

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

23/6/2016

CASE NO: A283/15

DATE OF HEARING: 30 NOVEMBER 2015

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ✓

23.6.2016

In the matter between:-

THOMAS BALOYI

Appellant

and

THE STATE

Respondent

JUDGMENT

A. INTRODUCTION:-

1. The Appellant was convicted by the Magistrate, Pretoria North of contravening Section 17(a) of the Domestic Violence Act, 116 of 1995. He was sentenced to a fine of R1 200,00 or 4 months imprisonment, which was wholly suspended for 3 years on condition that he is not found guilty of contravening the Domestic Violence Act during his period of suspension.
2. The Appellant now appeals his conviction before this Court of Appeal. The Appellant further sought condonation in respect of the late filing of his appeal. The State did not oppose the condonation application which was granted.

B. BACKGROUND:-

3. The Complainant and the Appellant at the time the said alleged assault took place on Saturday, 25 June 2011, were a couple living in the same home with their children. The incident is alleged to have taken place in the couple's bedroom.

Complainant's version

4. The Complainant testified that on the morning of 25 June 2011, the Appellant returned from church, had a bath and thereafter insulted her in their bedroom. He belittled her by saying that she did not qualify to be in their house and that she was not a deserving wife.
5. He then pulled the blankets off and dragged her forcefully out of their bed. He pushed her, which caused her to fall over the dressing table chair. He then strangled her, kicked her and hit her with his fist, threatening to kill her. Immediately thereafter he left the house.
6. After he left, she then went into their children's bedroom and told them of the assault. Thereafter she went to the clinic for medical help. In cross-examination she testified that she attempted to report this incident to the police the next day. It was further established that the injuries recorded in the J88 mysteriously went missing. Same could not be presented at the trial as evidence.

The Appellant's version

7. The Appellant denies having assaulted the Complainant on the said day. He testified that he went to work after returning from the church on that fateful Saturday morning. He persisted with his version and, on his behalf, the following improbabilities in respect of the Complainant's testimony were pointed out:—

- 7.1 The children did not witness the alleged incident and the testimony of the 12 year old son is not only hearsay but contradicts the Complainant's version in various respects;
- 7.2 The children were asleep in their own room and did not hear any noise;
- 7.3 The Complainant did not sustain any injuries hence no medical record existed on the J88.
8. In argument, counsel for the Appellant submitted that the State failed to prove beyond reasonable doubt that the Complainant was intimidated or assaulted by the Appellant.
9. The Appellant's version was corroborated by the daughter who testified that it was her mother who was the troublemaker in their family.
10. The Trial Court approached the matter in a biased manner. It was not impartial when allowing the parties to adduce their evidence. In other words the Court accepted the evidence of the 12 year old son despite the contradictions therein.

C. **APPEAL:-**

11. On appeal the Appellant's grounds of appeal were the following –

- 11.1 The Complainant was not a credible witness and moreso she was a single witness whose evidence could not be relied upon by virtue of the cautionary rule principle;
- 11.2 There were material contradictions between the testimony of the Complainant and the minor child in that the son testified that the Complainant suffered visible injuries on her eye "*blue eye*" while the Complainant testified that she was merely in pain. On this basis the Court should have found that the Appellant's version was reasonably possibly true, and that the State was unable to prove the assault. The conviction therefore should be set aside;
- 11.3 Furthermore, in argument, it was submitted on behalf of the appellant that the act of assault was a fabrication in that the Complainant was in the process of divorcing the Appellant at the time of the alleged assault. During the time of the proceedings the couple had already been divorced. Complainant clearly had a motive to falsely accuse and implicate the Appellant.

D. ANALYSIS AND FINDINGS:-

12. It is trite law that the evidence of a single witness must, in order to lead to a successful conviction, be clear and satisfactory in every material respect¹.

In *R v Mokoena* 1932 (A) (OPD) 79 at 80 De Villiers JP stated:

"... the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction ... but in my opinion that section should only be relied upon where the evidence of the single witness is clear and satisfactory in every material respect".

13. **Van Zyl J in *Zamani Cele v State* 2010 ZA KZPHC 26** at paragraphs 23 and 24 affirmed the application of a single witness' evidence, but pointed out the dangers on its reliance as well. The Court essentially found that:

Section 208 of the Criminal Procedure Act, 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. However where Section 208 has been satisfied, the cautionary rule, which would require corroboration, helps reduce the risk of a wrong conviction. By corroboration, is meant other evidence which supports the evidence of the single witness and which

¹ *Tofie v The State* (104/14) [2014] ZASCA 159

detracts from the evidence of the accused and renders it less probable upon one or more of the issues in dispute.

