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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

CASE NO: A2074/03

DATE: 2006-12-06

In the matter between

JOHANNES EZEKIEL SIBANYONI Appellant

and

THE STATE Respondent

JUDGMENT

ISMAIL, J:

[1] The appellant was charged in the district court in Pretoria of the crime of assault with the intent to commit grievous bodily harm. The alleged offence was perpetrated on 7 August 1998. He was convicted of the offence and sentenced for three years imprisonment, 18 months of which was suspended for a period of five years on condition that the appellant was not convicted of assault or assault with the intent to commit grievous bodily harm during the period of suspension.

[2] The appellant appeals to this court against both the conviction and sentence imposed by the court *a quo*.

[3] On 9 March 2001 the sentence was imposed. An application seeking leave to appeal, as well as bail pending appeal was successfully launched on 12 March 2001.

HISTORY RELATING TO DELAY IN APPEAL

[4] The prosecution of the appeal has taken four years and nine months since the appellant was convicted. The primary reason for the delay was that the appellant, who was a member of the trade union NEHAVU, who had undertaken to underwrite the appellant's legal cost for the appeal, had experienced financial difficulties in paying the attorneys. This caused a delay in obtaining the transcript of the proceedings timeously and concomitantly the advancement of the appeal. Furthermore the record was incomplete in that Dr Kantina Venter's evidence was not transcribed.

[5] The matter presented itself before us on 24 August 2006. We enquired from both counsel for the appellant as well as the respondent whether the appeal could proceed in the absence of Dr Venter's evidence in view of the trial court's reference to her evidence in its judgment. Both counsel agreed that the matter could proceed without the missing evidence.

[6] It was argued that the matter be postponed to 11 September 2006 and the parties agreed upon a timetable whereby they would file their additional heads.

[7] The matter could not proceed on 11 September 2006 as I was involved

in an urgent full bench appeal relating to an abduction matter in terms of the Hague convention. I informed all the parties prior to 11 September of the dilemma I faced and it was agreed that the matter would be argued on 6 December 2006.

APPEAL

[8] Mr Mokoena appearing on behalf of the appellant, in his additional written submissions, relied on two grounds of appeal in this matter namely –

1. "That as result of the honourable magistrate's conduct in the court *a quo* when cross-examining the accused and his witnesses, and unduly interfering during the criminal trial, in a manner that let the appellant and his witnesses be intimidated that resulted in the trial not being fair and such conduct was contrary to the provisions of section 35 of the Constitution of the Republic of South Africa.
2. That the honourable magistrate in the court *a quo* exhibited a conduct that was clearly biased against the appellant and should have recused himself when application for his recusal was initiated at the instance of the appellant."

[9] In respondent's response to Mr Mokoena's further written submissions which were filed in terms of the agreement between the parties at the hearing on 21 August 2006, it stated:

"The appeal should be struck off the roll on the following grounds:

1. The amended notice does not appear to have been served on the magistrate to give him an opportunity of

furnishing his additional reasons for the judgment. The appellant refers to the conduct of the magistrate during the conduct of the trial. This aspect appears in the amended notice of appeal.

2. Ad paragraph 12 of the appellant's further written submissions there is a refusal of the magistrate to recuse himself. According to the transcribers the application by Mr Maboya (the defence attorney) to take the refusal by the magistrate to revise (sic) himself on review during the judgment is not recorded on any of the cassettes. This aspect has not been transcribed.

[10] The respondent's heads wherein the point raised above is mentioned, was only filed with the Registrar of this court on 17 November 2005, that is some nine weeks after it was due. (The agreed date having been the 8th of September 2006.) Be that as it may, we decided that the appeal should be heard as the point taken by the respondent had no merit since the magistrate in his judgment at pages 222 to 229 dealt with the question of bias and the question of his recusal and referred to several authorities dealing with this aspect. Today Ms Sono arguing the appeal before us, submitted that she was no longer proceeding with and that she was abandoning the ground raised in her heads of argument. These aspects having been considered by the trial court, permits us, in our view, to hear the appeal which has already been delayed for almost five years.

