

SOUTH AFRICA / JUDGMENT

Rusi v S (CA&R289/2018) [2019] ZAECHGHC 84 (16 August 2019)

[2019] ZAECHGHC 84

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Rusa, J Eksteen

CASE / FILE NUMBER

CA&R289/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO CA&R 289/2018

In

the matter between:

ZIZIPHO

RUSI

Appellant

And

THE

STATE

Respondent

JUDGMENT

RUSA AJ:

- [1] The appellant was charged in Regional Court, East London with common assault on Mr Sifiso Shezi (“Shezi”) and assault with intent to do grievous bodily harm on Ms Nonhlahla Mcube (“Mcube”).

- [2] The appellant pleaded not guilty to both charges. At the end of the trial, the appellant was acquitted on the common assault charge and convicted on the second charge. The sentence imposed by the Magistrate was a fine of R5000, 00 or 5 months imprisonment, both of which were wholly suspended for a period of five years.
- [3] The appellant brought an application for leave to appeal against her conviction. Following the turning down of her application, the appellant petitioned the Judge President of this Court and this appeal comes to this Court after the granting of such petition.
- [4] It is common cause that, on 15 November 2017 and at approximately 18h00, the appellant arrived at the apartment of Shezi in Amalinda, East London. The appellant was Shezi's ex-girlfriend. After their relationship came to an end, Shezi and the appellant remained on good terms as they were still communicating. In addition, they were working together at the Department of Human Settlement. Furthermore, the appellant would from time to time assist Shezi with transport and financially.
- [5] When the appellant entered the apartment after Shezi opened the door for her, the appellant found Mcube sitting in bed, which was at Shezi's one bedroom apartment. On the evening in question, the appellant was carrying an umbrella as it was raining. The relevance of the umbrella will become apparent in due course. The appellant then asked Shezi to step outside, as she needed to talk to him privately and Mcube refused to allow Shezi to do so.
- [6] Whilst the appellant was still in the apartment, an altercation ensued the details of which are dealt with below.

EVIDENCE

- [7] Both Shezi and Mcube were the only witnesses called by the State.
- [8] According to Shezi, he was at his apartment in Amalinda when he heard a knock at the gate of the premises in which the apartment was situated. When he checked who was at the gate, Shezi saw an old man who was knocking standing by the gate. He ignored the knock and paid no attention to it. Moments later, Shezi heard a knock at the door of the apartment. He peeped through the glass of the sliding door to find out who was knocking and saw the appellant

standing by the door. The appellant asked Shezi to let her in, which he did.

- [9] Shezi testified that as soon as the appellant was inside the apartment, she caused havoc as she was shouting at both Shezi and Mcube. The appellant asked Shezi to step outside so that she could talk to him. At that stage, Mcube did not allow Shezi to step outside. The appellant then demanded payment of the money, which Shezi owed her. Whilst Shezi was transferring funds to the appellant's account, the appellant was shouting and screaming at both Mcube and Shezi. The appellant then advanced to Mcube and at that time, she was carrying an umbrella with her. The appellant pointed the umbrella at Mcube as she was shouting at her. At the time, Mcube was seated in bed and Shezi whilst

Shezi was standing. The appellant tried to walk past Shezi as she was advancing towards Mcube and, in the process, the appellant

began striking Mcube using her hands and the umbrella.

[10] According to Shezi, the appellant struck Mcube in her upper body as the latter was seated in bed. Shezi tried to stop the appellant from getting closer to Mcube, but the appellant was able to extend her hand and struck Mcube. When asked to demonstrate how the appellant struck Mcube, Shezi stated that the appellant 'threw blows by hands' which he (Shezi) tried to stop. Shezi could not remember the number of strikes that landed on Mcube.

[11] Shezi also testified that in addition to the money, the appellant also demanded return of some of the clothing items, which she purchased for him whilst they were in a relationship. Shezi started looking for some of those belongings. Shezi could not recall if the appellant was insulted and shouted by Mcube, but he testified that there was an altercation between the appellant and Mcube.

[12] During cross-examination, Shezi was asked if there was any communication between him and the appellant prior to the appellant arriving at the apartment. Shezi responded positively. Shezi was also asked if there were any arrangements between him and the appellant to meet each other at the apartment on the day in question and he replied negatively. Shezi denied that the appellant had telephoned him during the day prior to her coming to the apartment.

[13] Shezi confirmed that he and the appellant were communicating and that there was no bad blood between them, until at least when she showed up at the apartment. He further testified that if the appellant had asked for her money when they were communicating, he (Shezi) would have paid her, without the need for the appellant to come to the apartment.

