

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

Review No. : 309/2008

In the review between:-

THE STATE

versus

MALEKHOTLA SUZAN MOLEHE

CORAM: VAN DER MERWE, J

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 11 JULY 2008

[1] The accused was convicted of assault with intent to do grievous bodily harm and on 17 April 2008 sentenced to 12 (twelve) months imprisonment of which 6 (six) months were suspended for a period of three years on condition that the accused is not convicted of assault with intent to do grievous bodily harm or common assault committed during the period of suspension. The record of the matter reached this Court for purposes of automatic review only on 5 June 2008. On 6 June 2008 reasons for sentence were requested by a

Colleague. These reasons were received by the registrar of this Court on 8 July 2008.

[2] The charge against the accused was that she hit the complainant with a brick on her forehead. Only the complainant testified on behalf of the state. The accused, who was of course undefended, testified in her own defence and admitted that she hit the complainant with a brick, but stated that that was done in self-defence as the complainant hit the accused with her fist. The accused called a witness who corroborated the accused in material respects. I consider it unnecessary to deal with the merits of the conviction as I am satisfied, on each of the separate grounds set out in the following two paragraphs, that the accused did not have a fair trial. I am also satisfied that the matter must be dealt with at this stage without requesting further reasons from the magistrate, in terms of the proviso to section 304(2) (a) of the Criminal Procedure Act.

[3] After the conclusion of the evidence of the witness for the accused, the accused indicated that she wished to call a further witness who was present in court. The magistrate

then immediately out of her own accord and without any further inquiry, refused to allow the accused to call this witness on the basis that the witness was present in court whilst evidence was given in the case. It does not appear from the record who the witness was, but it may very well have been the husband of the accused who was present at and central to the fight between the complainant and the accused. It is also quite unclear for what period the witness was present during the proceedings. Be that as it may, the refusal of the magistrate to allow the accused to call this witness is a gross irregularity. Although the fact that a witness had been present in court during testimony may affect the weight of the evidence, such evidence cannot on that account alone be excluded or regarded as inadmissible. See **S v MANAKA** 1978 (1) SA 287 (T).

- [4] Regrettably the conduct of the magistrate in respect of the accused and her witness also resulted in a failure of justice. On two occasions shortly after commencement of cross-examination of the complainant, the accused put clearly relevant questions to the complainant. On each occasion the magistrate interrupted and limited the cross-examination on

the basis that the question raised matters not mentioned in the plea explanation of the accused. It is trite that an accused person is not obliged to make any statement in terms of section 115 of the Criminal Procedure Act and that if the accused person elects to do so, the accused is entitled to make a brief statement only indicating the basis of the defence. It is therefore highly irregular to disallow cross-examination merely on the basis that it raises matters not mentioned in a statement in terms of section 115 of the Criminal Procedure Act. It is no wonder that the accused had no further questions in cross-examination of the complainant after the second such interruption. Furthermore the questioning by the magistrate of the accused amounted to cross-examination, which ended with the following remark by the magistrate:

“Yes, sezesi(?) you keep on somersaulting wena, you keep on saying this and then again you say that one, you say that one and this is important for your defence. Any further re-examination?”

The magistrate interrupted the quite coherent and clear evidence in chief of the witness of the accused in the following manner:

“If I find out that you are making up the story, you will be charged for perjury. --- (Not through interpreter:) I know that.

And you will be send (?) to Kimberley? --- I know that.

Do you understand? --- I understand.

Because everything that you said so far was never, it is a new thing. New, new, new, new thing. --- Uhm.”

It was quite incorrect to say that everything that the witness had said was new. The questioning by the magistrate of this witness also amounted to cross-examination and included the following (again incorrect) statement by the magistrate:

“So now wena, you are coming up now, instead of corroborating her story, you are coming up with a new evidence. --- (no audible reply).”

The quoted remarks and statements not only diminished the dignity and the decorum of the court proceedings, but could reasonably be apprehended as indicative of bias.

- [5] In the result the conviction and sentence are set aside. The accused must be released immediately.

C.H.G. VAN DER MERWE, J

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