

SOUTH AFRICA / JUDGMENT

S v Mbanjwa (CA&R 41/07) [2008] ZAECHC 192 (17 November 2008)

[2008] ZAECHC 192**COURT**

High Courts - Eastern Cape

BEFORE

Jansen, Goosen

CASE / FILE NUMBER

CA&R 41/07

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CAPE LOCAL DIVISION JUDGMENT**

PARTIES: MBANJWA V THE STATE NOT REPORTABLE
Case
Number: CA&R
41/07
High

Court: EASTERN CAPE DIVISION
DATE
HEARD: 22
OCTOBER 2008
DATE
DELIVERED: 17
NOVEMBER 2008

JUDGE(S): JANSEN
J & GOOSEN AJ
LEGAL
REPRESENTATIVES –

Appearances: for
the Applicant(s): ADV
KOEKEMOER
for
the Respondent(s): ADV
D ROBINSON
Instructing

attorneys:	Applicant(s): WHEELDON RUSHMERE & NOACH INC
Respondent(s):	NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS CASE INFORMATION - Nature
of proceedings:	Key
Words:	
Summary:	IN THE HIGH COURT OF SOUTH AFRICA EASTERN CAPE DIVISION CASE NO CA41/2007 In
the matter between:	SUBUSISO CAPHIAS MBANJWA Appellant and THE STATE Respondent

JUDGEMENT

GOOSEN A J

The Appellant was convicted on a charge of assault and of crimen injuria by a magistrate sitting in Queenstown. The Appellant was sentenced to a fine of R6 000.00 or in default of payment thereof to undergo a period of eight months imprisonment. For the purposes of sentence the charges were treated as one.

Leave to appeal was granted and the appeal was prosecuted to this Court upon several grounds. On 6 February 2008 the matter came before this Court, with Erasmus J and Van der Bijl A J presiding. On that occasion the appeal was postponed sine die and the Appellant was granted leave to amend his grounds of appeal and to take such further steps as the Appellant might deem necessary in the prosecution of the appeal.

Subsequent hereto an amended Notice of Appeal was filed in which an additional ground was introduced to the effect that the magistrate had erred by not taking the necessary steps in terms of Section 186 of the Criminal Procedure Act (Act 51 of 1977) to have two witnesses, namely Martin Tafeni and Xolani Khalane subpoenaed to testify. It was contended that the evidence of the said witnesses was essential to the just decision of the case in that it had emerged during the course of the trial that the evidence of the two witnesses would in all probability directly conflict with evidence of the state witnesses in material respects.

On the basis hereof the magistrate's failure to call the witnesses, so it was argued, constituted an irregularity.

When the appeal was prosecuted before us on 21 October 2008, the principal argument advanced by the Appellant, on whose behalf Mr Koekemoer appeared, focused on this latter ground of appeal.

Although the other grounds of appeal were not abandoned, no great reliance was placed upon them in argument.

The essence of the argument advanced by Mr Koekemoer was that the record discloses that statements made by two witnesses, Tafeni and Khalane had been made available to the defence during the course of the trial.

During cross-examination of the complainant certain aspects of each of the statements of Tafeni and Khalane had been put to the complainant.

These allegations as put to the complainant conflicted directly with the version of the complainant. Neither the State nor the defence had called these witnesses to testify.

On this basis, so it was argued, this evidence, as would in all probability be given by the two witnesses, was essential to the just decision of the case and accordingly in the

light of the fact that the magistrate had failed to give consideration to and/or had failed to cause these witnesses to be

subpoenaed, an irregularity emerged from the record.

Therefore, it was argued, reliance could be placed upon this irregularity as a ground of appeal and furthermore that in the event that this court finds that the failure to call the witnesses indeed constitutes an irregularity, the appeal should be upheld and both the conviction and sentence set aside and the matter remitted back to the magistrate under a direction to the magistrate that the two witnesses be called in order to testify at a continuation of the trial of the Appellant.

The facts (most of which were common cause between the parties), are briefly as follows:

The Appellant is a detective in the South African Police Services. On 9 November 2004 he attended at the home of Sisiwe Dyonase in the Nkwanca informal settlement near Queenstown. Whilst seated in his motor vehicle outside of the complainants' premises he interviewed one Mbasa Gini as part of an investigation that he was then conducting.

After interviewing Gini the Appellant arranged that Bonke Bolani, the complainant's husband, be called so that he too could be interviewed. Bolani came to the Appellant's motor vehicle and the two of them were in conversation.

At that stage the complainant came out of the house and thereafter an altercation ensued between the complainant and the Appellant which resulted in him getting out of his vehicle and following the complainant into the house.