[14] Mcube testified that when the appellant arrived at the gate, she banged the garden gate. She did not know who opened the gate for the appellant, as she later heard footsteps. After then, Mcube heard the banging of the door of the apartment. Shezi went to the door, however Mcube was not certain if the door was closed or open, but only saw the appellant inside the house. In response to a question from the learned magistrate, Mcube testified that when the appellant was inside the apartment, she moved up and down and afterwards greeted Mcube twice, to which Mcube responded. The appellant then asked Shezi to step outside so that they could talk. Mcube asked the appellant to identify herself as she did not know her. Upon there being no response from the appellant, Mcube then told Shezi not to step outside.

[15] The appellant stared at Mcube and grumbled about the fact that Mcube had moved in with Shezi, whilst that was not the case with her. At that moment, the appellant demanded payment of her money from Shezi and the latter responded by telling the appellant that he did not have money but would pay her back as soon as he had any. As the appellant was agitated, Shezi asked her to leave the apartment. She refused to do so and told Shezi that she would leave once he had paid her. At that moment, the appellant pointed at Mcube saying

that she felt like beating her up. Mcube remained seated in bed. The appellant then demanded return of the shoelaces, which she had bought for Shezi. When the latter did not respond to that demand, the appellant removed the shoelaces from the shoes herself. The appellant further demanded socks, which were handed to her by Shezi.

THE ASSAULT

[16] Mcube testified that the appellant assaulted her with an umbrella containing a sharp iron top. She was assaulted in the head and that when she tried to block it with her left hand, the sharp object of the umbrella scratched her in her fingers. Mcube was also struck in the neck and arm. Meanwhile, Shezi was looking for the socks demanded by the appellant. Mcube was struck three times with the umbrella by the appellant. However, when Mcube was later asked how many blows struck her, she stated that she did not count when she was being struck, but recalled that she was struck in the head, arm, and fingers. There was, at that moment, no mention by her of being struck in the neck. The appellant only stopped assaulting Mcube when Shezi restrained her and asked her to leave. As she was refusing to leave, Shezi tried to shove the

appellant outside and that was when the scuffle between the appellant and Shezi began.

[17] The State then handed in a J88 form as exhibit 'A' which contained the medical report of a Dr Bhana, who treated Mcube the following day after the incident. The report was handed in by agreement between the parties' legal representatives in terms of section 213 of Criminal Procedure Act 51 of 1977. I shall return to the report in due course.

THE DEFENCE

[18] During her testimony, the appellant confirmed that she was previously in a relationship with Shezi, which lasted for almost 2 years. She testified that after the relationship ended, the appellant and Shezi remained on good terms as she gave Shezi financial and transport support.

[19] During the day on 15 November 2017, the appellant had tried to telephone Shezi, but he was not taking her calls. The appellant then drove to Shezi's place and she arrived there around in the evening of the same day and approximately at 18h00. When she got to the main gate, the appellant pressed the buzzer and the gate was opened. The appellant proceeded to Shezi's apartment and knocked at the door. Shezi emerged through the glass window of the sliding door. The appellant asked Shezi to open the door, which he did. The appellant then entered the apartment. As

it was raining, the appellant was carrying an umbrella which she placed against the wall, next to the door. Shezi went to sit in bed. When the appellant noticed the presence of Mcube who was also seated in bed, the appellant asked to talk to Shezi outside. Mcube refused to allow Shezi, to whom she referred as a husband, to step outside. It was at that moment that the appellant demanded payment of the money she lent Shezi. The appellant also demanded return of some items, which she purchased for Shezi whilst they were in a relationship. Mcube then accused the

appellant of being 'brainless'. In response to Mcube's utterance, the appellant told her that she was not at the apartment for her but that she was there to collect her belongings. Shezi shoved the appellant and asked her to leave. Meanwhile, Mcube had not ceased to backchat. When the appellant was pushed out of the apartment, it was then that a scuffle broke out between her and Shezi.

- [20] During her cross-examination, the appellant was asked how Mcube sustained the injuries and she replied that she did not know. According to the appellant, when the scuffle broke between her and Shezi, Mcube was seated in bed and playing with her phone. When it was put to her that it was coincidental that Mcube was injured on the day when there was a scuffle between the appellant and Shezi, and whilst Mcube was sitting in bed, the appellant reiterated that she had no knowledge of Mcube's injuries. She maintained that she went to the apartment to collect her money and belongings from Shezi.
- [21] Once again, when it was put to the appellant that it was improbable that she would have arrived at Shezi's place in a calm and collected manner, the appellant replied that she was born a calm person and denied that she was angry when she found Mcube at the apartment. She also denied having assaulted Mcube.
- [22] In response to a question from the learned magistrate, the appellant testified that when she met Mcube for the first time on 15 November 2017 at the apartment that did not sit well with her, as it was hard for her to accept what she had seen. She also testified that that was hurtful, at first.

