

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

Appeal No.: 10/2008

In the case between:

JOSEPH BOOYSEN SEITISHO

Appellant

and

THE STATE

Respondent

CORUM:

VAN DER MERWE, J *et* MOLEMELA, J

JUDGEMENT:

MOLEMELA, J

HEARD ON:

17 NOVEMBER 2008

DELIVERED ON:

11 DECEMBER 2008

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- [1] This is an appeal against conviction and sentence. The appellant was convicted in the Bloemfontein Magistrate's court on a total of three counts, viz two counts of contravening section 17(a) of the Domestic Violence Act 116 of 1998 ("Domestic Violence Act") in that (i) he entered the complainant's place of residence without her permission and damaged the corrugated iron in her house and (ii) stabbed complainant with a knife in contravention of a protection order issued in terms of the aforesaid Act; and

(iii) rape. He was sentenced to 12 months' imprisonment in respect of the first count, 2 (two) years' imprisonment in respect of the second count and 7 years' imprisonment in respect of the third count. The sentences were to run separately.

[2] The appellant pleaded not guilty on all counts. In his plea explanation in terms of the provisions of section 115 of the Criminal Procedure Act, No. 51 of 1977 (Criminal Procedure Act) the appellant with regards to count 1 and 2, denied any knowledge of the issuance and/or service of the protection order on him. With regard to the charge of rape he admitted the sexual intercourse but asserted that it was consensual.

[3] In convicting the appellant, the court *a quo* placed reliance on the following facts: that a protection order in terms of the provisions of the Domestic Violence Act was issued against the appellant on the 5th December 2002 and served on him on the 18th February 2003; that according to the complainant, the appellant failed to comply with the said protection order by entering the complainant's house

without her permission and damaging one of the corrugated irons on the 24th December 2004; that the appellant contravened the protection order by stabbing the complainant with a knife on the 4th February 2005 and that on the 29th April 2005 the appellant entered the complainant's shack and swore at her, after-which he had proceeded to have sex with her without her consent. On the latter charge, the court *a quo* accepted the complainant's version that she yielded to the appellant's demand for sex after he had instilled fear in her by threatening to stab her with a knife. The court *a quo* further accepted that after the rape, the appellant then accompanied the complainant to a school where she normally sold items as a hawker and then left her there to go to a tavern. While the complainant was on her way home, she saw a lady by the name of Suzan Tshabalala. She called her and informed her that the appellant had raped her. She then requested Suzan to summon the police on her behalf. Shortly after her arrival at home the police arrived and arrested the appellant. Suzan Tshabalala was called as witness and corroborated the testimony of the complainant in all material respects. She was not cross-examined by the applicant's legal

representative.

[4] With regards to count 1 and 2, the appellant disputed the existence of the protection order and its service on him. He further averred that he mistakenly stabbed the complainant when he was aiming to stab a man that he had found in the company of the complainant at their common home. Concerning count 3, the appellant's version was that it was the complainant that had seduced him by lifting her skirt and then suggesting sex. According to the appellant, that seduction was followed by consensual sex which was initiated by the complainant. After the sexual intercourse, she accompanied the complainant to the school and the two of them parted on a jolly note. He was thus surprised to learn that the complainant had laid rape charges against him.

[5] Counsel for the appellant, Mr Reinders, contended that the convictions in respect of count 1 and 2 cannot stand because the existence of the protection order was not proven. It would, with respect, seem that the court *a quo* had hoped to cure this defect by requesting that the

prosecutor hand in an affidavit/return of service. The prosecutor then handed in some documents which the court admitted as exhibit C. Significantly, exhibit C is neither an affidavit nor a return of service. That exhibit C was requested and handed in after both the state and the defence had closed their cases and even addressed the court is indeed worthy of note. Needless to say, documents handed in the afore-said manner are accepted as exhibits only if their authenticity and content are not in dispute. *In casu*, the existence of the protection order and its service remained in dispute throughout. Adv. Mohlala on behalf of the state conceded that the existence of the protection order was not proven and thus conceded to the setting aside of the conviction in respect of count 1. This concession was, indeed, correctly made.

- [6] Adv. Mohlala however submitted that the conviction in respect of count 2 could, in terms of the provisions of section 270¹ of the Criminal Procedure Act, be altered to a conviction of assault with intent to do grievous bodily harm.

¹ If the evidence on a charge for any offence not referred to in the preceding sections of this chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.

As authority for his proposition Adv Mohlala relied on the case of **S v MASITA** 2005 (1) SACR 272(C). This was a matter that came before the High Court on automatic review. The accused had been found guilty of contravention of section 17(a) of the Domestic Violence Act.

- [7] On review the court found that there was no proof of service of the court order in question and that the testimony of the accused gave no indication as to whether the accused had acknowledged the existence or the content thereof. The evidence however proved that the offence of assault with intent to do grievous bodily harm had been committed. The court held that even though the accused had not been warned that assault with the intent to do grievous bodily harm was a competent verdict for the charge laid against him, such a failure did not *per se* constitute a fatal irregularity, the primary investigation being whether the accused in the particular circumstances of each case had a fair trial or not. It was further held that the accused would have been properly informed that a charge of assault was implicit in the charges he faced and

therefore he was neither prejudiced nor was his right to a fair trial infringed. The court, relying on the case of *S V MAVUNDLA* 1980(4) SA 187 (T), concluded that all the essential elements of a charge of assault with intent to do grievous bodily harm were present in the charge that was put to the accused person and that, accordingly, assault with intent to do grievous bodily harm was a competent verdict for that charge. This conclusion was of course reached after that court's acceptance that the intent to do grievous bodily harm could be inferred from the weapon used in the assault.

