

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 189/2008

In the case between:

THE STATE

and

SELLOANE AGNES KGOMOTSANA

CORAM: MOCUMIE, J *et* MOLEMELA, AJ

JUDGMENT: MOCUMIE, J

DELIVERED ON: 5 JUNE 2008

[1] The accused appeared in the Magistrate Court, Bloemfontein on a charge of housebreaking with intent to do grievous bodily harm and assault with intent to do grievous bodily harm. On 31 January 2008 she was convicted as charged and sentenced to 9 months imprisonment of which 5 months imprisonment was suspended for a period of four years on condition that the accused is not convicted of housebreaking with intent to assault and assault with intent to do grievous bodily harm or assault

common committed during the period of suspension. She was also declared unfit to possess a firearm.

[2] I was not satisfied that the proceedings were in accordance with justice and sent a query to the Magistrate requesting her reasons for the conviction and sentence. The Magistrate responded and I thank her.

[3] The evidence of the State is somewhat muddled due to the poor quality of the record and the different versions given by the complainant in her evidence-in-chief and that which emerged from the court's questions.

[4] In essence the complainant alleged that she was home on the night of 21 April 2008 when the accused budged into her home and allegedly stabbed her once with a broken piece of bottle on her knee. Initially she told the prosecutor that she sustained a cut on her knee and later on told the court that she sustained three open wounds on her right leg. No medical report was submitted as she did not seek medical attention from a doctor or the hospital.

[5] She initially denied knowing the accused prior to this incident but later admitted that both were involved in a love-relationship with one “Thobela”, that the accused had confronted her during the day and that Thobela was present or at least in the vicinity when the accused allegedly stabbed her.

[6] Her son testified that the accused stabbed the complainant with a broken piece of bottle on her leg at their home.

[7] The accused denied stabbing the complainant with a broken piece of bottle. She averred that the complainant was cut by a fence when she jumped over to Thobela’s home when Thobela was chasing her and threatening her with a stick. She averred further that it was the complainant that, hit her with a stone on her way back from buying ‘snoek’ fish whilst she was in Thobela’s company. Thobela corroborated her in material respects: That the complainant threw a stone(s) at the accused; that he chased after the complainant with a stick; that she probably cut herself when she jumped over the fence when she fled from him.

- [8] The Magistrate referred to the contradictions between the accused and her witness. *Inter alia* she referred to the following: The part on which the accused was struck with a stone(s), whether they were drunk and where the incident happened. She found the accused's version to be improbable.
- [9] It is trite that in criminal trials, the State must prove its case beyond reasonable doubt. The accused is only expected to give a reasonably possibly true explanation. The test is not whether the court believes the accused but whether in the light of all the probabilities and improbabilities on both sides the accused is guilty. The approach to be adopted is set out clearly in **S v Chabalala** 2003 (1) SACR 134 (SCA) at 135a – i and **S v V** 2000 (1) SACR 453 (SCA) at 455 B-C.
- [10] In the set of facts the State proved that the accused and the complainant met on the day in question. From there different versions emerged as alluded to in para 7 above.

[11] The State did not prove that the complainant sustained injuries congruent to being stabbed with a piece of broken bottle. The complainant said clearly it was a cut. The Magistrate then questioned the complainant to establish the injuries as it appeared at that stage that she sustained three open wounds which the Magistrate struggled to find from the many scars the complainant had. This is what the Magistrate elicited from the complainant *verbatim* on page 24 - 26 of the record.

“Can I see the injury? ---....

Which one? --- ... (reply not interpreted).

... (Question not interpreted). Which one, you have got too many ... (intervenes). --- ... (speaking simultaneously).

Scars there. I want to see the one that he (?) stabbed you. The one that was caused by the accused. There are so many scars there. --- (Through interpreter:) it is all of ... (indistinct).

Ma'am, which one did she ... (intervenes). --- ... (reply not interpreted).

Do you see a scar, ... (further question not interpreted). --- ... (intervenes). I saw those scars. ---... (indistinct).

Are they visible? ---... (no audible reply).

We(?) on record?

PROSECUTOR (?): Yes.

COURT: Are they visible, the scars? --- ((?) Not through interpreter:) ee.

How many? --- Three.

Were those scars cause by the accused? – ee.

Didn't you say that she stabbed you once? --- Ee once. (Through interpreter :) it is a bottleneck and it is round.

It ...(squeaking) is round? --- ... (intervenes).

Which part, which part of the bottleneck? ---... (reply not interpreted).

How did you know that it is a bottle if ... (witness intervenes) did not see(?) ... (indistinct)? --- (Through interpreter :) I saw it. It is brown. It is a bottle.

How big was it? ---- He(?) was grabbing it like this...

Which part is it, the bottle has got a neck? --- (Not through interpreter:) on the neck.

She was grabbing it on the neck? --- And it was broken.

Ma'am, the bottle is like this... --- Bottleneck.

So he(?) was holding the neck? --- Ee, ... (intervenes).

... (speaking simultaneously). You know what! You talk too much! You talk too much and you do not listen! I am talking, you're answering. I am saying, the bottle has got a neck like this one of mine, this is a neck, then this is the body; where exactly on the body was it broken? --- (Through interpreter:) ... (indistinct) throughout(?) the ... (indistinct). It is broken here.

In the middle? --- Yes(?).

When she arrived with the bottle, was it already broken?

--- (Not through interpreter:) it was already broken.