There a struggle ensued as the Appellant attempted to effect an arrest of the complainant. During this struggle the complainant was assaulted and thereafter physically dragged out of the house by the Appellant.

The complainant was then placed in the motor vehicle and taken to the police station under arrest.

When the complainant appeared in court the charges which were to be preferred against her, namely for interfering with the police in the exercise of their duties, were withdrawn and the complainant was released.

The complainant laid a charge of assault and crimen injuria against the Appellant and it is these proceedings in respect of which the appeal is prosecuted.

The complainant's version in respect of the altercation, assault and arrest was essentially as follows:

She was inside her house preparing food when the Appellant had arrived outside of her house. Her husband was called to speak to the police. She came out of her house in order to inquire what was happening.

She spoke to her husband and pointed out to him that had he not got involved in a certain incident prior to that he would not now be the subject of police inquiries. She was remonstrating with her husband.

At that stage the Appellant addressed himself to her and called her a bitch and furthermore insulted her by referring to her mother's private parts.

The complainant responded by saying that the Appellant would not like it if she swore at him.

The Appellant then alighted from his motor vehicle and came into the yard where the complainant was standing.

According to the complainant the Appellant slapped her twice in the face at which point she retreated into the house. The Appellant followed her into the house and there arrested her.

She did not co-operate with him when he was effecting the arrest and he called a certain Xolani Khalane, apparently a community volunteer who was accompanying him and was then sitting in the police vehicle, to assist him in arresting the complainant.

When the complainant made to physically drag her out of the house she resisted saying that she would walk of her own accord.

This she did and she was then taken to the police station and placed under arrest.

The principal dispute between the complainant's version and that of the Appellant concerns the circumstances that gave rise to the arrest.

According to the Appellant the complainant came out of the house whilst he was talking to the complainant's husband and she was abusive towards him swearing at him and making it impossible for him to conduct his inquiries with the complainant's husband.

At that point the Appellant warned her that if she should persist with her conduct he would arrest her for interfering with police duties. The complainant persisted in her behaviour.

The Appellant then alighted from his vehicle and approached the complainant in order to arrest her. He told her that he was placing her under arrest at which point the complainant assaulted him by slapping him and then retreated into the house.

He followed her and again informed her in the house that he was arresting her and sought to physically effect the arrest. In the course of doing so he slapped her on her shoulder once and, since she was resisting arrest, dragged her out of the house.

Once out of the house she walked to the police vehicle on her own and was thereafter taken to the police station. He denied having at any stage sworn at or insulted her and furthermore denied the assault as alleged by the complainant.

The two portions of the record in which the versions of the two witnesses are set out read as follows. Firstly in respect of the witness Tafeni:

"And it's your evidence that he just assaulted you and slapped you in the house without any reason? -- Yes, Your Worship, it's my evidence.

And why would he do that, there are no problems between the two of you? – Your Worship, I don't know. This is what I have told this Court that he must tell the Court what was the reason.

Do you know Martin Tafeni? -- Yes, Your Worship.

Is he your neighbour? – Your Worship, he is residing at R in the location, R section of the location, Your Worship, but he likes to visit at the squatter camp.

Did you see him that day, Martin Tafeni, did you see Martin Tafeni? -- Yes, I saw him that day, Your Worship.

Did you ...(indistinct)? -- Yes, Your Worship, I saw him.

I want to confirm, during the incident he was there? -- Your Worship, I saw Martin when I was taken by force to the motor vehicle.

In terms of my docket statements, police statement A4, Martin amongst others says "I did not hear any words of insults". Would you like to comment on that? – Your Worship, I don't know because I am telling this Court that I saw Martin when I was taken to the vehicle."

Nothing else in relation to Martin Tafeni and the content of his police statement was put to the complainant.

In respect of Xolani Khalane the following emerges from the record:

“And are you saying you were cheeky and angry after the accused assaulted you? -- That’s correct.

And is it your evidence that you were cheeky and angry before he dragged you? -- I was angry at that time when he was dragging me, because already he had assaulted me.

So you were cheeky and angry before the friend came and helped? – That is correct. And after his friend had arrived and also another ... (inaudible).

So again I submit to you that you resisted the arrest on your own version. – I was not resisting, Your Worship. As I mentioned before I was cheeky, Your Worship, ... (inaudible).

COURT: Did you say and angry? – Yes, Your Worship.

MR SHAW: Sorry, Your Worship, I didn’t hear your question?

COURT: I was asking didn’t she say she was also angry because she had been assaulted.

MR SHAW: Did you have any problems with this friend that came and assisted the accused? -- No, Your Worship.

My understanding is that the accused was the only police official at the scene, would you agree with me? – Your Worship, I would say that I agree with you, because I ... (inaudible).

