

SOUTH AFRICA / JUDGMENT

Baisley v S (CA & R 244/2022) [2024] ZAECKMKHC 37 (28 March 2024)

[2024] ZAECKMKHC 37

COURT

Eastern Cape High Court, Makhanda

BEFORE

Gqamana, A Govindjee

CASE / FILE NUMBER

CA & R 244/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO.: CA & R 244/2022

In the matter between:

CLAIRE BAISLEY Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

GQAMANA J

Introduction

- [1] The appellant was arraigned in the Magistrate's Court, East London (the Court a quo), on two counts of assault. The appellant was convicted of only one count[1] and was sentenced to pay a fine of R 5000.00 or 5 months' imprisonment which was wholly suspended for 3 years on condition that she is not convicted of assault committed during the period of suspension. The court a quo also declared in terms of section 103(2) of Act 60 of 2000 the appellant to be unfit to possess a firearm.
- [2] The application for leave to appeal was refused, but leave to appeal on both conviction and sentence was granted to this Court on petition.[2]

- [3] The appellant contends that the court a quo committed a misdirection in its findings that, the case against the appellant was proved beyond reasonable doubt. In advancing the appellant's case it was argued that, had the court a quo applied the cautionary rule in respect of a single witness[3], it should have found that the complaint's evidence was infested with serious and material contradictions.
- [4] In *S v Leve*, [4] this Court pointed out that, if the trial court does not misdirect itself on the facts or the law in relation to the application of a cautionary rule, but instead, demonstrably subjects the evidence to scrutiny, the court of appeal would not readily depart from the trial court's conclusions[5].
- [5] The point of departure is that: in terms of section 208 of the Criminal Procedure Act 51 of 1977, an accused person may be convicted on the evidence of a single witness. Therefore a conviction would be sustainable based on the evidence of the single witness; if such evidence is clear and satisfactory in all material respects.
- [6] In *R v Mokoena* [6], the court said that:

"Now the uncorroborated evidence on a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the section], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory

in all material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc."

- [7] In *Rugnanan v S* [7] the SCA remarked that the cautionary rule does not require the evidence of SA single witness must be free of all conceivable criticism, but the requirement is that it should be substantially satisfactory in relation to the material aspects or be corroborated.
- [8] The complaint's evidence was that the appellant assaulted her on the 9th of August 2019 by kicking her with her feet[8] and again on 11 September by pushing her[9]. Both these incidents allegedly happened at the home of the complainant's son in Berea, East London. The appellant was also

residing at the same house, whilst the complainant was residing on the outside flatlet on the same property. The first assault incident was triggered by an argument between the complainant and the appellant which had happened a day or so before the alleged assault.

- [9] On the date of the first assault, the complainant confronted the appellant about harassing her granddaughter. When she approached the appellant, the latter was sitting on the verandah of the main house. The appellant ignored her at first. Despite that, the complainant confronted her and advanced closer to her seeking her attention. Again the appellant minded her own business and ignored the complainant. Suddenly the appellant lashed out and kicked the complainant in the stomach, three to four times. She steadied

herself by the table. The appellant was also swearing at her and the complainant left her and went back to her flatlet. The complainant only approached the doctor on 11 August 2019 because it was too sore for her to walk to the doctor before that day.

[10] The appellant obtained a protection order against the complainant after the first incident.

[11] A month later[10] a similar incident occurred where the complainant pushed her. The second incident allegedly occurred in the main house and was diffused

by one Sylvia, a domestic worker employed by the complainant's son.

[12] The appellant denied that she assaulted the complainant on both occasions. Her evidence on count 1 was that, the complainant approached her and was shouting at her. She ignored her and continued minding her own business playing games on her cellphone while she was seated by a glass table with her feet on one chair and her bum on the other chair. Her reaction angered the complainant and the latter approached her closer and picked up a coffee mug that was on the table. The complainant wanted to hit her with that mug and the appellant veered her off. She put her foot up to brace herself. The appellant denied kicking the complainant. Under cross-examination the complainant's version was not put to the appellant.