MAGISTRATE'S FINDINGS

- [23] In her judgment, the magistrate was not impressed with the way in which Shezi conducted himself when he testified. She found him to be extremely verbose, his manner of speaking dramatic and was arrogant. On the other hand, the magistrate found the appellant calm and collected when she gave evidence.
- [24] On the contradictions of the State witnesses' evidence, highlighted by the defence, the magistrate was unable to find any. There was, however, an issue about whether or not the appellant had knocked at or banged the door before Shezi let her in. On this, the magistrate found that there was no difference between knocking at the door or banging it as people perceive sounds differently. As far as I am concerned, this issue is material and relevant as it has a bearing in determining the appellant's motive for being at the apartment.
- [25] The magistrate found that when the appellant was unable to get hold of Shezi telephonically, it was probable that when she arrived at the doorsteps of the apartment, she banged the door. However, this finding is inconsistent with the subsequent conduct of the appellant when she entered the apartment. During her testimony, Mcube stated that when the appellant stepped inside the apartment, she greeted her twice. It is unlikely that a person who had just been banging the door, possibly in a state of rage, would have courtesy of greeting a woman who was in bed with her ex-boyfriend. One must accept the evidence of

both Shezi and the appellant that she knocked at the door of the apartment when she arrived.

[26] The magistrate found that it was probable that the appellant would have been upset and angry when she saw Mcube sleeping under the duvet, which the appellant had purchased. On this, the magistrate relied on the appellant's testimony that when she discovered Mcube at the apartment, for the first time, she was hurt as it was painful to see her there.

[27] As regard assault the offence for which the appellant was charged, the magistrate accepted the evidence of Shezi and Mcube and further relied on the report of Dr Bhana. In this regard, the magistrate found that the appellant did attack Mcube, out of frustration, using the umbrella and that the appellant intended to cause grievous bodily harm to Mcube and convicted the appellant as charged.

[28] The test for interference by a court of appeal with a trial Court's factual findings was set out in *S v Francis*[1], where Smalberger JA held that it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's

evaluation of oral testimony. The magistrate was critical of Shezi and described the appellant as a calm and collected lady.

However, even though she was critical of Shezi, the magistrate found that there was no reason for her not to accept his testimony.

On the totality of the evidence given at the trial, there is in my view no reason to find any material misdirection on the part of the magistrate with regard to her assessment of the evidence of the two State witnesses. There might have been contradictions and some exaggerations concerning the events that took place on the evening in question. However, those were not material to warrant an interference with the magistrate's findings in that regard.

[29] In my view, the magistrate correctly found that the appellant could not have been content when she discovered Shezi with Mcube in the apartment. In any event, on the appellant's own version, the appellant was hurt when she found Mcube sitting in bed and under the linen, which the appellant bought. The appellant was upset, understandably so.

[30] Having said that, that does not suggest that her frustration and reaction to what she had discovered were planned. It is clear that there was an altercation that took place after Shezi was unable to step outside to talk to the appellant, following Mcube's disallowing him from doing. Such altercation was, in my view, a spontaneous and on the spur of the moment. Nevertheless, no matter how angry and frustrated she was, that did not justify the conduct of the appellant in assaulting Mcube.

- [31] Having regard to what is stated above and the evidence of Mcube and Shezi, the magistrate was correct in her finding that the appellant assaulted Mcube. The appellant was unable to offer any explanation for the injuries sustained by Mcube as recorded in exhibit A. The magistrate correctly relied on the report and found that the appellant caused the injuries sustained by Mcube during the altercation at the apartment.
- [32] The issue which now requires determination is whether or not the extent of the injuries on Mcube as described by Dr Bhana in the report warrant a conviction for the offence for which the appellant was charged. In the report, it is stated that Mcube sustained soft tissue injuries on the right of her neck, on the cheek below her right eye, and a bruise on the index finger. No fractures were found. Dr Bhana recorded that Mcube had also complained of a headache and was distressed. More importantly, Dr Bhana did not record any bruising on any of the body sketches contained in his report.
- [33] I pause to mention that, to the extent that there might have been issues which required clarity from Dr Bhana, none of the parties deemed necessary to call Dr Bhana to testify on his report. The magistrate thus had no choice but to accept the report as is.
- [34] Going back to the report, the injuries listed under the heading 'general examination' do not appear to be of a serious nature. To sustain a conviction for the offence for which the appellant was charged, "the injuries must be of a serious character than the casual and comparatively insignificant and superficial injuries, which are to be expected in a case of common assault".[2]
- [35] On a charge for the offence of assault with intent to do grievous bodily harm, one of the key factors requiring consideration is the intention on the part of the offender to inflict harm on the complainant.
- [36] In *S v Mbelu*[3], Milner J dealt with factors to determine whether the more serious offence of assault with intent to do grievous bodily harm had been committed, as distinguished from the offence of common assault as follows:

"Where the court is confronted with the problem whether it should draw the inference that an assault was accompanied by this particular intent it usually has to rely on four main factors which provide the index to the accused's state of mind. I am not suggesting that these four factors are exhaustive; I do suggest that in the large majority of cases these are the factors, which provide a guide to the accused's state of mind. They are, first, the nature of the weapon or instrument used; secondly, the degree of force used by the accused in wielding that instrument or weapon; thirdly, the situation on the body where the assault was directed and fourthly the injuries actually sustained by the victim of the assault."

