence. By compelling the courts to embark on this procedure the underlying idea was that the court should make doubly sure that a person who pleads guilty has indeed no possible defence to the crime he admits committing. In *S v Baron* 1978 (2) SA 510 (C) at 512G the court held that ss (1)(b) was designed to protect an accused and especially an uneducated and undefended accused from the adverse consequences of an ill-informed plea of guilty.”

[6] As stated above, this matter came before me as an automatic review. After reading the record, the matter was returned to the relevant magistrate, inquiring from her, whether the accused did indeed admit all the elements of the charge against him. If the answer was affirmative, the magistrate also needed to indicate which specific parts of the record was relied upon for the finding that the accused admitted the unlawfulness of his actions. If the answer was negative, then the magistrate had to indicate why section 113 was not applied.

[7] The magistrate returned the query and responded by stating that she was indeed satisfied that the accused did admit all the elements of the offence, including unlawfulness. She

then referred me to the following passage of the transcribed record, which I have now highlighted:

COURT: Mr Phako did you have the intention to assault her?

ACCUSED: **I did not have the intention but it ended up happening like that.**

COURT: What do you mean when you say you did not have the intention?

ACCUSED: I was trying to talk (sic) for my money Your Worship, but at the end of the day **Your Worship it is not by law to do so** (sic).

COURT: Did anybody force you to hit this lady?

ACCUSED: **It was just my heart**, Your Worship."

Vide lines 11 – 20 on page 3 of the transcribed record.

[8] The magistrate further responded as follows:

"I refer the Honourable Judge to Professor CR Snyman in CRIMINAL LAW, page 95, and paragraph 2: "Unlawfulness means contrary to the community's perception of justice or equity or the legal convictions of the community"

I also relied on paragraph 3 of Snyman which refers to the Bill of Rights as being a point of reference in which the values of

human dignity and equality is a deciding factor for determining unlawfulness. I therefore concluded that the accused's conduct was further premeditated by the fact that the complainant is a prostitute and due to her status he in-dignifies her, **yet negates the seriousness of his conduct and misdirects himself by mistaking this for lack of intention and ignorance of the law.**

I am of the humble opinion that the very psychological element of culpability is satisfied in that the accused directed his will towards taking his anger out on the complainant"

Vide p 2 magistrate's response.

I will return to the aspect of unlawfulness later.

- [9] The magistrate convicted the accused of assault with the intent to do grievous bodily harm and sentenced him as follows:

"R3000 (three thousand rands) or 6 (six) months imprisonment of which R1500 (one thousand five hundred rands) or 3 (three) months imprisonment is suspended for 3 (three) years on condition that the accused is not convicted of Assault GBH within the period of suspension.

In terms of section 103(2) Act 60/2000 the court declares the accused still a fit and proper person to possess a firearm."

[10] The accused told the court that on the day of the incident he went to a lady who was selling her body (prostitute) and they agreed to have sexual intercourse. After making the agreement, they went to the accused person's house where he asked her to undress. She obliged and they indeed had sexual intercourse. When they were done the accused gave the complainant R20,00 as that was all that he had, but she did not want to accept it. She most probably did not want to accept the money as it was not the amount which they had agreed upon earlier. They had an argument and the accused got angry. He took an iron and hit the complainant. That then was the evidence on which the magistrate convicted the accused.

[11] Based on the facts given in the foregoing paragraph, can it be said that there was sufficient evidence to convict the accused of assault with intent to do grievous bodily harm?

[12] To convict the accused of assault with intent to do grievous bodily harm, there are two questions the court must ask itself: firstly whether the accused did indeed assault the victim and secondly, and most importantly for this specific charge, did the accused have the intent to cause grievous

bodily harm to the victim. If the court is not satisfied that the specific intent was present, the court may however still convict the accused of common assault as a competent verdict to the charge.

- [13] To determine whether the necessary intent was present, the court needs to take certain factors into consideration. These factors were discussed in a recent, unreported judgment of this division by Snellenburg, AJ in **S v MAMOHLALA MOFOKENG**, (and the cases referred thereto) Review case nr 19/2012, delivered on 18 June 2012, Lekale, J concurring. At paragraph 26 the court says the following:

“...The distinction between the crime of assault and assault with the intention to do grievous bodily harm was aptly re-stated in **S v ZWEZWE** 2006 (2) SACR 599 (N) at 603B-D. For the crime of assault with the intention to cause grievous bodily harm, the offender must have the necessary intention to cause the complainant grievous bodily harm. The enquiry into the existence of such intent requires consideration of the following factors:

- (a) the nature of the weapon used and in what manner it was used;

- (b) the degree of force used and how such force was used;
- (c) the part of the body aimed at; and
- (d) the nature of injury, if any, which was sustained.

The list is not a *numerus clausus*. **S v MAPASA** 1972 (1) SA 524 (E); **S v DIPHOLO** 1983 (4) SA 757(T) at 760E-G.”

