

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)**

REPORTABLE

Handed down: 13 July 2010

High Court Ref: 385

Magistrate: LULEKANI

Case no: 500/09

**IN THE MATTER OF:**

**The State**

**versus**

**Obert Mathebula Accused**

**REVIEW JUDGMENT**

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MAKGOBA J

- [1] The accused was convicted in the Magistrate's Court, Lulekani on a charge of assault with intent to do grievous bodily harm. He was sentenced to pay a fine of R2000-00 or to serve 10 months imprisonment which was wholly suspended for a period of 2 years on condition that the accused was not convicted of assault committed during the period of suspension.

[2] When the matter came before me on automatic review I had reservations with regard to the conviction of the accused and requested the trial magistrate to comment on the following issues raised by me:

“2.1 On the version of the complainant, can it be said that the accused intentionally stabbed the complainant with a broken bottle?

2.2 On what basis did the trial court reject the accused’s version that he intended to stab one Lucky but mistakenly injured the complainant?

2.3 For what reason would the accused intentionally stab and injure the complainant, who is his girlfriend, and whom he wanted to rescue from the said Lucky?

2.4 In his reasons for judgment the learned magistrate stated the following on page 46 of the record:

“Foreseeability test comes to the picture here that a reasonable person in the accused capability should have foreseen that he will stab the complainant with a bottle. Then the accused should have exercised that caution by not using the said bottle because Lucky was not next to him, there was the complainant between him and Lucky.

2.5 What form of *mens rea* did the learned Magistrate have in mind in the circumstances? Is it *mens rea* in the form of *dolus* (intent) or *culpa* (negligence) that was applied by the learned magistrate?”

[3] The trial magistrate in his response substantiates the reasoning behind the conviction and submitted that the conviction should stand. The matter was referred to the Director of Public Prosecutions for comments and the latter, correctly in my view, does not support the conviction of the accused.

[4] The complainant, Eunice Ngobeni, who is the accused's girlfriend, testified that on 24 December 2009 the accused found her with a certain boy, Lucky who wanted to assault her and the accused wanted to separate or rescue her from the said boy. At this stage of her evidence and before she could describe how she was assaulted by the accused, the prosecutor indicated to her that she was deviating from her statement she made to the police. She however stated that what she was telling the court is the truth.

[5] The complainant went further to say that the accused did not want to stab her; he wanted to stab Lucky but ended up in stabbing her. She said Lucky wanted to hit her and then the accused aimed at stabbing Lucky but accidentally stabbed her. She stated further that at the time the accused stabbed her Lucky was busy hitting the accused.

[6] When asked by the prosecutor as to how it came that the accused stabbed her she answered by saying that:

“I did not see as to how he stabbed me I just found myself injured.”

She said she was injured on her shoulder, waist and on her left ear.

- [7] Regarding the injuries she sustained the complainant showed to the court and the court observed and recorded a scar on the left ear measuring a centimetre in length and also a half centimetre scar on the back of the ear.

A medical report in the form of form J88 was handed in as an exhibit.

On the report the doctor recorded the following:

“Alleged to have been assaulted. The left ear (Pinna) is torn, 5cm long including the cartilage.”

- [8] It is significant to note from the court record that the court put the following question to the complainant who answered same without any hesitation:

“COURT: Why is the doctor not indicating here that you were stabbed on your shoulder and waist? Did you see that?

ANSWER: I did not know the doctor because he was a male doctor. I did not show him my shoulder and my waist.

COURT: And your doctor and you did not want to show him your waist and your shoulder?

ANSWER: I did not have any problem about my waist and my shoulder. I just wanted him to stitch my ear.”

[9] On the version of the complainant the accused did not stab her intentionally. Throughout her evidence she testified that the accused had tried to actually protect her from another person who wanted to assault her.

The complainant, even if she may have deviated from her statement made to the police, was never discredited or declared recalcitrant by the prosecutor. There is therefore no reason to ignore her evidence. Throughout her testimony the complainant always maintained that the accused at no point deliberately stabbed her.

[10] The trial court rejected the accused's version after applying the "foreseeability test". In terms of this test the magistrate stated that a reasonable person in the capability of the accused should have foreseen that he will stab the complainant with the bottle. The magistrate further noted in his reply to my query that the accused had intention in the form of *dolus indirectus*.

[11] It is trite that *mens rea* in the form of *dolus* (intent) is required for a conviction on the offence of assault. By applying the test of a reasonable person in determining the issue of foreseeability the magistrate had in mind *mens rea* in the form of negligence not *dolus indirectus* as he purports to say.

[12] In *S v Dladla and Others* 1980 (1) SA 1 (A) Jansen JA referred to the case of *S v Mienies* 1978 (4) SA 560 when looking at *dolus* and held that

“...clearly a gradation according to the degree of foreseeability is intended. It is not *post facto* objectively determined foreseeability, but the subjective contemplation of the doer in the commission of the act, whether he regarded the possibility as a faint or strong possibility... with intention one is concerned with what the doer subjectively foresaw; with negligence one is concerned with what, according to an objective standard, he ought to have foreseen.”

[13] In a further response to my queries the learned trial magistrate stated that the evidence of the complainant is to the effect that she was stabbed on her shoulder, waist and had her left ear cut. According to the magistrate the complainant was therefore stabbed several times by the accused while holding the bottle. In the magistrate’s view, it cannot be said that that was done by mistake by the accused.

[14] It is evident from the record of proceedings in the trial court that it was never confirmed that the complainant was indeed stabbed thrice. The complainant did testify that she was stabbed thrice but on the J88 medical report that was presented to court, there was only the injury on the ear noted. If there were two other injuries then the doctor would have surely noted this down on the J88.

[15] In my view there was no intention on the part of the accused when committing this act. He had seen this person attempting to assault his girlfriend and his immediate reaction was to protect her. He attempted to stop the attack on her with the use of a broken bottle. During the scuffle the complainant was injured with the broken bottle on her ear. He did not intend to stab her, neither did he have intention in the form of *dolus indirectus*.

[16] Accordingly the accused in this matter could not have foreseen the result of injuring the complainant; he simply wanted to protect her from an assault using a broken bottle. Therefore, the conviction of the accused on assault with intent to do grievous bodily harm was not in accordance with the law and should be set aside.

[17] I accordingly order that the conviction and sentence be and are hereby  
set aside.

EM MAKGOBA

JUDGE OF HIGH COURT

I agree

B R DU PLESSIS

JUDGE OF THE HIGH COURT