IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

CASE NO: 24/16

In the matter between:

THE STATE

and

MIHLALI QHAYISO Accused

REVIEW JUDGMENT

MBENENGE J:

Introduction

[1] The accused appeared before the Magistrate for the District of Mdantsane facing two counts of assault with intent to do grievous bodily harm. The allegation had been that on or about 27 November 2014 and at or near Mdantsane Shopping Mall (the Mall) he unlawfully and intentionally assaulted Sandy Sonwabo (first complainant) and Siyabonga Daki (the second complainant) by stabbing them with a knife. He pleaded not guilty on both counts, raising self-defence as his defence on count 1, and a bare denial to the allegation that he had stabbed the second complainant.

[2] The incident had been preceded by an event during which the accused was allegedly robbed of his cell phone by the complainants on the previous day. Whilst on his way to report the robbery to the police on the following morning the accused came across the complainants.

[3] The complainants were the only witnesses called by the State to testify in pursuit of the charges, with each one of them having testified for his part and to the misfortune that befell the other on the fateful day.

The State case

[4] The first complainant testified that he and the second complainant met up with the accused who did not appear to be in a good mood demanding his cell phone from them. The demand attracted an altercation. The accused started off by poking him on his face. The second complainant tried intervening, to no avail. The first complainant said he became angered and hit the accused with a clenched fist on his face. As he was turning to leave and whilst unsuspecting the accused stabbed him once with a knife on his back. His legs became numb. He subsequently received treatment at Cecilia Makiwane Hospital (the Hospital) where the stab wound was sutured.

[5] According to the first complainant "*medical practitioners*" informed him that he would be permanently confined to a wheelchair and be unable to walk again. The J88 medical report under cover of an affidavit (deposed to in terms of section 212(4) of the Criminal Procedure Act 51 of 1977 (the Act)) was tendered as an exhibit, with the accused's attorney raising no objection thereto. Recorded therein is a stab wound on the back along T8 –T10, 3 inches x ¼ x ¼ and "*weakness [to] both lower limbs due to injury*."

[6] When it was put to the first complainant that the accused got stabbed during a scuffle that ensued for the possession of a knife the first complainant had been carrying, the first complainant said he assumed that the accused "*stabbed himself by the time he was stabbing me at the back as he stabbed me severally, so maybe he managed to stab me by the time I was falling.*"

[7] In his testimony the second complainant confirmed having been in the company of the first complainant. He said he got stabbed by the accused who had been in the company of a certain "*Frans*". He went on to say:

> "So Frans was asking this vetkoek from me, as I was busy sharing this vetkoek with Frans there was an argument, a quick argument behind us between the accused of the complainant. But Frans said that no I must ignore them. As I was just shared this vetkoek with Frans I just noticed the complainant already stabbed by the accused person. (Interpreter: And the witness is pointing at the back). As I was trying to know what is happening the accused person advanced at me with a knife. So as he advanced at me with a knife I tried to retreated as he was not from me and it appeared that as he stabbed the complainant at the back the complainant was turning away from him. And at that stage Sandi, or the complainant was already down at that time, so as I was moving backwards I tried to look for anything so that I cab be able to defend myself. So I managed to pick a stone but the accused has already stabbed me. (Interpreter: And the witness is pointing on the right shoulder). As I picked that stone so the accused did not continue. So the accused turned away and I went to the complainant and the complainant was complainant as his legs cannot move. So I tried to get a car to convey us to the hospital. And we went to the hospital. At the hospital as I was stitched and the complainant was stitched, it is whereby the accused person emerged. And it appeared that he stabbed himself on the thigh…, and he was making a noise saying that you stabbed me, so that the doctors can hers." Sic

The accused's version

[8] The accused testified in his defence. On the day in question he had been on his way to the police station to lay a charge against the two complainants who he said had robbed him of his cell phone on the previous day. He met the complainants by the Mall. They were in the company of three other unknown persons. He enquired about the whereabouts of his cell phone. The complainants denied knowledge of the phone, saying the accused should not take them for granted. They (the complainants) drew knives. The first complainant advanced at him, and as he was about to stab him, he grabbed the knife. A struggle for the possession of the knife ensued. The accused dispossessed the first complainant of the knife and stabbed him on his back. One of the complainants' companions stabbed him on his thigh. He managed to escape and was thereafter conveyed to the Hospital where he received treatment. In short, the accused said he had been confronting the complainants about his phone, they attacked him and he defended himself.