[11] The issue in this matter revolves around the factual dispute whether the appellant, a member of the Trade Union NEHAVU, was protesting against the Department of Education and was handing a memorandum at the offices of the department, had assaulted Mrs Oosthuizen in her office on the 4th floor of the building. Mrs Oosthuizen stated that the appellant was in the forefront in the protest in that he and others entered her office and that he assaulted her. She stated:

"Toe hulle by my kantoor kom het mnr Sibanyoni aan die voorpunt van my kantoor gestorm. Die ander optoggangers het hom gevolg."

According to her the appellant climbed onto her desk and started dancing on it. He then started kicking at her whilst she was seated on her chair and she moved her chair backwards in order to avert the attack on her.

[12] The appellant submitted that the magistrate's conduct during the trial left the appellant and his witnesses with the perception that he was biased and for that reason the appellant did not receive a fair trial. In *S v Rall* 1982 (1) SA 828 (AD) it was stated:

"Any serious transgression of these limitations will in general constitute an irregularity in the proceedings. Whether or not the Appellate Division will then intervene to grant appropriate relief in the instance of the accused depends upon whether or not the irregularity has resulted in a failure of justice. That in turn depends on whether or not the irregularity prejudice the accused.

or possibly whether or not the Appellate Division's intervention is required in the interests of public policy."

See also *S v May* 2005 (2) SACR 331 (SCA), and *S v Sikhipa* 2006 (2) SACR 439 at 443 and in particular paragraph 8 thereof.

[13] At page 85 of the record the following extract at lines 22 to 28 appears:

"So I do not understand, are you now accusing your attorney of sucking out of his thumb when he put this to Mrs Oosthuizen, because if you want to do that I will not allow you to do that. Your attorney is a very respectable member of the side bar practising in Pretoria for a long time - ..."

This remark took place whilst the prosecutor was cross-examining the accused. Even if the accused contradicted the instructions he gave to his attorney, the remark is clearly intended to impart to the accused that he is lying. The magistrate does not for a moment pause to think that the attorney may have made a mistake and thereby seek clarification on this aspect.

[14] Further example is the questions posed by the magistrate from pages 119 of the transcript, to pages 122. During the questioning the magistrate endeavoured to show that the reason the group entered Mrs Oosthuizen's office was to intimidate (her) when the answer is no. The next question is, what other purpose could it have been. At page 126 the suggestion from the questions posed are that the complainant suffered those injuries because her doctor and the psychiatrist confirmed the symptoms

and the injuries. At line 26 the following extract appears:

"If it was other members that did this to her, it is difficult why she would nominate you. Don't you agree? – Your worship, according to me and with regard to all the letters and the meetings, on the letters there is my name as the institutional secretary Ezekiel, I am at the meetings and those who do not like the unions they feel bad about it and think that is, by only knowing my name and seeing it that is why she indicated me."

The extract strongly suggest that the magistrate did not believe the appellant's version, hence the question - Don't you agree with me?

[15] Ultimately the complainant was a single witness and the judgment of the magistrate – he stated at page 238, lines 4 to 10:

"Wat hierdie getuie aan betref, selfs al was daar geen stawing vir haar getuienis nie, sal enige geregshof steeds by die korrekte toepassing van die versigtigheidsreël, as gevolg van die kwaliteit van haar getuienis, self gebonde wees tot die aanvaarding van haar getuienis, maar soos dit is, word haar getuienis in die geheel gestaaf bo elk en ieder aspek daarvan deur betroubare, onverbonde en direkte getuienis."

[16] Regarding the incident in Mrs Oosthuizen's office she is a single witness. Her evidence may be corroborated by Schoonraad and the other state witnesses on other peripheral issues, such as the accused was toyi-toying and that the office was disrupted after the event as indicated on the photographs. The witnesses do not corroborate the version that the accused threw a chair or that he

stood on the desk in the office and that he attempted to kick the complainant. On these aspects the complainant is a single witness. In this regard the evidence Macheni Masilela who suggested the accused was not at the forefront of the people in the complainant's office. The trial court rejected the evidence as it was contradictory to that of the accused. Mr Mokoena, in his heads, alluded to various aspects of the evidence in the transcript whereby he submitted that the magistrate cross-examined these witnesses. I do not propose to deal with all of them, save to state that the questions were asked, not with a view to clarifying the evidence but rather to discredit him.