In other words he wasn’t a police official?

INTERPRETER: Come again?

MR SHAW: In other words the friend was not a police official? -- No, Your Worship.

Do you know this friend’s name? -- He said that his name is Xolani.

There is a police statement under the name of Xolani Khalane, A7. And I read amongst other paragraph seven of Xolani’s statement, sorry paragraph two of Xolani’s statement. And he refers and I am stating in my words, the complainant, he refers to the accused as the complainant. The complainant was busy taking statements from the witness when the suspect started to swear at the complainant. My understanding is that Xolani says you were swearing at the accused? -- What would be the reasons for me to swear at the accused.

No ma’am, that I can’t answer you. I am just saying to you there is another police statement that says you were the person swearing at the accused. -- Your Worship, I don’t know why I would swear at the accused, because I wasn’t speaking to the accused. Even the accused did not come to me, Your Worship.

Are you denying that you swore at the accused? -- I am denying it totally, Your Worship.

This Xolani goes further and says, she, and I am assuming it is you, then started to assault the complainant being the accused. That you assaulted the accused – (inaudible).

COURT: Mrs Dyonase, just for the point of correction, when you are in the witness box you answer questions, you don't ask questions. Mr Shaw probably put the version of the accused, and maybe other witnesses, but you must respond as to what you know about that.

MR SHAW: Xolani's statement, police statement is saying that you assaulted the accused. – Your Worship, I would not be able to assault another person, but he swore at me, Your Worship, and he is a police official, and I am not too sure what happened ...

(indistinct).

Xolani further alleges that when the complainant being the accused, tried to arrest her, being you, she, being you, refused. Would you like to comment on that? -- Your Worship, as I have already mentioned in this Court ... (indistinct) I was cheeky, Your Worship, and I was also angry.

So did you resist? -- I did not resist.”

Later, Mr Shaw, who appeared for the Appellant at the trial says the following:

“Your Worship, there is perhaps one further comment. The accused denies that anyone assisted him in arresting you? -- There is a person, Your Worship, who assisted him, it is Xolani.”

Section 186 of the Criminal Procedure Act provides that:

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person at a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.

The first part of this section is discretionary. It is a wide discretion which, naturally, must be exercised judicially. (See *R v Gani* 1958(1) SA 102 (A)).

Where however it appears that the evidence of a witness is essential to the just decision of the case, the discretionary power to subpoena a witness becomes a duty which must be exercised by the presiding officer. (See in this regard *R v Hepworth* 1928 AD 265.)

It is incumbent on the trial court to decide whether the evidence is essential or not. If it appears that the evidence is in fact essential to the just decision of the case then a failure to call a witness constitutes an irregularity. See in this regard *S v B & Another* 1980(2) SA 946 (A); *R v Dlakavu* 1948(3) SA 1202 (E); *R v Lesabe* 1960(4) SA 217 (T). See also *Director of Public Prosecutions, Transvaal v Mtshweni* 2007(2) SACR 217 (SCA).

The term “essential to the just decision of the case” means that the court, upon an assessment of the evidence before it, must consider that unless it hears the evidence of a particular witness it is bound to conclude that justice will not be done in the end result. If the statement of the proposed witness is not unequivocal or is not specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value. (*S v Gabaatholwe and Another* 2003(1) SACR 313 (SCA) at par. 6)

A court of appeal will only interfere with the exercise of the discretion on very limited grounds (see Gabaatlholwe (*supra*) at par 8). If however it is contended *ex post facto* that a witness was objectively essential to the just decision of the case and it is apparent that the trial court did not apply its mind to the matter (because it was not requested to do so) then in that event a court of appeal would be justified in interfering if it is satisfied that the witness was indeed essential. (see Gabaatlholwe at par 8).

That is the situation in this matter. It does not appear from the magistrate's judgment that the question was considered by the magistrate. It is common cause that he was not requested to consider the matter and it is apparent that the issue is one which has arisen *ex post facto*. It was conceded by Mr Koekemoer that the two witnesses were available to the defence. There is however no explanation as to why they were not called.

In the case of the witness Tafeni, his statement can hardly be described as specific to a relevant issue. The thrust of his evidence appears to be that he did not hear any insults being uttered (by whom is not stated). He does not state when he was on the scene, where he was, whether he could hear anything at all, and what if anything he observed of the events of that day. The complainant conceded that Tafeni was on the scene at the stage that she was being taken to the vehicle and was already under arrest. It is

common cause that at that stage no insults were being traded, the event was all but over.

In my view Tafeni's evidence does not contradict the complainant's version nor does it advance that of the appellant. I am accordingly not satisfied that the evidence can be described as essential to the just decision of the case.