The magistrate's findings

[9] The Magistrate found that the second complainant's evidence came short of being reliable. This resulted in the accused being found not guilty and discharged on count 2.

[10] The version of the accused that he was acting in self-defence was upheld by the Magistrate as having been reasonably and possibly true. The Magistrate was however of the view that the accused had become the "*attacker himself*" by causing more harm to the first complainant whom he stabbed on the spinal cord. Purely on this ground, coupled with the Magistrate's finding that *"[t]the evidence of the accused was not corroborated by any other evidence*", the version of the accused in respect of count 1 was rejected, resulting in the accused being convicted on count 1.

Referral to the Regional Court

[11] The accused thereupon testified in mitigation of sentence, followed by an application made by the accused's attorney that the matter be "*postponed for correctional supervision*." After the Prosecutor had addressed the court on sentence, the Magistrate was of the view that the offence of which the accused had been convicted merited punishment in excess of the jurisdiction of the District Magistrate's Court.

Referral to the High Court

[12] The Regional Magistrate, Mdantsane to whom the matter was referred for sentence, expressed doubt as to whether the proceedings had been in accordance with justice and referred the matter to this court for review in terms of section 116(3)(a) of the Act.[1]

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[1] The section provides:

> "(3)(a) The regional court shall, after considering the record of the proceedings in the magistrate's court, sentence the accused, and the judgment of the magistrate's court shall stand for this purpose and be sufficient for the regional court to pass any

[13] Of paramount importance are the following remarks made by the Regional Magistrate underpinning his view on the impugned proceedings:

> "It turns out that the second complainant apparently lied about being stabbed in the shoulder by the accused and it also resulted in the accused being found not guilty on count 2.
>
> This should lead to some caution in the treatment of the evidence of the two complainants where it was shown that the second complainant's evidence could not be relied on. It should also cast a shadow on the evidence of the first complainant where he supports the version of the second complainant that he (second complainant) was stabbed by the accused.
>
> The accused gave plausible explanation of how he inflicted the wound on the back of the complainant whilst the state witnesses speculate that the accused stabbed himself in the thigh."

[14] A plethora of queries was raised by the Regional Magistrate. Two of those questions, which go to the root of the problem in this matter, are:

> "Page 69 of the record line 13: Did the court convict the accused on his own version or on the version presented by the state witnesses?
>
> Line 17: "*The evidence of the accused was not corroborated by any other evidence*"
>
> The court, rightly so, acquitted the accused on count 2 due to the apparent lie about the second state witness being stabbed in the shoulder by the accused. It is common cause that the accused suffered a stab wound to the thigh. The state witnesses tendered an extremely unlikely submission that accused may have stabbed himself in the thigh. It is correct therefore to state that the evidence of the accused is not supported by any other evidence?" Sic.

> competent sentence: Provided that if the regional magistrate is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice he or she may request the presiding officer in the magistrate's court to provide him or her with the reasons for the conviction and if, after considering such reason, the regional magistrate is satisfied that the proceedings are in accordance with justice he or she may sentence the accused, but if he or she remains of the opinion that the proceedings are not in accordance with justice or that double exists whether the proceedings are in accordance with justice he or she shall, without sentencing the accused, record the reasons for his or her opinion and transmit such reasons and the reasons of the presiding officer of the magistrate's court, together with the record of the proceedings in the magistrate's court, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as possible, lay the same in chambers before a judge who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him or her under section 303."

Those pertinent questions did not immediately attract an answer from the Magistrate.

[15] The views of the Director of Public Prosecutions, Bhisho (DPP) regarding the propriety of the test invoked by the Magistrate were sought. This precautionary step was taken because the possibility of the setting aside of the conviction was looming, and it became prudent to give the State a hearing on the matter. On the authority of *R v Difford* [2] the DPP opined that because the Magistrate believed the version of the accused as having been possibly true she ought to have given the accused the benefit of the doubt especially given that she had acquitted the accused on court 2 on the basis that the complainants had lied in material respects even in relation to count 1.

