

SOUTH AFRICA / JUDGMENT

Botha v S (A31/2020) [2020] ZAFSHC 256 (18 September 2020) [2020] ZAFSHC 256

COURT

Free State High Court, Bloemfontein

BEFORE

Musi, Reinders

CASE / FILE NUMBER

A31/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

number: A31/2020

In

the matter between:

ERIC

BOTHA

Appellant

against

THE

STATE

Respondent

CORAM:

MUSI, JP et

REINDERS, J

HEARD

ON: 24 AUGUST

2020

JUDGMENT**BY: REINDERS, J****DELIVERED ON: 18 SEPTEMBER 2020**

- [1] On 26 June 2018 the district court magistrate seated at Wepener convicted the appellant of assault with the intent to do grievous bodily harm. The appellant was sentenced to three years correctional supervision on 17 July 2018.
- [2] Leave to appeal against his conviction was dismissed by the trial court, but granted on petition by this court on 1 November 2018.
- [3] In a nutshell the version of the state, as accepted by the trial court, entailed that the complainant was assaulted and stabbed by the appellant with a knife after attempting to defuse an argument between an unknown person and appellant (together with a person known to him as Seuntjie) at a birthday celebration party. According to the complainant his cousin, Mr Hancock, had knowledge of and witnessed the incident as he was standing outside his yard in close proximity to the premises where the party took place. Mr Hancock testified that he was inside his yard all the time.
- [4] The appellant denied assaulting the complainant and proffered an alibi to the effect that he had left the party before the incident and was at home with his wife at the time.
- [5] The attack on appeal against appellant's conviction was amongst others that the trial court did not apply the cautionary rule properly; failed to properly appreciate contradictions between the two state witnesses; failed to consider whether appellant's alibi was reasonably possibly true and placed an onus upon appellant to prove his innocence.
- [6] Much may be said in favour of all the afore mentioned grounds of appeal. There is, however, in my view, a more compelling and disconcerting reason why the appeal should be upheld. The record reflects that the magistrate descended into the arena when appellant testified. The magistrate took it upon himself not only to intervene whilst the prosecutor was cross-examining the appellant, but after re-examination by appellant's legal representative the magistrate continued his interrogation of appellant for some nine pages of the record of proceedings.
- [7] The record reflects that whilst appellant was cross-examined by the prosecutor the magistrate interfered. It reads:

Court: Is your name Panki, you?

Mr Botha: Yes that is my nickname.

Court: Now where as the prosecutor is correctly asking you, how does the complainant then know that you going around with that name?

Mr Botha: Maybe he asked around, but I really do not know, I really do not know.

Court: Maybe what, he was doing what?

Mr Botha: Maybe he asked about my name or whatever I really do not know how come he put me in this, but I really do not know.

Court: What will then the reason for him to ask around your name if you say he do not know, why would he do that asking around about you? (Inaudible language).

Court: Sorry?

Mr Botha: Can I ask something... (intervene).

Court: Ja u kan maar Afrikaans praat meneer dan verstaan ons beter mekaar.

Mr Botha: Edelagbare wat gebeur het, het gebeur...(tussenbeide).

Court: Nee ek het nie dit vir u gevra nie, if you can just interpret. Ek het gevra hoekom sal die klaer u ken by name Panki, my vraag is doodeenvoudig.

Mr Botha: Ek weet rerig nie Edelagbare.

Court: En hoekom sal hy vir jou rondvra of altans hoekom gaan hy rondvra daar in die lokasie omtrent Panki as hy nie weet dat u ten minste een van die persona is wat hom sou gestee het nie?

Mr Botha: Wat ek wil tuisgebring het Edelagbare is dat na die insident, na die insident het dit en, dit wat jy nou gese het gebeur het gebeur, en sy broer het so twee weke na die op die 3 Februarie het hy gekom en my kom dreig in Wepener. Hy het my rondgejaag in Hoogte met sy ka ren gese hy gaan my doodmaak.

Court: Meneer u antwoord nou ongelukkig nie die vraag nie, ek gaan vir u weer vra dit is 'n vraag wat die Aanklaer vir u gevra het daar. Hoekom sal die klaer rondvra omtrent u en hy gebruik spesifiek die onnaam Panki, hoekom gaan hy dit doen?

Mr Botha: Ek wou juis op daardie punt gekom het Edelagbare, aangesien ek nie die klaer ken nie. Ek wil weer op daardie dinges kom, so ek het 'n saak teen hom oopgemaak, teen hom James Swart. En nadat ek die saak oopgemaak het ten hom toe kom hulle die 12de en hulle kom maak 'n saak teen my oop.

Court: Is it now again Jim or James Swart?

