A180/2005 /Mpp

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 07/02/2005

NOT REPORTABLE

Magistrate

Naphuno

Case No : B396/2003

Supreme Court Ref No : M 5611

THE STATE vs MPHASHA JOSEPH MATHULE

REVIEW JUDGMENT

JORDAAN J

The accused was charged in the magistrate's court at Naphuno with the crime of assault. He was convicted as charged and sentenced to R4000 or 2 years imprisonment.

The incident took place in a Bar Lounge. It is not in issue that the accused assaulted the complainant, but is in issue whether he acted in self-defence.

The complainant was the only witness for the state, and the accused the only witness for the defence .

The accused indicated that he wanted to call witnesses to corroborate his version. He was given the opportunity to do so but his witness failed to attend court on 16 November 2004 .

When the matter came before Claasen J he directed the following queries to the magistrate:

" Moes die hof nie

2.1 die beskuldigde 'n verdere geleentheid gegee het om sy getuie te vind nie?

2.2 die vriend Eddie of die klaer se ouers geroep het nie?"

The magistrate replied that in his view the accused was given enough time to call his witness and that he did not deem it necessary to call the witnesses mentioned in 2.2 *supra.*

The matter was referred to the office of the Director of Public Prosecutions. They *inter alia* remark as follows:

"The learned magistrate correctly informed the accused of his right to call witnesses in his defence *(Vide:* Record: p. 15 1. 7-10). The matter was postponed on 4 November 2004 for the defence witness, Mr Alfred Malatjie to the 8 November 2004 *(Vide:* Record: p. 21 1. 5 to p. 22 1. 15). The matter

only resumed on 16 November 2004 whereupon the defence witness was absent *(Vide:* Record: p. 22 1. 16). The accused had requested that Mr Alfred Malatjie be present at court on 16 November 2004 and the latter had agreed ( *Vide:* Record: p. 22 1. 20 to p. 23 1. 15).

The accused was given a relatively short period of time to secure the attendance of his witness. This was the first occasion that this defence witness failed to appear in court. Since the trial court failed to establish from the accused, the relevance of Mr Malatjie's evidence to his case or to establish if Mr Malatjie and the person referred to as "Eddie" were the same person or related to each other, it is uncertain what impact the outstanding defence witness testimony would have had on the outcome of the trial. This notwithstanding, it is submitted that the learned magistrate erred in not according the accused a further opportunity to secure the attendance of his witness to court. This failure by trial court is contrary to the rules of natural justice, in particular, the *audi alterarn partern* rule and renders the trial irregular and unfair.

Sections 186, 167 and 274(1) of the Criminal Procedure Act of 1977, as amended, make provision for a court to call witnesses in circumstances where, in its discretion, the evidence would be essential to the case. Eddie's evidence pertaining to his participation in the assault as well as the evidence of the complainant's parents would have both served either to credit or discredit the accused's version of events. Such testimony would thus have been crucial in determining a just decision in this case. While the learned

magistrate correctly stated in his response that the complainant's parents were not present at the scene, he erred in his statement that Eddie was conclusively not at the scene. The learned magistrate thus erred in his estimation of the relevance of the testimony of both Eddie and the complainant's parents and consequently failed to apply the discretion accorded to him by the Act to call witnesses. In light of the fact that the accused was not represented by a legal representative as well as the possible impact that the omitted testimony may have had on a just outcome of the case, it is submitted that this omission by the learned magistrate has the consequence that it cannot be said that justice had been effected *in casu.*

Furthermore, the accused was charged with the offence of assault common but the learned magistrate tendered a verdict of guilty for assault with the intent to do grievous bodily harm. It is submitted that the latter is not a competent verdict of the former and the verdict is thus incorrect (Vide: section 267 Criminal Procedure Act 51 of 1977, as amended).

It is submitted that both the verdict and sentence of the learned magistrate be set aside and that the matter commence *de novo* before a new magistrate."

I agree. The conviction and sentence is set aside. The matter is remitted to the magistrates court so that the matter be dealt with *de novo* by another magistrate.

E. Jordaan

JUDGE OF THE HIGH COURT

I agree

L O BOSIELO
JUDGE OF THE HIGH COURT