[14] In the present case, the victim did not testify at any stage of the proceedings. No medical report (J88) was handed in as an exhibit by the state. Prior to the conviction of the accused, the court itself also did not enquire about the injuries the victim would have suffered. All that can be determined from the record, prior to the conviction, is that the accused used an iron to assault the victim. It is not clear where he hit the victim, what injuries she sustained, whether she needed to get medical treatment, and if so, what treatment she received. The mere fact that the accused used an iron, to hit the victim, does not necessarily mean that he also had the intent required to do her grievous bodily harm. The court only made these inquiries after conviction and prior to sentencing. By then it was too late to redeem an erroneous conviction.

[15] I am not satisfied that there was sufficient evidence before the court that the accused did indeed have the necessary intent required to be convicted as charged. He pertinently denied that specific element of the charge during the judicial questioning in terms of section 112.

[16] Returning to the aspect of unlawfulness, the magistrate in her response, referred me to two passages of the record (as quoted in paragraph 7 *supra*) to support her finding that the accused did admit the unlawfulness of his actions. However, it is clear from the record that the court was in fact not satisfied about this aspect:

COURT: Did you know that your actions were wrongful and unlawful and punishable in law?

ACCUSED: **I was not aware, Your Worship.**

COURT: You were not aware; what do you mean, can you just go around hitting somebody, do you think it is right and the law wont do anything to you?

ACCUSED: **Your Worship, I believed the law will take its course.**

COURT: So the Court is once again going to ask you; did you know that your actions were wrongful and unlawful and punishable in law?

ACCUSED: **I didn't know, Your Worship.**

COURT: Mr Molekoa?

PROSECUTOR: [No audible answer]

COURT: You then just told the Court that people go around doing this kind of thing the law will take its course, so how can you contradict yourself, or it just doesn't apply to you, it applies to everybody else, but not to you?

ACCUSED: Your Worship the main reason I thought it was just a small thing, I never knew that the complainant was going to take this further to court.

COURT: No, the Court didn't ask you whether you knew that the complainant was going to lay a charge against you. The Court asked you whether you knew that your conduct being to assault somebody is unlawful and punishable in law and wrongful?

ACCUSED: **No, Your Worship the conduct would not be right, Your Worship."**

Vide line 21 on page 3 to line 24 on page 4 of the transcribed record.

[17] The court was clearly not satisfied with the answers that the accused provided to the court's questions. Nothing is more indicative of this, than when the court addressed the

prosecutor, but got no audible response. The court should then and there have applied section 113. The court could not have been satisfied that the accused did indeed admit the unlawfulness of his actions. The further questioning by the court on this aspect clearly exceeded the purpose of questioning by the court in terms of section 112. It also defies the purpose of section 112 as set out in **KHOLOANE** – *supra*.

[19] The aforesaid exchange between the magistrate and the accused indicates two important points. The one point was that initially the accused was unwilling to admit the element of unlawfulness. The other point was that the magistrate did not find joy in the accused's unwillingness. I have highlighted certain portions of the exchange. On two occasions the accused answered that he did not know that his actions were wrongful and unlawful. He did not have to repeat that answer.

[20] The moment he said that on the very first occasion, the magistrate was obliged, by law, to put an end to the judicial questioning in terms of section 112, to note a plea of not guilty in terms of section 113 and to call upon the public

prosecutor to lead evidence. Instead of following that fair procedure, the magistrate persistently carried on quizzing the accused. She asked five more questions. All those questions were calculated to elicit an admission of an element the accused did not want to admit. By appealing to the magistrate to let the law take its own course, he was probably asking that evidence be led to prove, at least, the element of unlawfulness.

[21] Instead of stopping the questioning process, the magistrate regrettably continued:

“So the Court is once again going to ask you; did you know that your actions were wrongful and unlawful and punishable in law?”

Yet again the accused’s answer was:

“I didn’t know, Your Worship.”

Again the magistrate did not leave it at that.

[22] In a somewhat confrontational kind of manner, she unduly prolonged the questioning procedure far beyond its

purposive bounds until the accused gave in and admitted the element of unlawfulness. The accused was lamentably pressured. It cannot be fairly said that he freely and without undue influence admitted all the elements of the crime. Such a plainly injudicious and excessive questioning cannot sustain a proper conviction. The underlying plea was vitiated by material irregularity.

[23] From the record, the court also never inquired from the state whether it accepted the plea as tendered by the accused.

[24] In the circumstances I am inclined to find that the accused did not freely admit all the elements of the charge preferred against him. Therefore the conviction cannot stand. It is then also not necessary to deal with the sentence imposed by the court.

[25] Accordingly I make the following order:

25.1 The conviction and sentence of the accused under Welkom case nr A3283/2012 are set aside and any payments made towards the fine of the accused must be refunded.

25.2 The matter is referred back the district court of Welkom for the retrial of the accused *de novo* before another magistrate.

M.H. RAMPAL, J

I concur and it is ordered.

A.F. JORDAAN, J

/am