- [8] I am of the view that the case of *S V MASITA* (supra) is distinguishable from the one at hand. *In casu*, count 2 was phrased as follows: "That the accused is/are guilty of the crime of contravening section 17(1), read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act, Act 116 of 1998 in that a protection order was issued in terms of which the accused was ordered not to physically, verbally or emotionally and sexually abuse the complainant and that on or about the 4th day of February 2005 ... and while the said protection order was in force the accused did

intentionally and unlawfully contravene the order imposed on him in terms of the protection order against him in that the accused stabbed complainant with the knife.”

[9] It is trite law that the essential elements of a charge of assault with intent to do grievous bodily harm are the following: (a) the application of force; (b) unlawfulness; (c) the intention to apply force; and (d) intent to do grievous/serious bodily harm. It is equally trite that in considering the intent to do grievous bodily harm, the weapon used is just but one of several considerations. In **S v MDAU** 2001 (1) SACR 625 at 627b the court had the following to say on this aspect:

“Whether the court deals with an apparently obvious case or with another type of case the court must, because of the onus on the prosecution, never lose sight of the real enquiry: what exists to convince that in the mind of the accused there existed an actual intent to inflict bodily harm which is of a serious (“grievous”) nature? ... In answering that enquiry the following are the major considerations in this case:

(1) what was used as ‘weapon’, and to which part of the complainant’s body was it directed?

- (2) because fists are less effective to cause body injury than for example a knife, what degree of force was used to strike at the complainant?
- (3) what injuries were caused?
- (4) what was the reason and object, if any, for the action of the accused? and
- (5) what caused the accused to desist?"

[10] My view is that when due consideration is paid to the five factors mentioned above vis-à-vis the facts of this case, it is rather difficult to conclude that the essential element of "intent to do grievous bodily harm" can, *in casu*, be inferred from the charge-sheet. This is the critical aspect that distinguishes this case from application of the principle in **S v MASITA** (*supra*). Having come to this conclusion, it is unnecessary for me to deal with the aspect of whether the accused person was prejudiced by the failure to be informed that a charge of assault was implicit in the charge that he faced.

[11] With regards to the conviction on count 3, I am satisfied that the court *a quo* correctly accepted the evidence of the

complainant, especially as it was corroborated in all material respects by the evidence of an independent witness. Critically, the evidence of this independent witness was left completely unchallenged by the appellant's legal representative. In contrast, the version of the appellant was not only riddled with contradictions but was quite improbable. It follows then that the court *a quo* correctly rejected the appellant's version as false. Its acceptance that the state had proven its case beyond reasonable doubt can also not be faulted. See **S v FRANCIS** 1991 (1) SACR 198 (A) at 204 c – e; also see **J v S** ALL SA 1998 (2) SA 267 (A).

- [12] Regarding the sentence imposed, this court is sitting on appeal and thus has limited powers as sentencing is a discretionary power of the trial court that may only be tampered with if it was tarnished by a material misdirection or is startlingly inappropriate. See **S v BLANK** 1995 (1) SACR 62 (A). Also see **S v KGOSIMORE** 1999 (2) SACR 238 (SCA).

[13] Mr Reinders argued that the sentence is, considering the circumstances of the case, shockingly inappropriate, especially considering that the complainant and the appellant were a married couple who had, on the complainant's own admission, had consensual sex three weeks prior to the incident in question. The court *a quo*, in its judgment (p144 line 11-13) considered the following as one of the mitigating factors: "That the accused was not a stranger to the complainant in that they were married." I am thus satisfied that the court took cognizance of that factor. I am also satisfied that all the other personal circumstances of the appellant were also taken into account. Rape is a serious offence and is justifiably visited with severe sentences. See **S v CHAPMAN** 1997 (2) SACR 3 at 5 b – e. The sentence imposed by the court *a quo* is not one that can be described as shockingly inappropriate. In my view the court *a quo* exercised its sentencing discretion properly. There is therefore no justification for this court to tamper with that sentence.

[14] I would accordingly make the following order:

- 14.1 The appeal against conviction and sentence in respect of count 1 and 2 succeeds and, accordingly, both the conviction and the sentence in respect of count 1 and 2 are set aside.
- 14.2 The appeal against conviction and sentence in respect of count 3 (rape) fails. Accordingly, the conviction and sentence imposed by the court *a quo* in respect of count 3 is hereby confirmed.

M. B. MOLEMELA, J

I concur.

C. H. G. VAN DER MERWE, J

On behalf of the Applicant:

Adv. S. J. Reinders
Instructed by:
Giorgi & Gerber Attorneys
BLOEMFONTEIN

On behalf of the Respondent:

Adv. A. Mohlala
Instructed by:
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