Mr Botha: James Swart.

Court: Is the bigger brother of the complainant?

Mr Botha: Yes.

Court: Ja

Mr Botha: So nadat ek vir hom 'n saak oopgemaak het, het hulle vir my 'n saak kom oopmaak. En nou die allegations na my kant toe gegooi Edelagbare.

Court: Is that all?

Mr Botha: En ek het die ondersoek beampte vertel ek het niks met die allegations te doen gehad nie. En sy het getuies gesoek ek het gese ek het nie getuies want ek was nie daar gewees nie, ek het saam met my vrou mos geloop.

Court: Proceed ma'am.

[8] After the prosecutor concluded the cross-examination there was no re-examination by accused's representative. Obviously the magistrate was entitled to ask clarification questions. Instead of asking questions to clarify some issues the magistrate descended into the arena and cross-examined the appellant.

[8.1] The record reflects:

Court: Mr Kola, Seuntjie Kola het hy dreads?

Mr Botha: Ja hy het dreads.

Court: In Februarie, nie Februarie nie maar Januarie toe hierdie voorval plaasgevind het, het hy dreads gehad?

Mr Botha: Dis reg Edelagbare.

Court: Wat het die klaer gese omtrent die tweede persoon wat hom aangerand het, spesifiek wat betref sy hare toe hy hier getuig het die klaer? Het hy gepraat van dreads of is hy verkeerd?

Mr Botha: Nee hy is nie verkeerd nie Edelagbare.

Court: Nee ek se toe hy daar getuig het toe se hy Kola het dreads opgehad, u het gehoor.

Mr Botha: Ja Edelagbare ek het gehoor Edelagbare.:

Court: En die Kola persoon was een van die persone wie hom aangerand het?

Court: Hoekom is hy dan seker van daardie storie?

Mr Botha: Ek weet regtig nie Agbare.

Court: Why is he sure about that aspect that Kola was having dreads?

Mr Botha: Is ek seker of Kola dreads gehad het?

Court: Nee die klaer, die klaer hy se een van die persone wat hom aangerand het, het dreads gehad en dit is Kola, nou se ek vir u hoekom is hy seker omtrent dit?

Mr Botha: Ek weet nie hoekom is hy seker nie, want soos hy sy stelling gestel het, het Kola van agteraf gekom ek het van voor at gekom, soos hy se, ek weet nie hoe wees hy Kola het dreads opgehad nie. Maar ek weet Kola het dreads gedra.

Court: Is dit nie maar omrede hy het die persoon gesien nie, of die persoon wat die dread gedra het?

Mr Botha: Sorry Agbare.

Court: Is dit nie omrede hy het gesien Kola of die ander persoon wat hom gestee het, het dreads gehad nie, is dit nie seker maar die rede nie?

Mr Botha: Seker maar.

[8.2] Later, the record reflects the following:

Court: En hoe het hy gese wie het daardie persone lastig geval?

Mr Botha: En Botha en Seuntjie Kola.

Court: Could he have made a mistake?

Mr Botha: Yes Edelagbare.

Court: Hoekom se u so?

Mr Botha: Want ek was nie daar buite rand gewees nie.

Court: Meneer u se dan die lig was heel goed daar buite gewees, u het dan nou vir my gese da thy moes die twee persone gesien het, die lig was dan heeltemal goed. Nou kan ek nie verstaan as use u weet nie, u lhet dan nou so pas vir my gese dat die lig was goed.

Mr Botha: Hy se hy het hulle gesien, u het my gevra of dit moontlik was dat hy hulle gesien het, so hy kon hulle gesien het. Maar ek was nie daar nie... (tussenbeide).

Court: Ja u was nie daar nie, volgens u was u glad nie daar nie.

Maar stem u saam?

Mr Botha: Ek stem saam ja.

Court: Die persone hy moes hulle kon gesien het wie die ander een laaste daar aangeval het, want u se die lig was goed gewees

Mr Botha: Ja Edelagbare

[8.3] And:

Court: Now why you did not come to the police station or just try and get hold of the police say you looking for, here is I am not going to take the blame for something that I did not do? U kan maar Afrikaans praat.

Mr Botha: Edelagbare ek is, in die matter is ek die eerste beskuldigde en Seuntjie die wat die assault gedoen het is die tweede beskuldigde. So ek, ek weet rerig nie hoe om dit te stel nie, ek is besorg oor my eie probleme en my eie... (tussenbeide)

Court: Because the rumour was going around the person who stabbed the complainant is only one person is only Kola, you do not know anything about it because you were at home. Why you did not come at least try to get hold of the police tell them the guy that you are looking for, here he is I am not going to be responsible for what happened here, why were you not doing it. Because remember you were asleep, you were sleeping at home you do not know a thing about this? Obviously you are also a suspect in the matter, but just so at least the correct person can be in front of Court. Mr Botha?