[16] For the sake of completeness, I invited the Magistrate to comment on the propriety or otherwise of the test she invoked. She eventually conceded, albeit for different reasons,[3] that the accused ought to have been acquitted.[4]

[17] It is clear from a reading of the record and the Magistrate's response to the review query that she accepted the version of the accused (that he had been defending himself) as having been reasonably and possibly true. She was not entitled to reject it on the basis that the accused exceeded the bounds of self-defence. That was never the case of the prosecution in the first place. In any event, the finding flies in the face of the accused's version that he, too, was threatened by the complainants and their companions and received a stab wound to his thigh from one of his captors.

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2 1937 AD 270 at 272.

3 This is how she responded to my query:

> "5. The magistrate had an oversight, she meant to say, "*if the court takes the evidence of the accused as reasonably true that he was defending himself, he exceeded the bounds of self-defence by causing more harm to the complainant by stabbing him on the spinal cord*."
>
> 6. The doctor was not called by the state to testify on the findings appearing on J88. On those grounds the state failed to prove its case beyond reasonable doubt and that warrants the accused acquittal."

4 The test she invoked is dealt with more fully in paragraph [10] above.

[18] The test applicable in criminal trials was stated in *S v Sithole & Others*[5] as follows:

> "There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond the reasonable doubt. The corollary is that an accused is entitled to be acquitted is there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent test, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand, each one being the corollary of the order. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

[19] The Magistrate was therefore wrong in convicting the accused after she had accepted his version as having been reasonably and possibly true. Purely on this basis, the conviction cannot stand.

Unfair trial

[20] There are some areas of concern so adeptly raised by the Regional Magistrate that call for attention. Without those concerns being dealt with, this judgment would be incomplete. The concerns that are pivotal to this judgment may briefly be summarized as follows:

- The interference by the Magistrate in the cross-examination of the accused
- Questioning by the Magistrate after re-examination without the State and defence being thereafter invited to further pose questions on matters arising for the Magistrate's questioning
- Irregular procedure followed in re-opening the State case
- Failure by the Magistrate to allow the accused to show his scar to the Court as proof of having been stabbed

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5 1999(1) SACR 585 (W) AT 590 g-i

These are dealt with, not necessarily in the order in which they have been enumerated, herein below.

[21] The record is revealing concerning how the Magistrate interposed during the cross-examination of the first complainant. The relevant portion of the transcript is lengthy (comprising some 5 pages), but the following questions and answers capture what is of essence:

> "Mr Makeleni I just wish it was taken note of that you are misleading the Court with all now this, because now you are saying that Mabhuti was the one who enquired from the accused. …Yes it was Mabhuti who was asking about the phone.
> Whereas the impression that you gave is that the accused came to you and asked about this phone.
> Court : Mr Makeleni you must know that we are not about the phone here, the charge is assault with intent to do grievous bodily harm; it is not robbery theft of a phone.
> Mr Makeleni: But Your Worship he accused gave evidence – the witness gave evidence about this phone.
> Court : But I am telling you that you must know that the charge here is assault with intent to do grievous bodily harm, it is not about the robbing of a phone or theft of a cell phone.
> Mr Makeleni: Your Worship …..(**intervention**).
> Court : I hear you dwelling much on the issue of a cell phone.
> Mr Makeleni: I know …(**intervention)**.
> Court: Of which this issue of a cell phone is not taking us anywhere.
> Mr Makeleni: I am still going …(**intervention)**.
> Court : And the cause of the fracas is the cell phone, that the accused was demanding cell phone from the [complainant] person and that is all about the cell phone. Then do not dwell much on the issue of a cell phone because we are not about the cell phone here, the charge is assault with intent to do grievous bodily harm …(Xhosa).
> Mr Makeleni: Your Worship I am still going there because the reason there was this …**(intervention)**.
> Court : (Xhosa) …the charge here is assault with intent to do grievous bodily harm.
> Mr Makeleni: And the reason why there was this assault Your Worship is because of the cell phone.
> Court: That is not in dispute that the accused was demanding his cell phone from the witness and this one did not know anything about the cell phone of the accused, he said so. What I am saying, do not dwell much on the issue of a cell phone here, we are not about the cell phone, the charge is assault with intent to do grievous bodily harm. If your cross-examination is disputing that the accused stabbed the complainant you must ask questions on that." Sic.

