

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 336/2012

THE STATE

versus

THEKISO VINCENT BOROTHO

CORAM: RAMPAL, J *et* VAN ZYL, J

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 20 DECEMBER 2012

- [1] The accused, Mr Thekiso Wessels Borotho, a 39 year old male from Snake Park in the Kroonstad district, was convicted and sentenced by the Kroonstad district court on a charge of assault with intent to do grievous bodily harm under case number A1152/12. The accused was sentenced to a fine of R1000 or 4 months imprisonment wholly suspended for 5 years on condition that the accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension. The accused was not declared unfit to possess a fire-arm.

- [2] The accused elected to conduct his own defence and the matter was subsequently sent to this court as an automatic review in terms of section 302 of the Criminal Procedure Act, 51 of 1977. After reading the record, the matter was returned to the magistrate with the following query:

“1. Was there sufficient evidence tendered to convict the accused as charged or not?
2. If not, what was a competent verdict? If there was, what was such evidence?”

- [3] The magistrate responded and gave the following reasons in support of her finding that the accused is indeed guilty as charged: firstly that she thoroughly considered both the evidence led by the state as well as the accused; secondly, that the accused did not deny assaulting the complainant although he alleged that he was acting in self-defence because the complainant insulted him, the defence cannot stand as it does not satisfy the requirements for self-defence, and lastly that the J88 report, submitted by the state, confirmed the injuries sustained by the complainant.

[4] It is now the duty of this court to determine whether the conviction and sentence of the accused were indeed in accordance with the law.

[5] 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 21st May 2012 the accused re-confirmed his earlier decision to conduct his own defence.

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

"IN THAT upon or about 22/03/2012 and at or near Fedility guard (sic) offices, in the district of Kroonstad, the accused did unlawfully and intentionally assault Johannes Phonoshe by hitting the complainant with fists with the intent of causing him grievous bodily harm."

[7] 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 and that he would conduct his own defence.

- [8] The accused pleaded not guilty to the charge and the magistrate explained to him that he may disclose the basis of his defence and that he could also remain silent. The accused indicated that he would like to explain his defence. However the accused never gave a plea explanation and the state proceeded to call its first and only witness.
- [9] The complainant testified that the he knew the accused as they were working for the same security company. On the day in question the complainant and some of his colleagues went to fetch the accused from where he was posted. He further testified that when they got to the accused, the accused just simply charged at him and started hitting him with fists. However he stated that he did not even know from which direction the blows were coming. He felt some fists hitting him in the face. Their colleagues intervened and separated them.
- [10] The complainant went on to testify that he suffered serious injuries and that he went to see a doctor. The state handed in the J88 report without any objection by the accused. The J88 indicated that the complainant had swelling on his right

cheekbone area (“zygomatiese area”) and that it was sensitive to pressure (“drukteerheid”).

[11] The complainant denied that he was fighting with the accused. He thought or suspected that the accused assaulted him because the accused claimed that he, the complainant, had insulted him. The accused also reminded the complainant of an incident that took place more than a year earlier. The accused was almost dismissed from his employment. He believed that the complainant was behind that incident.

[12] It is apposite to remember that the accused was conducting his own defence. During cross-examination the accused put it to the complainant that he insulted the accused over the phone. When they met the accused confronted the complainant about the insults. The complainant denied that the accused verbally confronted him first. He answered that the accused stealthily attacked and punched him. He did not even know where the blows came from. The accused again made reference to the incident that took place about a year and a half earlier. The accused suggested that the complainant had deliberately issued him with a rifle which

was not fully loaded, on that occasion. On account of the missing bullets the accused nearly lost his employment. The complainant said that he was not on duty on that day and that he thought the matter was long settled. That was then the cross-examination by the accused and the state closed its case.

[13] The court proceeded to explain to the accused his rights with regards to: calling witnesses; giving unsworn evidence from the dock; giving evidence under oath; and remaining silent. The court also warned him of the consequences of not giving evidence. The accused elected to testify under oath.

[14] The accused testified that he was busy talking to one of his colleagues, a certain Mr Nkokoane, when the complainant came and started to insult him. He further testified that the complainant grabbed him, hit him on the chest with the forehead and that such actions caused him to hit back at the complainant. This version was not put to the complainant and the complainant therefore could not have responded to it. The accused testified during cross-examination by the

state that he was not sure as to precisely where the blows he threw actually hit the complainant, because there were people standing between them. This was in short the evidence given by the accused. The defence then closed its case.

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

[16] 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 number 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.”

[17] If the aforesaid two paragraphs are applied to the present case, can it be said that the accused assaulted the complainant and also that he had the required intent? The state did indeed submit a J88 report which indicated that the complainant, on the day in question, sustained an injury (swelling) to his head (face). From the record it is not clear

how severe the swelling was, what treatment, if any, the complainant would have received or how long the swelling lasted. When asked by the prosecutor where he hit the complainant, the accused responded to say that there were people in front of him and that, on account of his obstruction, he was not sure whether or not he hit the complainant in the face. He wildly threw punches in the direction of the victim. The version of the victim tended to give credence to the version of the accused. No dangerous weapon was used and no serious injury was sustained. This, to me, is indicative of the lack of intention to cause grievous bodily harm. I therefore cannot conclude that the accused did indeed have the necessary criminal intention to commit the crime with which he was charged.

- [18] Right from the onset of this matter, the accused said that he was acting in self-defence. As mentioned before, it is important to remember that the accused conducted his own defence. There is a duty on the court to be cautious when accused persons are representing themselves and also to assist them in putting their defence across to the state witnesses. In *casu* the court was unhelpful. Even though only in the defence case, the accused stuck to his story that

the complainant verbally abused him, that the victim initiated the aggression and that he had to repel such unlawful and aggressive acts in order to defend himself.

[19] The onus of proof always rests on the state to proof beyond reasonable doubt that the accused is indeed guilty as charged. The court may well convict the accused on the evidence of a single witness, but then it also has to apply the cautionary rule by looking for other objective evidence to support the unsatisfactory evidence of a single witness. In my view, this objective evidence could possibly have been provided by Mr Nkokoane, seemingly a state witness. He, however, was not at court on the day of the trial and the state did not request a further postponement to get the witness to court. The accused also wanted to call this witness. The court, through the assistance of the state, could have assisted the accused in ensuring the presence of the witness at court, but it did not.

[20] If the version of the accused is reasonably possible in the circumstances, he is entitled to be acquitted of the charges against him. I am of the opinion that the accused did indeed take the court into his confidence by not denying that he did

indeed assault the complainant. However he asserted that he defensively did so. On the facts, it cannot be found, beyond reasonable doubt, that his actions were not justified. In my view, the version of the accused was also more probable than that of the victim. I am, therefore, of the view that the trial court materially erred in convicting the accused.

[21] Accordingly I have come to the conclusions that the accused did not have the necessary intent to cause grievous bodily harm to the complainant and that the version of the accused was reasonably possibly true. In the circumstances of this case, it has to follow that the state failed to prove its case beyond reasonable doubt. Therefore, the conviction cannot stand. It is also therefore not necessary to deal with the sentence. The proceedings in the court below were not in accordance with justice, in my respectful view.

[22] Accordingly I make the following order:

22.1 The conviction and sentence of the accused under Kroonstad case nr A1152/12 are set aside.

M.H. RAMPAL, J

I concur.

C. VAN ZYL, J

/am