Mr Botha: Ek weet rerig nie hoe om te antwoord daarop nie Edelagbare."

[8.4] The magistrate went on as follows:

Court: Was die klaer gedrink?

Mr Botha: Die klaer ek kan nie rerig se of hy gedrink het, hy het gedrink maar ek kan nie rerig se hoeveel hy gedrink het nie.

Court: Hoe weet u hy het gedrink, how do you know that he did drink?

Mr Botha: Ek het hulle gesien inkom in die tent, so ek was, ek het nie stil gesit nie ek was rond gewees in die tent.

Court: See him and who else coming into the tent?

Mr Botha: Van die mense wat ingekom het, ek meen ek is al voor die party begin het toe het ek, nadat ek klaar gewas het toe het ek nog die beligting ons het nog verstellings gemaak daarso, so elke mens wat daar ingekom het, ek weet nie omtrent watter tyd het hulle ingekom nie, maar soos die tweede getuie gese het dat die laaitie het gekom, ek skat dis die laaitie gewees.

Court: But you saw him drinking? Mr Botha: Ja I did saw him drinking.

Court: Why were you looking at him?

Mr Botha: Come again Your Honour?

Mr Botha: Ek het nie net na hom gekyk nie, die mense wat daar binnekant gesit het.

Court: Ja but how do you know that he was drinking?

Mr Botha: He was drinking because I was helping out at the bar, soos ek gese het ek was geroep om uit te help... (tussenbeide).

Court: You do not know this person sir, you do not know the complainant why concentrating on somebody you do not know but now you come and tell me he was actually drinking?

Mr Botha: But I did see... (intervene).

Court: Mr Botha.

Mr Botha: Net soos hy my die eerste dag ook gesien het net soos hy se ek het hom gesteek. Ek het hom oak daardie dag gesien toe hy ingekom en hy het gaan sit en drink.

Court: Wat het hy gedrink ken u?

Mr Botha: Hulle het biere gesit en drink.

Court: Hoeveel?

Mr.Botha: Ek weet nie presies hoeveel nie.

[9] In the process of entering the arena, the magistrate put lengthy and incoherent questions and statements to the appellant. This lead thereto that the appellant, whilst attempting to answer the questions, being interrupted by the magistrate. Some of the questions were of such a nature that one would have expected them to have been posed by the prosecutor and not the magistrate.

[10] It must have been difficult for appellant to understand some of the questions. The appellant must have felt intimidated and some answers reflected this predicament.

[11] The guiding principles for questions by a presiding officer to an accused were stated as follows in *S v Rall* 1982 (1) SA 828 (A) per Trollip AJ:

(i) A judicial officer must ensure not only that justice is done but in addition that it is seen to be done. He must therefore so conduct the trial that his open-mindedness, impartiality and fairness are manifest to all concerned with the trial and its outcome, especially the accused.

(ii) A judicial officer should refrain from questioning witnesses or the accused in such a way or to such an extent that it may preclude him/her from detachedly or objectively appreciating and adjudicating upon the issues.

(iii) A judicial officer should refrain from questioning a witness or the accused in a way that may intimidate or disconcert him/her or unduly influence the quality or nature of his/her replies and thus affect his/her demeanour or impair his/her credibility.

See also: *S v Mabuza* 1991 (1) SACR 636 (0)

[12] Once it is established that the presiding officer indeed descended into the arena, the important question to be asked and answered is whether these irregularities constituted a failure of justice vitiating the proceedings.

See: *S v Felthun* 1991

(1) SACR 481 (SCA) at 485h-486b

[13] In *S v Le Grange and Others* 2009 (2) SA 434 (SCA) the principles in *Rall* supra were cited and applied, leading to the conclusion that the cumulative effect of the irregularities which had occurred, was indicative

thereof that the appellants did not have fair trials. The convictions and sentences were therefore set aside.

[14] Applying the above principles to the matter at hand, I conclude that the magistrate's conduct as aforesaid was so serious that it resulted in a miscarriage of justice necessitating the setting aside of the conviction and sentence.

[15] Counsel for the respondent responsibly conceded before us that the conviction and sentence cannot stand.

[16] I therefore make the following order:

The appeal succeeds and the conviction and sentence are set aside.

C. REINDERS, J

I concur.

C.J. MUSI, J

On behalf of appellant: Ms S Kruger

Bloemfontein Justice Centre BLOEMFONTEIN

On behalf of res. pondent: Adv S Chalale

Office of the Director: Public Prosecutions BLOEMFONTEIN

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