Thus satisfaction of the cautionary rule does not *per se* justify the conviction of the accused. The ultimate test is proof beyond reasonable doubt, which depends upon consideration of all the evidence and the degree of safeguarding in the particular circumstances of the case.

14. A Trial Court should be cautious in convicting an accused if there is doubt.

In ***S v Van der Meyden 1999 (1) SACR 447 (W)*** at 448f-g it was held:

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent.'

'There are not separate and independent tests, but the expression of the same test ... In order to convict the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true'.

Thus if at the end of the trial the Court is left in doubt about the guilt of the accused, the accused is entitled to the benefit of the doubt².

15. This Appeal Court having heard counsel and having considered the record is inclined to make a finding that the Trial Court had not considered the single witness evidence with caution.

² ***S v Sauls and Others 1981 (3) SA 172 (W)***

16. It was patently evident that the Complainant's testimony was unsatisfactory and was laced with contradictions if consideration is given to evidence of the defence witness, her minor son.

17. This family has been divided into two factions, namely, the mother and son against the father and daughter. The Trial Court did not take cognisance of why both children have different versions despite being told "*a version*" by their mother. Surely one version is not true.

18. We note certain of the contradictions which were dealt with on appeal namely:

18.1 Did the Complainant sustain a "*blue eye*" as her son testified?
Her testimony makes no reference to such an injury;

18.2 Why did the Complainant and her son testify that she went to the clinic that same morning of 25 June 2011, when in fact it was only established during the trial proceedings that she went to the clinic on 27 June 2011?

18.3 Why is there no documentary proof reflecting the nature of the injuries?

- 18.4 Was she assaulted in the early hours of the morning or at night as the defence witness testified?
- 18.5 Why does the son testify that their mother lifted her T-shirt to show them the marks on her body whilst the Complainant does not testify to this fact;
- 18.6 According to her version the alleged action of the accused in assaulting her would have created some noise. Why did the children not hear it when their room was adjacent to their parents' room?
19. The accused's version, on the other hand, was not contradicted in any way. His daughter mainly testified in respect of the Complainant's irrational and negative behaviour. She denies that the assault took place. However this Court takes cognisance of the fact that she was not an eye witness to the alleged assault.
20. We find that these blatant contradictions in the Complainant's evidence should have alerted the Trial Court to exercise its discretion with caution.

We note her findings:

"Of what transpired in the bedroom between the accused and the complainant we have evidence of a single witness on both sides. I have taken the liberty with necessary caution. After having approached the evidence of the complainant with the necessary caution that she is a single witness, I have found that she is a credible witness".

21. The evidence of the single witness, in my view, is not clear and satisfactory in every material respect. The State's case is contradictory to a point where it can hardly be said that the guilt of the appellant has been proved beyond reasonable doubt. The State failed to discharge its onus.

22. This Court finds that the accused is entitled to be acquitted as his evidence presents a version which evinces that he might be innocent. The Complainant's evidence should have left doubt in the trial Court's mind.

23. In **R v Dhlumayo and Another [1948] 2 ALL SA 566 (A) 1948 (2) SA 677 (AD) at 678 paragraph 8 Greenberg, JA said:**

"8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellant court will only reverse it where it is convinced that it is wrong".

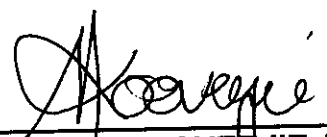
24. Evidence at the disposal of the court demonstrates that the Court *a quo's* conclusion on fact is clearly wrong and should be reversed.

25. **The following order, in the result, is made:**

25.1 The appeal against conviction is upheld.

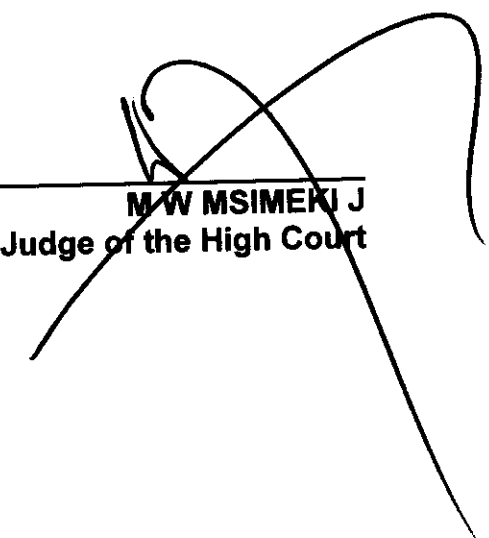
25.2 The conviction and sentence are set aside and replaced by the following order:

"the accused is found not guilty and discharged".



H KOOVERJIE AJ
Acting Judge of the High Court

I concur and it is so ordered



M W MSIMENI J
Judge of the High Court

I agree