As for the statement of Khalane, at face value it appears to provide corroboration for the version of the appellant. The test however is not that the evidence of the witness should be of some value; it must be essential to the just decision of the case. This requires that it should be more than merely of potential value. It should be of such a character that without the evidence an injustice will follow. A court considering the evidence which can be tendered should be persuaded that unless the evidence is received it is bound to conclude that justice will not be done in the end result. I do not consider that the evidence of Khalane is such that the failure to receive it will result in an injustice. His evidence is not the only evidence available in relation to the events described. On the contrary, the evidence of both the complainant and her husband was led by the prosecution and the appellant testified in his defence.

Nor can I ignore the fact that the statements of both Tafeni and Khalane were available to the appellant's legal representatives throughout the trial. Indeed, in presenting the appellant's version to the state witnesses under cross-examination, reliance was placed on the

version as set out in these two statements. These witnesses were not called by the defence and there is no explanation on the record as to why they were not called.

Mr Shaw, who appeared at the trial on behalf of the appellant, relied heavily on the fact that these witnesses were not called by the prosecution, seeking to persuade the magistrate to draw an adverse inference in this regard. Although the magistrate's judgment does not address the issue, an adverse inference was quite properly not drawn.

Whilst a trial court must ensure that justice is done and to this end is obliged in certain circumstances to ensure that essential evidence is placed before it, its function is not to conduct the litigation on behalf of the parties. Where a witness statement is relied upon by a party and that witness is available to testify, a court will be slow to cause such witness to be subpoenaed in the event that the party elects not to call the witness. It will of course only do so if it is convinced that the evidence is essential for the proper and just decision of the matter.

In this instance the evidence of Tafeni and Khalane was not essential to the just decision of the matter. In the result the failure to subpoena the witnesses in terms of section 186 of the Act does not constitute an irregularity.

I turn now to deal with the other grounds upon which the appeal was prosecuted. These were broadly based on two grounds. Firstly, that the magistrate erred in accepting the evidence of the complainant based on the probabilities of the matter, and secondly that the magistrate erred in finding that on the complainant's own version she had committed an offence entitling the appellant to arrest her.

The latter ground is easily disposed of. On the complainant's version she was addressing herself to her husband and not to the appellant. At that stage the appellant swore at and insulted her. When she responded to him he alighted from the vehicle and approached her. She turned and went into the house. There the appellant grabbed hold of her and assaulted her. He then sought to arrest her which she resisted until she was dragged out of the house. On this version there is no basis to find that complainant committed any offence for which the appellant was entitled to arrest. It is also hardly surprising that an individual would put up some resistance when being assaulted in the manner described by the complainant. There is therefore no basis to find that the magistrate erred by not finding that the arrest was justified in the circumstances.

It is trite law that an appeal court will not lightly interfere with a trial court's findings on credibility. The magistrate was steeped in the trial and was best placed to assess the veracity of the evidence tendered by the witnesses. It was suggested in argument that the sequence of events described by the complainant was improbable having regard to the fact that the appellant is a police officer who was conducting his investigations. There is in my view nothing inherently improbable in the version. The complainant was clearly upset about the fact that the police were making enquiries of her husband. It was this that led her to berate him for getting involved with the events that resulted in the police enquiries. When the appellant insulted her she responded and from there the scene deteriorated in the manner described by the complainant.

I cannot find that, in assessing the credibility of the witnesses and in weighing the probabilities, the magistrate erred or misdirected himself. It follows therefore that the appeal against the conviction cannot succeed.

In regard to sentence it was argued that this court should nevertheless interfere with the sentence imposed on the basis that it is shockingly inappropriate having regard to the circumstances in which the offence was committed and the personal circumstances of the appellant. It is of course well established that an appeal court will not lightly interfere with a trial court's discretionary imposition of sentence.

The appellant is a police officer who was convicted of crimen injuria and assault, perpetrated upon a member of the public. The offences were committed whilst the appellant was on duty. In considering the sentence to impose the magistrate treated the two offences as one for purposes of sentence and imposed a fine with imprisonment as an alternative. In my view the sentence does not induce a sense of shock which would lead me to conclude that it is inappropriate or disproportionate. An assault is a serious infringement of the victim's right to personal security and dignity. The offences

deserve an appropriate sentence. In my view the sentence imposed is appropriate. It follows therefore that the appeal against sentence cannot succeed.

I would therefore propose the following order: The appeal is dismissed.

G. GOOSEN

(ACTING JUDGE OF THE HIGH COURT)

I concur. The appeal is dismissed.

J C H JANSEN

(JUDGE OF THE HIGH COURT)

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