IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No: AR 441/10

In the matter between:

BATHOBILE MARGARET SIMELANE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Delivered on: 2 March 2011

NKOSI AJ

[1] The Appellant *was convicted in the Magistrate's Court, Newcastle* of Assault with intent to do grievous bodily harm and sentenced to a fine of R3000.00 or to undergo 6 months imprisonment of which one-half was conditionally suspended for a period of five years.

BACKGROUND FACTS

The salient features of the complainant's evidence are as follows:

[2] On 24 August 2009 she proceeded to the S.E Vawda Primary School after her child was sent home from school. At the school the principal was not present. On advice by the deputy principal she spoke directly with the Appellant whom she located in the staff room. Upon a discussion with the Appellant regarding her child the complainant directed they both go to the deputy principal to discuss the matter. The Appellant did not co-operate. Instead the Appellant grabbed her on her left shoulder and poked her in her face with a finger. She retaliated by doing the same to the Appellant. Thereafter, the Appellant pulled her, resulting in both falling to the ground with the Appellant landing on top of her.

[3] The Appellant rose, grabbed her by the neck from behind, dragged her to a table where there were mugs and other items and hit her on the back of her head with a mug. When she realised that she was bleeding, she caught the Appellant by the hair, causing the Appellant*'s wig to fall off. While the Appellant retrieved her "hair"*, she walked away and began to phone the police on her cellphone. The Appellant then grabbed another mug which she threw at her striking her on the back of her head. The other teacher, Mrs Orrie, then arrived and separated the two. The complainant was subsequently examined by Dr Waite, who according to her testimony did not physically examine her to observe the injuries to her

head but only asked where she was injured.

[4] Tasha Combrink testified and confirmed that the verbal argument ensued between the complainant and Appellant in the staff room. However, when she observed the two grab each other, she left the staff room to seek help. Upon her return to the staff room, she observed broken cups on the floor and saw the complainant bleeding from both sides of her head behind the ears. The Appellant's wig was lying on the floor.

Rhekea Orrie testified and confirmed that she intervened in the confrontation between the complainant and Appellant who were standing near the table. Appellant was holding a cup in her hand. She observed that the complainant was bleeding down her neck and the Appellant was injured in her hand.

[5] The Appellant's version is that she acted in self defence on the day in question and she denies striking the complainant with a mug at any stage.

[6] The learned Magistrate in the Court *a quo* found the complainant to be an honest and reliable witness whose evidence had to be believed, while he rejected the version of Appellant that she acted in self-defence as implausible

and her act as excessive.

[7] The Appellant now appeals before this Court against both the conviction and sentence, leave having been granted by the Court *a quo*.

ISSUE

[8] *It is common cause that there was a "fight" between the complainant and the Appellant in the staff room of S.E. Vawda Primary School,* on 24 August 2009. It is also common cause that during the aforesaid fight, the complainant sustained two lacerations on the scalp of her head. It is further common cause that the Appellant pleaded a private defence during the trial.

[9] The main issue on appeal, in my view, *is whether the Appellant acted with an unlawful intent to do the complainant grievous bodily harm. Closely connected to the main issue is – what were features or characteristics of the injuries sustained by the complainant and where* were those injuries located on her head?

[10] Both counsel submitted written Heads and addressed the Court on the merits of the appeal. I must hasten to state that this appeal will be decided on a narrow but critical point, namely, the lack of crucial evidence, in particular the medical evidence, to prove the case against the Appellant beyond a reasonable

doubt. The arguments and submissions made by both counsel will, therefore, not be traversed in full, save to illustrate relevant points in the judgment.

[11] Counsel for the Appellant was of the view that the findings of the learned Magistrate were inconsistent with the facts placed before him. The learned Magistrate committed a number of errors on facts and law and consequently drew wrong conclusions from the evidence led during the trial.

[12] Counsel for the Appellant submitted on the conviction that the Court *a quo in its assessment of the complainant's evidence failed to take into account that* the evidence of the complainant as to the location of injuries sustained on the date in question was in conflict with that of the doctor. (Par 5(a) of the Heads). He also submitted that the Court misdirected itself by using its outside knowledge of the inaccuracy/tardiness of the doctor when examining patients without calling the doctor himself in terms of Section 186 of the Criminal Code. (Par 6 of the Heads). I agree with the above-mentioned submissions for reasons that will become evident later in the judgment.

[13] Counsel for the Respondent, in her disavowal of the earlier submission made in the Heads, *conceded that doctor's viva voce* evidence was critical in the just

decision of the case. She, however, was of the view there was sufficient evidence to prove injuries on the complainant and that Appellant was the aggressor.

