

SOUTH AFRICA / JUDGMENT

Mahala v S (CA&R 381/2012) [2013] ZAECHGC 14 (25 February 2013)

[2013] ZAECHGC 14**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Chetty, Majiki

CASE / FILE NUMBER

CA & R 381/2012

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Source record**NOT****REPORTABLE****IN THE HIGH COURT OF SOUTH AFRICA****(EASTERN CAPE, GRAHAMSTOWN)****Case No: CA & R 381/2012**

In the matter between:

THANDIWE MAHALA

.....Appellant

And

THE STATE

.....Respondent

Coram: Chetty and Majiki JJ

Heard: 13 February 2013

Delivered: 25 February 2013

Summary: Appeal

– Evidence – Adequacy of proof –

Complainant highly inebriated – J88 recording single wound to
scalp – Complainant

testifying to several – Trial Court

disregarding medical evidence – Witnesses disregarded –

Paucity of state

witnesses insufficient to disregard onus –

Appeal allowed

JUDGMENT

Chetty, J

- [1] At approximately 02h45 on 2 August 2009, the complainant, Mr Khanyisa Sebe, was examined at the Casualty department of the Provincial Hospital in Port Elizabeth by Dr A.C Anyikwa. He recorded his clinical findings as follows: -

“Scalp laceration that was not bleeding actively Smelling of alcohol, restless and uncooperative. Scalp laceration was stitched. Wound was fresh and consistent with stab injury. Patient could not give adequate history because he was drunk as at time of review.”

described the complainant’s mental health and emotional status as “stuporous” and concluded by stating that the complainant was “clinically drunk and had a stab wound on scalp”.

- [2] In due course the appellant and her co-accused were arrested on a charge of having assaulted the complainant with intent to cause him grievous bodily harm and, at their subsequent trial, the complainant testified that during the attack on him he sustained various stab wounds, to wit, on his scalp, on the left ear, the nose and the right side of the forehead. He described the injury to the ear as being 10 cm in length and extending to the jaw. The stab wound on the nose was 2½ cm in length, treated but not stitched whilst he wound on the forehead, which he described as “a small one”, about 2 cm in length, stapled together. A further wound, which he described as being 1½ cm in length on his right side, was also stitched. Under cross-examination, the complainant denied having been treated by a doctor and steadfastly maintained that a nurse attended to him and stitched and stapled his wounds. The medical report, the J88 and the contemporaneous casualty notes compiled by Dr Anyikwa were, with the consent of all the parties, admitted in evidence as exhibit “B”.
- [3] In its judgment and confronted by this anomaly, the trial court, for reasons known only to itself, in effect found that the doctor did not record all the complainant’s injuries. The rationale for this finding is perplexing to say the least and the magistrate’s finding in this regard clearly wrong. The report clearly establishes that the complainant was so highly inebriated that he was unable to recall what had happened to him. The trial court nonetheless found his version, that he had been assaulted by the appellant and her co-accused, acceptable. What adds to the confusion is that after the appellant and her co-accused had testified, the magistrate called two further witnesses, the first, the appellant’s sister and the second, the complainant’s

sister.

- [4] The reason for calling the appellant’s sister appears to have been for her to either verify or refute the appellant’s version that she remained in the tavern following the altercation with the complainant. The appellant’s sister, Ms Nokuzolo Mahala (Mahala), vouchsafed the appellant’s evidence that she never left the tavern after the altercation with the complainant. The trial court ignored the evidence and omitted to consider it at all. Instead, it relied on the

evidence of a further witness called by it, to wit, the complainant's sister, Ms Nolusindiso Nditha (Nditha). The latter's evidence that the appellant and the co-accused and others chased after the appellant is conspicuously absent from the police statement minuted from her the following day. In his judgment, the magistrate found that the policeman who recorded her statement had "hopelessly" done so and held that "the statement carries no weight whatsoever." This finding is speculative in the extreme. The trial court appears to have sought corroboration for the complainant's evidence by calling Nditha and, notwithstanding the obvious shortcomings in her evidence, found that she afforded corroboration for the complainant's version. In essence, it rejected the appellant's sister's testimony for the simple reason that it was in conflict with the complainant's version. By her own admission Nditha arrived at the complainant's home after the altercation between him and his assailants had ended and the latter had fled the scene. By all accounts the complainant's state of inebriation rendered his identification of his assailants suspect.

- [5] In his evidence in chief he testified that the appellant and her erstwhile co-accused entered his yard armed with broken bottle necks and that both stabbed him. Under cross-examination by the appellant's attorney, he retracted that evidence alleging that he was unable to say who stabbed him. Nditha's evidence concerning the altercation in the tavern is conspicuously absent from the complainant's narrative. His further evidence that he left the tavern alone is in direct conflict with Nditha's evidence that she accompanied the complainant.
- [6] The conviction appears to rest entirely on the evidence of Nditha that the appellant chased after the complainant. Her evidence in this respect was contradicted not only by the appellant but Mahala. In my judgment, the evidence adduced by the state and the magistrate himself, was wholly insufficient to establish the appellant's

guilt beyond a reasonable doubt. In the result the following order will issue: -

The appeal is allowed. The conviction and sentence are set aside.

D. CHETTY

JUDGE OF THE HIGH COURT

Majiki J

I agree.

B. MAJIKI

On behalf of the Appellants: Mr D.P Geldenhuys instructed by Grahamstown Justice Centre, 69 High Street, Grahamstown

On behalf of the Respondent: Adv S Mgenge, National Director of Public Prosecutions, High Street, Grahamstown, Tel: (046) 602 3000

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