[22] The questioning by the Magistrate exceeded normal bounds. There are limitations set within which judicial questioning should be confined. In *S v Rall*[6] the

[6] [1982] 1 All SA 258; 1982 (1) SA828 (A) at 831-H832H.

then Appellate Division provided the following useful guidelines which the Magistrate overlooked.

> "(a) A judicial officer should so conduct the trial that his or her open-mindedness, impartiality and fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused (see, for example, *S V Wood* 1964 (3) SA 103 (O) at 105G; *Rondalia Versekeringskorporasie van SA Bpk v Lira* 1971 (2) SA (A) at 589G; *Solomon and another NNO v De Waal* [1972] 2 All SA (1972(1) SA 575 (A) at 580H)
>
> (b) 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 *Greenfield Manufactures (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 570 E—F; *Jones v National Coal Board* [1957] 2 All ER 155 (CA) at 159F)
>
> (c) A Judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him or her from objectively adjudicating upon or appreciating the issues being fought out before him or her by the litigants. As Lord Greene Mr observed in *Yuill v Yuill* [1945] 1 All ER 183 (CA) at 189B, if he or she does indulge in such questioning:
> "…he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. (See, too, the Jones case *supra* at 159C-E) Or, as expressed by WESSELS JA in *Hamman v Moolman* 1968 (4) SA 340 (A) at 344E, the Judge may thereby deny himself –
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> > 'the full advantage usually enjoyed by the trial Judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts…"
>
> (d) A judge should also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or her, unduly influences the quality or nature of his or her replies and thus affect his or her demeanour or impair his or her credibility."

[23] The interference by the Magistrate in the cross-examination conducted by the defence was not justified. A trial can be fair or not fair resultant from how cross-examination is permitted to unfold.[7] The stabbing incident was triggered by the alleged robbery of the accused's cell phone. The Magistrate's interjection on the basis that the case was not about a cell phone but about an assault was unwarranted. In conducting herself the way she did, she descended into the arena and associated

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[7] *Jolingana vs The State* 2016 (2) SACR 404 (ECB) at para [16].

herself with prosecution, thus contaminating the proceedings by not acting in an open-minded and impartial fashion.

[24] After the accused had been cross-examined by the Prosecutor and re-examined by his attorney, the Magistrate subjected him to questioning on various aspects of his version. The relevant portion of the transcript, demonstrative of a yet another unpalatable exchange with the accused, reads:

> "Court: I have got some few questions. You said you were stabbed, who stabbed you? I did not see the real person who stabbed me …(**intervention**). Who stab you?... But they were five, it was Mabhuti, Sandi and the Others.
> That means all of the them they stabbed you on your thigh? Not all of them.
> Who stabbed you?...Let me say it was Mabhuti.
> Or you are not sure?...The reason why I said so it is because he was the one who was behind me. You said others were still coming, at what time they came closer to you?... They came closer by the time they noticed that I am struggling with this young man I am dispossessing the knife. They were carrying knives?... Yes. Do you not think at the time you were struggling, dispossessing the knife from the complainant five people would have killed you?...Yes I am thinking of that but I was in front of the one whom I was struggling with, so I was not facing at them.
> Why did you go to the witnesses and asked them about your phone they took yesterday instead of going to the police to report your phone?... I thought that they will give me back as I did not know the previous day whether they were drunk or not.
> Did they give you?...No. What did you do?... I did nothing, I did not to go and lay charges against them.
> You are here because you stabbed both witnesses and you say they stabbed you but you are not sure who stabbed you, did you lay a charge?...No I did not go and lay a charge. Why, because they laid a charge against you because you stabbed them?...The reason why I did not go and lay a charge, I was told not to lay a charge.
> You were defending yourself against who?...Against Sandi and Mabhuti as I asked them, they insulted me and they advanced at me. Is there any injury you sustained as a result of assault by complainant Sandi?...That is correct, it was wound on the thigh.
> You were stabbed by Sandi?...Not by Sandi. Can you answer the question please? Is there any injury you sustained as a result of assault by Sandi?...Yes.
> Where?...It is this only wound. Do you understand the question?...Can you repeat?"
> Both arms were moving from left to right, from right to left. So as I managed to dispossess him he was falling, (Interpreter: And he showed by bending towards the left side). Did you hear the complainant saying you asked him about your phone and you were poking, continued poking at him and he was fed up of that and he hit you with a fist and you were shocked because you were assaulted by him and he went away and you followed him and you stabbed him at his back?...I heard him when he said that I think he was just fabricating.
> Then why it was not disputed by your attorney in cross-examination?...I did not tell my attorney that.
> If you did not tell your attorney about this, because everything that is asked by your attorney is on instruction, is it not an afterthought what you are saying?...No it is not