- [37] The factors listed above were also discussed in *S v Dipholo*[4], where the court held as follows:

“On a charge of assault with intent to do grievous bodily harm, the question arises whether the state has proved beyond reasonable doubt that the accused had the required intent (to do grievous bodily harm). That is a question of fact which must be decided on the basis, inter alia, of the following factors: (a) The nature of the weapon used and in what manner it was used; (b) The degree of force used and how such force was used; (c) The part of the body aimed at; and (d) the nature of the injury, if any, which was sustained”.

[38] In his book, *Criminal Law*, the learned author CR Snyman, states that:

“All the requirements for an assault set out above apply to this crime, but in addition there must be intent to do grievous bodily harm.... It is simply the intention to do such harm that is in question.”[5]

[39] On the facts presented to the Court, there was no evidence that there was an intention on the part of the appellant to cause grievous bodily harm. The injuries listed in the report do not support the offence of assault with intent to do grievous bodily harm and for which the appellant was convicted. In the circumstances, the magistrate misdirected herself on the conviction she made. The appropriate conviction in this case ought to have been that of common assault.

[40] After the magistrate convicted the appellant of the second charge, she sentenced the appellant to a fine of R5000.00 or 5 months' imprisonment both of which were wholly suspended for a period of five

(5) years.

[41] The setting aside of the magistrate's conviction and replacing thereof with a conviction of common assault necessitates an interference with the sentence imposed by the magistrate. In this regard, when dealing with the question whether the sentence imposed by trial court was appropriate, Mthiyane JA in *Director of Public Prosecutions, Kwazulu-Natal v P* [6] at Para 10, held as follows:

“+The test for interference by an appeal Court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate. Even in the absence of misdirection, it would still be competent for this Court to interfere if it were satisfied that the trial court had not exercised its discretion reasonably and imposed a sentence which was not appropriate.”

[42] The position enunciated above was reaffirmed by the Constitutional Court in *S v Bogaards*[7] at paragraph 41 in which Khampempe J held as follows:

“Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another” (footnotes omitted) (underlining my emphasis)).

[43] Given the change of the conviction, the legal principles set out above as well as the interest of justice, I take a view that it will serve no useful purpose to refer the matter to the magistrate for sentencing as all the facts, which the magistrate should have considered are on record.

[44] Having considered the offence committed, the appellant's personal circumstances as well as the interests of society, I am of the view that a fine of R1000.00 (one thousand rand) wholly suspended for 1 (one) year would be appropriate.

[45] In the result, the following order is made:

The order of the magistrate is set aside and replaced with the following:

“(a) The accused is found guilty and convicted of common assault;

(b) The accused is sentenced to a fine of R1000,00, wholly suspended for a period of 1 (one) year, on condition that the accused is not convicted of a similar offence during the period of the suspension”.

M RUSA

ACTING JUDGE

I agree

J EKSTEEN

JUDGE OF THE HIGH COURT

GRAHAMSTOWN

Counsel for the Appellant: Mr

S Skade

Instructed by: Skade

Attorney Inc.

16 Gasson Marina Vista

Quigney

EAST LONDON

For the Respondent:

Adv. L W Sinclair

Instructed by: Director

of Public Prosecutions

High Street

Date Heard: 14

August 2019

Judgment

Delivered: 16

August 2019

- [1] 1991 (1) SACR 198 (A) at 204c-e. See also R v Dhlumayo & another 1948 (2) SA 677 (A) at 705-706; S v Hadebe & others 1998 (1) SACR 422 (SCA) at 426a-c.
- [2] S v Mbelu 1966 1 PH H176 (N)
- [3] See supra note 2 and also S v Mdau 2001 (1) SACR 625 (W).
- [4] 1983 (4) SA 757 (T) at 760E-G. See also S v Mapasa 1972 (1) SA 524 (E) and S v Zwezwe 2006 (2) SACR 599(N) at 603b-d.
- [5] CR Snyman, "Criminal Law" 5th edition at page 461 - 462
- [6] 2006 (1) SACR 243 (SCA)
- [7] S v Bogaards 2013 (1) SACR 1 (CC) at para 41. See also S v Malgas 2001 (1) SACR 469 (SCA) at para 12 and S v Hewitt 2017 (1) SACR 309 (SCA) at para 8.

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