[14] It is a trite principle that in criminal proceedings, for the prosecution to succeed, the State must prove its case against an accused beyond a reasonable doubt. In the corollary, a Court does not have to be convinced that *every detail of an accused's version is true, as long as such a version is reasonably possibly true in substance. It is also improper for a Court to reject an accused's version merely because it is improbable unless such version can be said to be so imp*robable that it cannot be reasonably possibly true. See *S v Shackell* 2001(2) SACR185 (SCA) par [30], and *S v V* 2000(1) SACR153 (SCA) par [3].

[15] I now turn to the merits of the appeal.

[16] *In this case, the State's case rested profoundly on the evidenc*e of a single witness, the complainant, as to the actual assault. It is a well-known judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors, evident in the entire body of evidence, which militate against his or her credibility. (See *Stevens v S* 2005 [1] All SA 1 (SCA) at 5d-e).

[17] In my view, there is no clear evidence in the judgment that the learned Magistrate did weigh the merits of the complainant as a witness against any factor which militated against her credibility. An appraisal of all the relevant facts of the case, does show that such factors do exist, insofar as they contradict the complainant in her version of how she sustained the injuries. There will be no specific reference made to such factors in order to demonstrate the point because it would not be decisive of the issue at hand.

[18] A disquieting feature in the judgment of the Court *a quo* is that the learned Magistrate chose to ignore a vital piece of evidence properly placed before him. In this regard, the words of Nugent J, (as he then was) in *S v Van der Meyden* 1999(1) SACR 447 (W) at 449 j-450b are apposite. He said the following:

> "The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logic corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the Court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether to convict or acquit) must count for all the evidence. Some of the evidence might be found to be false; some of it might found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none may simply be ignored".

[19] The learned Magistrate ignored the medical evidence adduced by Dr Waite, on the basis of his previous experience with him, by taking an improper judicial notice of an alleged unpalatable practice. Even if the learned Magistrate's personal

observations of the doctor's alleged misconduct were correct, this fact could not have been sufficiently notorious to be capable of judicial notice and could not entitle him to breezily circumvent such an important piece of evidence which contradicted the complainant on a very material aspect of her testimony, namely, the position of the injuries sustained.

[20] I agree with the counsel for Appellant, that the proper approach would be for the Court to exercise its powers in terms of section 186 of the Criminal Code and call the doctor to establish whether there was inaccuracy or tardiness in examining the complainant as she claimed. The oral evidence of the doctor would have been important for another reason as well, that is, to establish the characteristics of the injuries sustained by the complainant in order to determine whether they were inflicted with the use of a mug or any other object. Lacerations manifest in many forms. It could not be assumed they were only consistent with the manner testified to by the complainant.

[21] The evidence adduced left a number of reasonable possibilities. The complainant could have been injured in the staff room when falling over the chair, could have knocked against a corner of the table where the wrestling took place, could have been injured with a mug during the wrestling or could have been

injured by broken pieces of a mug(s) on the table while grappling with the Appellant.

[22] The doctor's evidence might have confirmed or excluded other possible causes and place the learned Magistrate in a better position to make an informed decision on the issue. The Appellant's evidence that there were broken pieces on the table was not pertinently challenged. Without clear evidence of exactly where the pieces were located in the room, it cannot be said that her version is far-fetched. There was no expert evidence which excluded the Appellant's version of how injuries might have been inflicted.

[23] The reasonable inference which the learned Magistrate purported to draw from the location of the Appellant's injuries in her hand does not exclude other reasonable inferences or possibilities save the one drawn. [*R v Blom* 1939 AD 188 at 202-203 and *R v De Villiers* 1944 AD 493 at 508-509]. The Appellant's version that she sustained the injuries during the struggle for possession of a mug is not implausible and cannot be discounted as unreasonable and remote. In the absence of expert evidence by the doctor who examined the Appellant's injuries, the learned Magistrate could not draw any adverse inference based purely on his imagination and or speculation of how the Appellant might have sustained the injuries which she sustained.

[24] I am, therefore, of the view that the learned Magistrate should have entertained a doubt in favour of the Appellant. In the result, the appeal against the conviction must succeed.

[25] Accordingly, the following order is made:

1. The Appeal against the conviction of assault with intent to do grievous bodily harm is upheld.
2. The conviction and sentence of the Court *a quo* is set aside.

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NKOSI AJ

I agree.

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BALTON J

Date of Hearing:	Thursday, 10 February 2011
Date of Judgment:	2 March 2011
For the Appellant:	Mr Mvune
Instructed by:	
For the Respondent:	Ms Ngcobo
Instructed by:	Director of Public Prosecution (DPP)
	Johannesburg