[17] Another aspect of the magistrate's stance in this matter is contained at page 135 of the record at line 20 onwards.

"Now just to make matters straight sir a demonstration would be when people stand together at one place and march, would be when the people as a group walk together from one place to another place, don't you agree? Do you agree? – Let me correct this thing like this , firstly I said that we, that first we were going to sit in. I never mentioned anything about a march. Sir, that fact of the matter indicate the evidence before this court, the undisputed evidence is that a group of people walked from floor to floor, from office to office, the whole group of people. So in fact the facts of this matter, the undisputed facts before this court is that there was a march inside the building from floor to floor, from office to office and that is what you testified yourself

...so get your evidence straight before you tell me "let us get this straight" isn't that what you explained? ..."

Further on it continues:

"Now is that a sit in, walking round the office is a sit in? – We were also doing those sit-ins and also marching inside the building, or do I understand all this evidence before me wrong now? – No, I do not know this English so I cannot agree with the march."

This clearly suggests that the magistrate had already made up his mind that the protestors were in fact staging a march and not a sit in as the witness stated. The magistrate tells the witness that the undisputed evidence during the trial was that it was a march and not a sit in. He engaged in a debate with the witness that it was in fact a march and not a sit in. This demonstrates that the magistrate to that extent entered the arena engaging into a dispute with the witness, showing the witness that the undisputed evidence was what he claimed it to be and not what the witness was stating it to be. Had the magistrate discredited the witness in his judgment without embroiling in this exchange between himself and the witness one could say that the magistrate was acting objectively. However, the magistrate was discrediting the witness whilst he was giving evidence under oath.

[18] The sentence imposed by the court was one of direct imprisonment for a first offender for the crime of assault with the intent to do grievous bodily harm. This was not the type of assault whereby one would impose, in my view, direct

imprisonment. The complainant was not assaulted with a weapon, she was not assaulted in such a manner that she sustained severe injuries. At best her injuries are described as psychological injuries that she suffered from post traumatic stress as a result of people marching into her office. A sentence of imprisonment, if it were to be imposed, should have been suspended on condition that the accused at best would not commit an assault or an assault with the intent for a certain period of time.

[19] Not for a moment did the magistrate think that the group of protestors entering the complainant's offices may have caused her to emit the spray gas thereby causing the group of people to stampede out of the office. In the process of dispersing displacing the furniture in that office, and thereby *ex post facto* the photographs reflecting the disarray in the office.

[20] In *S v Sigwahla* 1967 (4) SA 566 (A) at 568 G Homes JA stated:

"The principle is clear, a judicial officer should ever bear in mind that he is holding a balance between the parties, and that fairness to both sides should be his guiding star and that his impartiality must seen to exist . . ."

See also *Rall's* case *supra 831 to 832* where Trollop AJA stated:

"It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is the fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and

his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused ... The Judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise conveys or is likely to convey the opposite impression."

See also in this regard *S v Roberts* 1999 (2) SACR 434 (SCA) at paragraphs 32 to 34 as well as *S v Shackell* 2001 (2) SACR 185 (SCA).

[21] In my view the trial magistrate did not conduct himself in an impartial manner as is evident from some of the extracts referred to in this judgment. These examples are not exhaustive. It is for this reason that I believe that the appellant did not have a fair trial. Accordingly I will recommend that the conviction and sentence be set aside.

MOTATA, J: I agree and it is so ordered.

DATE OF JUDGMENT: 2006-12-06

ON BEHALF OF APPELLANT: ADV P. MOKOENA

ON BEHALF OF RESPONDENT: ADV M. M. SONO