You said that at Mangaung they said that those wounds cannot be stitched.

Why? --- (Through interpreter:) I do not know.

Are they doctors now, the police? --- I do not know.

Questions from the court's questions?"

Both the State and the accused had no questions to put to the witness after the court's questions. This was despite the fact that the Magistrate in her own questions raised new evidence pertaining to the injuries the complainant allegedly sustained.

[12] During cross-examination the accused denied stabbing the complainant and being inside her house on the day in question. When she had to cross-examine the complainant's son she put one question only. The next time she wanted to put her version to the witness she was stopped. She then simply said: *"that which you just said, is not true. I cannot be able to ask you questions on lies ..."*. See **S v Govele** 1987 (4) SA 297 (O). Throughout her cross-examination the accused was not assisted by the Magistrate to put relevant questions and put her version to the witnesses in a concise manner. Neither was she assisted to put questions to the complainant after the Magistrate raised new issues which the State did not raise earlier on.

[13] In her judgment the Magistrate attacked the accused's failure to cross-examine on anything material. As she puts it:

"The complainant was cross examined by the accused then but nothing material came from that cross-examination because it was about ... It came to this court's attention that the accused is disputing that she was at the complainant's place and stabbed her."

[14] With regard to the complainant's son the Magistrate criticized the accused's cross examination by asking one question in the following words:

"Then the accused went on by saying: These people are lying. That is the only thing that she could say..."

In **S v Sebatana** 1983 (1) SA 809 (O) at 812 A the Full Bench of the Free State Provincial Division had the following to say:

"Experience has repeatedly taught us that, particularly in the case of illiterate and untutored Black accused, they may put a few irrelevant questions to a State witness, or no questions at all and then subsequently give evidence which conflicts with that of the State witnesses in material respects. This may be the result of ignorance about the true nature and purpose of cross-examination, notwithstanding an explanation by the Magistrate of the accused's "right" in that connection. The presiding officer in such a case has a duty to assist the accused in presenting his defence by way of cross-examination by, for example, expressly asking him whether he agrees with each material allegation made against him by a State witness. In this way it should in most instances rapidly become

clear which evidence is disputed, and the presiding officer can himself put the necessary question or contention to the State witness. This would at least give the accused the impression that he is being fairly treated during the trial."

See also **S v Khambule** 1991 (2) SACR 277 (W); **S v Modiba** 1991 (2) SACR 286 (T).

[15] The court ought to have advised the accused to put her version to the witness or as much of it as it related to the evidence of the witness. It was advisable to ask the accused outright whether she agreed with material allegations against her.

[16] I think in this case the Magistrate committed a gross irregularity and the accused has not had a fair trial. There has in fact been a failure of justice. In my view there is no doubt that the facts clearly show that the irregularity of failure to advise the accused as to her rights to cross-examination and the consequences of such failure led to a failure of justice. On this basis alone the conviction cannot stand and the proceedings ought to be vitiated.

[17] In the light of what I have said in the above paragraphs it is not necessary to go into the sentence imposed. It goes without saying that it will automatically fall by the way-side. Especially taking into account the words of **Musi J** in **S v Lekgetho** 2002 (2) SACR 13 (O) at 17f:

“Moreover, the crass manner in which the accused was invited to address the court betrays the magistrate's disinterest in whatever the accused might have wanted to say.”

[18] However there is one last aspect that needs to be addressed: Impartiality and courtesy of a presiding officer. In my observation the manner in which the accused and to some extent the complainant were addressed by the Magistrate lacked impartially and courtesy throughout the whole proceedings e.g. The complainant was told at page 25 of the record:

“You know what! You talk too much. You talk too much and you

do not listen ...”

To the accused it was said, at page 81 of the record:

“But the way you were saying it ... You were challenging me by your physique, the way you are standing the way you are *talking to me* ...”

[19] A presiding officer must endeavour at all times to be absolutely fair to both the prosecution and the defence. The individual before her or him has the right to equality before the law and to equal protection by the law (section 8 of the Constitution).

Kroon J said the following in **S v Abrahams and Another**

1989 (2) SA 668 (E) at 670:

“Courteous treatment of witnesses and accused persons is, after all a facet of the maxim that justice must be seen to be done.”

A judicial officer can only properly fulfill his or her demanding and socially important duties if he or she guards against his or her own actions, is attentive to his or her own weaknesses

(such as impatience), personal opinions and whims, and continually restrains them. The standards which a judicial officer should maintain in the questioning of witnesses and the accused have been summarised in **S v Mabuza** 1991 (1) SACR 636 (O) at 638 g – i as follows:

- (1) The court should not conduct its questioning in such a manner that its impartiality can be questioned or doubted;
- (2) The court should not take part in the case to such an extent that its vision is clouded by the dust of the arena and is unable to adjudicate properly on the issues;
- (3) The court should not intimidate or upset a witness or the accused so that his or her answers are weakened or his or her credibility shaken; and
- (4) The court should conduct the trial in such a way that its impartiality, its open mindedness, its fairness and reasonableness are manifest to all who have an interest in the trial, in particular the accused.

Clearly in this case the Magistrate failed to uphold these standards. **Musi J's** words in **Lekgetho** *supra* at 17b – c cannot be overemphasized.

[20] In the circumstances I make the following order:

ORDER

The conviction and sentence of the accused are set aside.

B. C. MOCUMIE, J

I concur.

M. B. MOLEMELA, AJ

/em