

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Case No. :A29/2009

In matter between:

BAREND JACOBUS MEIRING

Appellant

and

THE STATE

Respondent

CORAM : C.J. MUSI, et VAN ZYL,JJ et MATLAPENG,AJ

HEARD ON: 25 OCTOBER 2010

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 10 NOVEMBER 2011____

[1] I have read the judgments of my sister Van Zyl J and my brother Matlapeng AJ in this matter. My analysis of the evidence unfortunately yields a result which is at variance with my sister's conclusion. I am constrained to withhold my assent to her judgment.

- [2] The facts are extensively set out in the two judgments mentioned above. I therefore do not deem it necessary to repeat it herein. The proceedings, in the court *a quo*, were recorded in longhand by the magistrate. It is not a reconstruction as Van Zyl J states in her judgment. There will be no recording of the *ex tempore* judgment because it was not recorded mechanically. We have the magistrate's reasons for her judgment. We have a full transcript of the record. The appellant did not complain or allege that he was prejudiced by the manner in which the record was kept.
- [3] I agree with my colleagues' exposition of the legal principles and approach as to the onus and the evaluation of evidence in a criminal case.
- [4] In considering the nature, number and impact of contradictions it must always be remembered that witnesses do not always make a blow by blow mental recording of an incident. In many instances witnesses do not even realise that they would be called upon to testify and be subjected to cross-examination about an incident. It is important when assessing the impact of a contradiction to weigh it up against

the other evidence tendered in the particular case. Contradictions should not be evaluated without placing them in their proper context.

- [5] An all or nothing approach, i.e. two or more state or defence witnesses contradicted each other therefore the state's case or the defence's case should be rejected or they corroborate each other therefore their evidence must be accepted, should not be adopted. One witness should not be crucified for the sins of another. It goes without saying that two witnesses may see the same incident differently for different reasons, for example, their power of observation, retention concentration and narration.
- [6] When two or more witnesses contradict each other it might be that the one witness did not pay proper attention to the incident or because he/she cannot remember exactly what happened whereas the other witness observed and recalls everything. Proper attention must be given to the reasons or probable reasons for the contradictions. An all or nothing approach like a compartmentalized approach is flawed, unhelpful and inimical to the holistic approach that ought to

be followed.

[7] A court of appeal does not lightly interfere with the credibility findings of the trial court. I however, agree with Van Zyl J and Matlapeng AJ, for the reasons stated by them, that the magistrate did not properly motivate her credibility findings in favour or against the witnesses. We are therefore at large to make our own assessment of the evidence. See **S v Nkosi** 1993 (1) SACR 709 (A) at 711 E. **S v Francis** 1991 (1) SACR 193 (A) at 204 c-e.

[8] Van Zyl J is of the view that the two state witnesses contradicted each other on material aspects. She points to three material contradictions. I deal with them seriatim.

[9] Firstly she points out that the complainant testified that the spotlight was shone in his face when the appellant's car stopped next to the police vehicle whereas Ms Nyanzela testified that the spotlight was shone on the car after the swearing.

[10] The question to be answered is whether it is a material

contradiction and if it is whether it affects the complainant's credibility. In my view it is not material. The appellant testified that:

"My son put the spotlight on the face (sic) of the occupants of the said vehicle and ordered (sic) him not to do so but put it towards the ground which he did."

[11] The appellant corroborates the evidence of the complainant that his son shone the spotlight in the complainant's face. It is clear that Nyanzela's evidence is wrong in this regard.

[12] Secondly she points out that according to the complainant the appellant swore at him and took the car's keys while the former was still seated in the vehicle. According to Nyanzela the complainant first alighted from the vehicle, the appellant then took the keys and only thereafter did the swearing start. Van Zyl J correctly concludes that there are contradictions as to exactly which profanities were allegedly uttered.

[13] The contradictions might be material but they are not an indication of the mendacity of the witnesses. Again it is clear from the appellant's and the complainant's versions that the

appellant spoke to him while he was still seated in the car.

The appellant's version in relation to this incident is as follows:

"This man told me he is going to drive away and I removed the key from the ignition."

[14] The complainant's version is as follows:

"Accused then pulled out the car keys then I alighted from the vehicle. He then tried to use the radio in the police vehicle."

[15] It is clear that Nyanzela is genuinely mistaken when she testified that the appellant uttered the words after the complainant had alighted from the vehicle, for the simple reason that the appellant and the complainant corroborate each other that the complainant was seated in the car until after the keys were removed from the ignition.