[13] In *S v Manicum* [11] Broome DJP (sitting with Booysen J) said that:

"The fact the appellant was not cross examined is something which must enter the scales. It has been said time and again that if evidence is not challenged in cross examination, it may be accepted without further ado. I refer to a judgment in the case of Sv Xoswa and thers 1965(1) SA 267 (C) at 273C-E where his Lordship, Van Wanes J, as he was then said:

'The prosecutor left the statement unchallenged. I agree with the remarks of the Full Bench of the Transvaal Provincial Division in the case of *Rev Ngema* 1960 (2) SA 263 (T), that where the State intends to discredit the evidence of an accused to meet the State's attackWhile it does not follow in every case that the failure to cross examined would necessarily be fatal to the State's case , nevertheless I agree with the attitude taken up by the State representative, which was that in the particular circumstances of this case the absence of any challenge in cross examination by the prosecutor.....leaves the appellant's guilt in some doubt'.

The same position applies in the present case. The position is also dealt with in Hoffmann and Zeffert *The South African Law of Evidence* 4th ed at 461 under heading 'Failure to cross-examine' and the learned author says:

'Failure to cross-examine may therefore prevent a party from disputing the truth of the witness's evidence.'

[14] The court a quo in dealing with the cautionary rule simply stated that the evidence of the complaint on count 1 was “clear and straightforward. There is nothing that suggests or creates the doubt in the minds of the Court in her evidence.” The court a quo then accepted her evidence as satisfactory and rejected the appellant’s evidence.

[15] The evaluation of the evidence of a single witness requires the trial court to consider such evidence in the context of and together with all other evidence adduced at the trial to prove the guilt of the accused beyond reasonable doubt[12]. The conclusion reached by the court must account for all the evidence. The complainant’s evidence was riddled with so much

improbabilities. The assault allegation in the context of and together with all the other evidence does not make sense. It is so

improbable that the appellant would have been able to kick the complainant three to four times while seated. The injuries

reflected on the J88 were not a corroboration of the complainant’s version. Such injuries are not consistent with her version if one takes into account her stature and her weight. If the complainant was kicked three to four times in the manner described by her, more serious injuries would have been expected under such circumstances.

[16] In light of the above the court a quo committed a misdirection in its conclusion that the complainant’s evidence was “clear and straight forward”.

[17] In addition, it is trite that, in criminal cases, the onus is upon the State to prove the guilt of the accused beyond reasonable doubt. The accused has no onus to prove her innocence. Where there is a reasonable possibility that the accused’s version is reasonable possibility true she is entitled to the benefit of doubt.

[18] In this matter, the court a quo failed to give due weight to the fact that the appellant was not cross-examined on her version meaning, the truth of her evidence was not disputed. The authorities referred to in paragraph 13 above supports my view that, in the absence of any challenge by the prosecution of the evidence of the appellant leaves her guilt in some doubt.

[19] For all the above reasons, the appeal must be upheld, and both the conviction and the resultant sentence are set aside.

[20] In the result, the following order is issued:

1. The appeal is upheld.
2. The conviction and sentence of the appellant are set aside.

N GQAMANA

JUDGE OF THE HIGH COURT

I agree:

A GOVINDJEE

APPEARANCES:

Counsel for the Appellant: Adv R Simms Instructed by: C/O Whitesides Attorneys Makhanda

Counsel for the Respondent: Adv A Nohiya Instructed by: Director of Public Prosecutions

Makhanda Heard on: 14 February 2024

Judgment

Delivered on: 28 March 2024

- [1] On count 1.
- [2] The order was granted by Bloem and Malusi JJ on 14 April 2023.
- [3] Ms Ruth Schaffer, (the complainant) was the only that testified on behalf of the State during trial.
- [4] 2011 1 SACR 87 (ECG) at 18.
- [5] See also S v Prinsloo and others 2016 2 SACR 25 (SCA) at 183.
- [6] 1932 OPD 79 at 80.
- [7] Rugnanan v S (259/2018) [2020] ZASCA 166 (10 December 2020) (unreported judgment, SCA).
- [8] Count 1.
- [9] Count 2.
- [10] On 11 September 2019.
- [11] 1998 2 SACR 400 (NPD) at 404e-j.
- [12] Minister of Basic Education, Sport and Culture v Vivier NO and another 2012 2 NR 613(SC) at [17].

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Prepared on 9 October 2026 · Esheria