FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review Case No. : 113/2010

In the case between:-

THE STATE

and

THABO JOSEPH LEISA

CORAM: CILLIé, J *et* JORDAAN, J

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 22 APRIL 2010

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[1] This matter came to the attention of this Court by means of automatic review. The accused was charged with assault with intent to do grievous bodily harm. The accused chose to conduct his own defence and pleaded not guilty. In terms of section 115 of the Criminal Procedure Act, the accused set out the basis of his defence as being a matter of self-defence. He alleged that the complainant assaulted him by throttling him whilst the complainant was in possession of an iron rod. He

managed to disarm the complainant and hit the complainant on the head with the same iron rod.

[2] On behalf of the state only the complainant testified to the effect that the accused confronted him in the street and demanded tobacco from him. When he told the accused that he does not have any tobacco in his possession, the accused hit him with an iron rod.

[3] The accused's rights in regard to cross-examination were then explained to him by the presiding magistrate and, although the accused initially intimated that he did not understand the explanation, he did proceed with some cross-examination of the complainant. Thereafter the state closed its case and the accused's rights were then explained to him by the presiding magistrate in the following manner:

> "The public prosecutor is closing his case. That means that he has got no other witnesses to call. Now this is your chance now to tell the court your version. You can do so by giving evidence under oath whereby you will be subjected to cross-examination by

> the public prosecutor and the court may also ask you some questions. Bear in mind that what you have told the court in your basis of defence and the questions that you put to the witness are not regarded as evidence. They will only be regarded as evidence if repeated under oath. Do you understand, sir?"

The accused then intimated that he does understand. The record then shows the following:

> "COURT: Yes, what do you elect to do, sir?
>
> ACCUSED: Yes I want to show the court the wounds.
>
> COURT: No, man, I am asking what do you elect to do?
>
> ACCUSED: Your worship, I will listen to the court.
>
> COURT: So are you closing your case?
>
> ACCUSED: Yes, I am closing my case, your worship.
>
> COURT: Defence case closed, Mr Prosecutor."

Thereafter the accused addressed the court by just intimating that he is not guilty because he did not have the intention to assault the complainant.

[4] The accused was found guilty as charged and sentenced to six months imprisonment.

[5] From the aforesaid it is quite clear that the accused did not understand the implications of not testifying in his own defence, neither was he properly informed about the implications of not testifying. He was obviously a layman that did not understand what the term evidence under oath implies and was obviously not explicitly informed that, if he does not give evidence under oath, the evidence of the complainant could and most probably would be accepted which would inevitably lead to a conviction. What is more, he was obviously lured by the presiding officer into closing his case without the implication of that being explained to him in proper understandable terms for a layman.

[6] In reply to enquiries from this court, it appears that the presiding officer at that stage has been employed on a contract basis which employment expired on the 31st of November 2009 and that, notwithstanding efforts to contact and get hold of the said presiding officer, he could not be traced.

[7] From the above it is clear that the accused did not understand the implications of the explanation given to him and had no idea what the results of closing his case without giving evidence under oath would be. Instead of explaining that in proper understandable terms, he was lured into closing his case by the presiding officer. This obviously led to a miscarriage of justice and the conviction and sentence cannot stand.

[8] In the result the conviction and sentence are set aside.

A. F. JORDAAN, J

I agree.

C. B. CILLIé, J

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