[16] Thirdly she points to the fact that words other than swear words were uttered which Nyanzela understood whereas she testified that she does not understand Afrikaans. Nyanzela was adamant she heard the words being uttered by the appellant. She corroborates the complainant's version. Even

if it is found that she could not or did not hear any of the words uttered by the appellant, it still does not detract from the complainant's evidence. The fact that Nyanzela lied or did not remember well what happened does not mean that the complainant is a liar or that his evidence should be rejected. The merits, demerits and probabilities of his evidence should be examined in the light of the totality of the evidence. If that is done it becomes clear that his evidence is credible and reliable.

[17] I have already pointed out that the contradictions between the complainant's and Nyanzela's versions are because of Nyanzela's lack of attention to detail. The complainant's version in as far as it is contradicted by her is confirmed by the appellant. I am therefore not surprised that Van Zyl J does not point to a single inherent improbability in the complainant's version. She also does not point to a single contradiction in his evidence. She finds flaws in his evidence by comparing it with that of his colleagues, Inspectors Lindeboom and Muller.

[18] Inspectors Lindeboom and Muller, as the magistrate correctly

found, contradicted each other. They were biased against the complainant. Their evidence was palpably geared towards favouring the appellant against the complainant. I do not want to speculate on the reasons for their bias but the record speaks for itself. Their improbable, contradictory and fabricated evidence is the proverbial elephant in the room. I highlight a few issues to substantiate my view.

[19] Lindeboom received a cell phone call from a colleague in distress because the appellant took the police vehicle's keys. When the appellant arrived at the police station he was angry according to Lindeboom. He spoke to the appellant and the appellant gave him his version and apologised for his behaviour. When the complainant arrived at the police station he (Lindeboom) did not ask him for his version of the events. Why not?

[20] According to Lindeboom he asked the complainant whether he wanted to lay a charge and the complainant said no. Both Muller and Lindeboom initially testified that the complainant said no, without qualification, when he was asked if he wants to lay a charge. This version was never put to the

complainant and secondly both witnesses later testified that he said no he wants to speak to the Station Commander first. Both of them mention the qualification as an afterthought. Why?

[21] Lindeboom testified that:

“Mr Meiring opened the door to step out of police station (sic) then sergeant Mahlelehlele entered, the farmer turned and said to me here is the man. Sergeant Mahlelehlele raised his hand and pointed a finger at Meiring saying I will beat you or shoot you. I then asked sergeant to keep quite.” (My underlining)

[22] Muller testified as follows:

“But on the night of the incident after sergeant Mahlelehlele stepped in (sic) the police station and said to Mr Meiring that he will shoot him and Inspector Lindeboom enquired if he wanted to lay charges he said no but later learnt about the same.” (My underlining)

[23] The appellant testified as follows about the happenings at the police station:

“I stepped outside the police station and saw the police officer with which I had (sic) earlier conquered (sic) on the road, he was

alone and asked (sic) him where his companion was. He said I must not intimidate him. I went back to Lindeboom and the complainant pointed a finger at my nose and told me to stop in the presence of Lindeboom, Muller and other police officer (sic). I took off his hand for the first time but again (sic) pointed a finger under my nose and Lindeboom had to come out to take him away. When I left I heard him say if I don't stop he is going to shoot me saying that to Lindeboom and Muller." (My underlining)

[24] Not only do the two police officers contradict each other but they also materially contradict the appellant. It is clear that the police officers are economical with the truth. If the complainant uttered these words to the appellant directly surely the appellant would have heard it. The appellant's evidence is clear, he heard the complainant saying to Lindeboom that if he (appellant) does not stop he will shoot him. He heard nothing about being beaten up or words to that effect.

[25] Significantly, during cross-examination it was put to the complainant that:

"Both Inspector Lindeboom and Muller will confirm that you said

to accused “ek gaan jou bliksem, ek sal jou doodskiet.”

The complainant’s response to this statement was as follows:

‘They will be lying, what happened is that in accused (sic) absence I said if accused should continue like that he will be short (sic) dead or be bliksemed (sic).’

[26] The probabilities favour the complainant’s version. He said this in the appellant’s absence and the appellant, Muller and Lindeboom, for whatever reason or motive, concocted their versions relating to what the complaint said. That is why their versions are so incoherent and contradictory. The complainant’s unexplained and strange migration from a meek lamb, at the farm road, to a roaring lion, at the police station, is improbable.

[27] Both the complainant and the appellant testified that they met outside the police station. Both Muller and Lindeboom testified that the complainant stepped into the police station while the appellant was still in the police station. According to Lindeboom “Meiring opened the door to step out of the police station then Sergeant Mahlelehlele entered.” According to Muller

“Sergeant Mahlelehlele stepped in (sic) the police station and said to Meiring...” Why did they both not notice that the appellant stepped out of the police station where he met the complainant and spoke to the complainant before returning into the police station?

[28] During cross-examination of Lindeboom the following is recorded:

“Question: What you say is new and even different from what was said by accused?

Answer: That is what is contained in my statement and stand (sic) by it.

Question: Mr Meiring said complainant pointed a finger at him first time and the second time again and you had to stop him and as he was walking away heard (sic) complainant saying to you and Muller that he will shoot him.

Answer: That is how it occurred

Question: Do you agree that what you say and what accused said is not the same?

Answer: Correct.”

[29] It is clear that Lindeboom contradicted himself. This incident could not have happened as he initially testified and as the

appellant testified.

[30] When Lindeboom was asked why he did not ask the appellant whether the latter wanted to lay a charge his response was “because he asked for the phone numbers of the station commander and he talked to him on the phone.” When he was asked when that happened his response was that he is not sure. This is strange and a fabrication. There is no evidence from the appellant or any other witness that the appellant asked for and was given the Station Commander’s phone number and that he called the Station Commander.

[31] Muller testified that he sent the complainant to investigate a domestic violence complaint involving a man and a lady at a farm. Although this evidence seems innocuous, it is also meant to cast aspersions at the complainant’s version. The complainant’s uncontroverted evidence was that he went to attend a theft of goods complaint. Nyanzela corroborates his version. She testified that her sister called the police because her sister wanted her to “give her the clothes back”. Muller’s evidence, viewed in conjunction with the appellant’s evidence, is clearly calculated to leave an innuendo of a

possible sexual encounter between the complainant and Nyanzela lurking. Put differently, Muller wanted the magistrate to reason as follows: if he was sent to attend to a domestic violence complaint involving a man and a woman, what was he doing with a woman involved in a domestic dispute between two sisters in the car. It is clear that Muller deliberately mentioned that the domestic violence complaint involved a man and a woman to put the complainant in a bad light. This version was never put to the complainant. Neither was it put to Nyanzela that her sister did not call the police but that the complainant was sent to attend to a domestic violence matter involving a man and a woman.

- [32] Lindeboom and Muller's evidence is improbable because the appellant gave them his version which must have included: that the complainant transported a civilian; that the civilian was wearing his official jacket; that he had a spotlight that he shone on the farm and had a dead rabbit and two dead bucks in the official vehicle. Armed with all this information which *prima facie* implicates the complainant none of them confronted him or asked him to explain why he disregarded police policy or standing orders. Lindeboom reported the

incident to the Station Commander and made entries in the relevant record books without being favoured with the complainant's version. Why does he do that?

[33] Muller's unqualified assertion that "it is not allowed for an officer on duty to transport a person in a police motor vehicle" is also not correct. There are many instances where police are allowed to transport civilians. Seeing that he spoke about domestic violence an example relating thereto would be apposite. In terms of article 8(2)(c) of the National Instruction 7 of 1999 issued by the National Commissioner of Police:

"A member may, only as a last resort, transport a complainant in a police vehicle to find a suitable shelter if such a vehicle is available and there is no other means of transport. In such an event the complainant must be informed that he or she is being transported at his or her own risk."

[34] Article 10(1)(c) of Special Force Order (General) 03A/1987/010 also stipulates under what circumstances civilians may be transported in an official police vehicle. He ought to know that. A proper answer would have been that under certain circumstances it is allowed. If he wanted to

exclude the circumstance under which the complainant transported Nyanzela he should have done so and not insinuate that the complainant acted outside the boundaries of rigid police policy.

[35] I am convinced that Muller and Lindeboom's evidence separately and collectively is neither credible nor reliable. Their evidence should be rejected in as far as it differs from the complainant's version.

[36] The appellant's version is not only improbable but demonstrably false and calculated to mislead.

[37] According to the appellant he asked the complainant for his appointment certificate and the latter refused and said the former must go and ask the commissioner where his certificate is. When he told him it does not work like that the complainant started making calls from his two cellphones. On his version nothing untoward happened before the complainant took out his cell phone to call his colleagues. This is highly improbable because at that stage the complainant had no reason to call his colleagues.

[38] His reason for removing the keys from the ignition is also a fabrication. He was in total control at that scene. I agree with Matlapeng AJ's assessment in paragraph 30 of his judgment that the appellant had scant regard for the complainant.

[39] The appellant made all sorts of innuendos from trivial ones to serious ones in order to cast a dark shadow over the complainant's evidence and character.

[40] The evidence that the complainant had a spotlight was tendered to show that he (complainant) shone the spotlight in order to look for sheep that he could steal. The evidence that Nyanzela was wearing a police jacket was tendered to show that she was more than a complainant or suspect. The evidence that the blue lights of the police vehicle was not working was meant to insinuate that the complainant could not have put on the blue lights when the appellant was approaching. The evidence that the radio was not working was led in order to show that the appellant could not have tried to use the radio. In fact during cross-examination of the complainant it was put to him that the radio not working

because the police station was being renovated. When the accused realised that that will not work because the unchallenged evidence of the complainant is that Muller contacted the complainant via the radio, he changed tack and testified that the radio did not work because of poor reception.

[41] I find it strange, no unacceptable, that he would not swear in front of his son but would belittle a police officer in the manner that he did in front of his son. You do not grab a police vehicle's keys from the ignition; open the canopy and throw out a rabbit or whatever is in there without the policeman's consent. His conduct on the day cannot be described as exemplary.

[42] Even at the police station he taunted the complainant by asking him about his companion to the extent that the complainant had to admonish him not to intimidate him.

[43] Van Zyl J (in paragraph 43 of her judgment) says that she finds "it improbable that the appellant would have gone to the police station if he in fact acted in the manner the appellant (sic) testified. One

would expect that he would rather have avoided the police station if he made himself guilty of the conduct as alleged by the complainant.”

[44] I do not agree with this reasoning. The appellant testified that he went to the police station to complain. The record then reads as follows:

“Question: What about as now you were satisfied about his identity?

Answer: So that I must have a suspect in case my sheep were missing.”

[45] The appellant admits that he was told by Lindeboom that he is committing the crime of obstructing a police officer in the exercise of his duties. He went to the police station knowing that he conducted himself in a manner that constituted a crime. It is no longer in the realm of probability. It is a fact! His evidence is clear:

“He told me to give the man the keys as I am now obstructing him in performing his duties.”

[46] The appellant did not hesitate to tell a blatant lie. When he was asked what his complaint at the police station was he said “it was about this officer with another person in a police vehicle claiming to be attending his complaint to fetch clothes that were

already collected and having a rabbit and two bucks in the police vehicle.”

[47] There is no evidence about two bucks being found in the vehicle. One can only wonder where he got the information about the complainant fetching clothing from because the complainant did not tell him that. Whilst on this topic; where did he get the information that the police vehicle’s blue lights were not working? Where did he get the information that the complainant drove 20 km with Nyanzela contrary to police orders? Where did he get the information that the police radio was not working? His version that he saw in the occurrence book that complainant drove 20 km in a different direction is clearly a lie. There is no evidence that he perused the occurrence book on that evening or at any other time.

[48] I agree with Matlapeng AJ that the appellant’s evidence must be rejected in as far as it contradicts the complainant’s evidence. I also agree that the appellant’s failure to call his son as a witness, under these circumstances, without a reason, justifies an adverse inference. I do not agree with

Matlapeng AJ that the appellant is stereotyping the complainant because he is a black person. There is no evidence to suggest that he acted in the manner that he did because the complainant is black. There is a suspicion but no evidence to substantiate it. The word “kaffir” was uttered to hurt and impair the complainant’s dignity as a black person. One can only speculate what he would have said and/or done if the driver of the vehicle was a white person.

[49] I apologise, on behalf of the Court, to all concerned, especially the appellant, for the long delay in delivering these judgments. I only received the judgments of my colleagues on 31 October 2011.

[50] I agree with the conclusion of Matlapeng AJ, viz that the appeal should be dismissed. The conviction and sentence are confirmed.

C.J. MUSI, J

On behalf of the Appellant:
Instructed by:

Adv. C Snyman
Symington and De Kok

On behalf of the Respondent:

Adv. A Ferreira
Director of Public Prosecutions
Bloemfontein

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