> an afterthought. You say your parents said you must not lay a charge against the witnesses, leave them like that they wanted you to make a revenge because you were robbed? I am saying that everyone who is offended by someone is going to the police and lay a charge.
> Mr Makeleni: Your worship I hear the accused is saying that he need to attend to nature Your Worship, he is going to pee on his …(**intervention**).
> Court : (Xhosa) …answer this question." Sic.

[25] These questions were hardly questions to get clarity on certain unclear issues,[8] but constituted cross-examination, with the result that the Magistrate descended into the arena, transgressing the guidelines stipulated in *S v Rall*.[9] In any event, neither the accused's attorney nor the Prosecutor was afforded the opportunity to question the accused in relation to any matters that arose from the accused's answers to the Magistrate's questions.[10]

[26] The Magistrate's lopsided approach once again reared its ugly head when, in the course of the trial, the accused sought to show the Court the stab wound to the thigh he had sustained. That endeavour was thwarted by the Magistrate's interjection:

> "no, no, no, no, no, we do not want to see the inner part of his trousers. If he was stabbed the doors are opened for him to open a case so that he can show the injury and J88 to that case in that court, not in this case."

Given that the accused claimed to have been defending himself, it was important for the Magistrate to allow him to show his scar as proof of having been stabbed to the thigh. The Magistrate's appears to have "*favoured the State in a way that could only lead to the administration of justice falling into disrepute and a perception of bias on her part.*"[11]

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8 *Mokoena v S* [2014] ZAGPJHC 141 (15 May 2014).

9 *Supra*

10 *R v Khumalo* 1947 (4) SA 156 (N); see also *S v Mseleku & Another* 2006 (2) SACR 237 (N) where Nicholson J said the following concerning section 167 of the Criminal Procedure Act:

> "[10] If the Court examines any person in terms of section 167 the prosecutor and the accused may put questions arising from such further questioning by the Court…".

11 Per CJ Claassen J in *S v Du Plessis* 2012 (2) SACR 247 (GSJ) at para [25].

[27] The last issue concerns the procedure that was followed when the second complainant was being recalled to testify. Despite the accused's acquittal on count 2, this issue is dealt with in order to demonstrate how the entire trial served to mock and constitute a travesty of justice. Shortly after the second complainant had been cross-examined and the State had indicated that it had no questions in re-examination, the Magistrate became concerned that no medical report supportive of the stabbing of the second complainant had been handed in. The relevant portion of the transcript reads:

> "Court: Any re-exam?
> Prosecutor : None your Worship.
> Court : Thank you, you may sit down.
> Witness excused
> Prosecutor : That will be the State's case your worship.
> Court : The witness said he went to hospital and stitched there as he was stabbed by the complainant – by the accused.
> Prosecutor: Yes your Worship. There is a (indistinct) however your Worship the J88 Your Worship is ……..(indistinct) is not available your Worship.
> Court : Hmm?
> Prosecutor: The J88 your Worship is not available in the docket.
> Court : Where is the proof that the accused was – the witness was stabbed?
> Prosecutor : But your Worship the J88 your Worship would be that relevant proof your Worship, however it is not within the docket your Worship. IO do not know whether …(indistinct) of postponing the matter in order your Worship to establish – to …(indistinct)
> Court : Where is the proof that the witness was stabbed?
> Prosecutor: Your Worship if I may just consult with the witness.
> Court : Consult on what?...it is not in the docket your Worship .
> Court : Then if there is no J88 why the injuries were not shown to Court?
> Prosecutor: Well your Worship he did point your Worship at where he …(intervention).
> Court: Point where
> Prosecutor : At the shoulder your Worship.
> Court : If I point here can I see now there is an injury here?
> Prosecutor : No Worship
> Court: Did you see the injury?
> Prosecutor : No your Worship, I did not see it.
> Court: If you say he pointed on the shoulder, then did you see injury?
> Prosecutor: No your Worship.
> Court: Where is the proof that the accused – the witness was stabbed?
> Prosecutor: Your Worship if I may then your Worship humbly so your Worship apply that we recall the State witness your Worship so as to establish …(indistinct).
> Court: The State case is not yet closed?
> Prosecutor: (Indistinct)… If I may then call your Worship recall the witness your Worship to the stand.
> Court : Mm
> Siyabonga Diki: Recalled

Further questions by the Prosecutor:
Prosecutor: Apologies your Worship. I had to recall you because now you said that after the attack you together and the complainant went over to the hospital you were observed by medical practitioners. …That is correct.
Yes, and you mentioned that you were treated with the injury that you sustained from the attack?... That is correct.
What sort of treatment did you receive? …As it was a wound, but it was not big, I was stitched.
Dou you still have visible stitches or scars from …(intervention)? …That is correct.
Could you kindly show this Court…(Indistinct).
Court: I cannot see.
Prosecutor : Can you move closer.
Court : I cannot see. Dou you see something here?
Prosecutor: No. Also proceed to the defence attorney as well.
Court: Can you show the attorney, maybe he is going to see something. What happened to your back?...(No interpreted).
Huh?...I was stabbed?
Where?...In zone 6
When?...Tuesday.
Thank you, you may sit down. It that the State case?
Prosecutor: Yes your Worship"

[28] In her reply to the relevant query by the Regional Magistrate, the Magistrate said:

> "Application to re-open the State case was not done properly by the State and the defence did not get the opportunity to respond. It was an oversight on the part of the Court due to inexperience of aspirant prosecutor." Sic.

[29] The Magistrate's response on this aspect leaves much to be desired. She seeks to shift blame for an oversight on her part to the Prosecutor. The excuse is unavailing. It is trite law that the Court has a general discretion that must be exercised judicially upon the facts of each case to allow a party who has closed its case to re-open it and to lead evidence at any time before judgment.[12] It is not hard to envisage a situation where judicial officers presiding over lower courts sometimes get confronted with inexperienced prosecutors. It remains the duty of Magistrates to ensure that proper procedures are followed at all stages in a trial. There was a duty cast on the Magistrate to guide the inexperienced Prosecutor where there were indications of him floundering as she is not merely a figure-head. She had a duty not only to direct and

[12] *S v Felthun* 1999 (1) SACR 481.

control the proceedings according to recognised rules of procedure but to see that justice is done.[13]

[30] It is clear from the above quoted excerpt that the State had elected to close its case after the second complainant had been cross-examined by the accused's attorney. No formal application was made to re-open the State case. The defence was also not afforded the opportunity to cross examine the second complainant. One cannot help but observe that, whilst the Magistrate was more than eager to allow the second complainant to show his alleged injury to the court, the same benevolence was not extended to the accused.

Conclusion

[31] The Magistrate wrongly convicted the accused after invoking a wrong test and the proceedings were thus vitiated.

[32] Therefore, I propose the following order:

> **The accused's conviction on count 1 and the resulting sentence are set aside**.

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S M MBENENGE

JUDGE OF THE HIGH COURT

30 November 2016

I agree

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[13] *R v Hepworth* 1928 AD 265 at 277, quoted with approval in *S v Rall (supra)*; see also *S v Musiker* 2013(1) SACR 517 (SCA) at para [17].

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D VAN ZYL

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT