



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, BHISHO**

CASE NO: CA & R: 23/2023

Delivered on 7 September 2023

In the matter between:

THE STATE

and

SABELO SALUSALU

REVIEW JUDGMENT

Bloem J

1. The matter came on review in terms of section 302(1)(a) of the Criminal Procedure Act 51 of 1977. The accused was charged under section 17(1)(a) of the Domestic Violence Act 116 of 1998 with having contravened the prohibitions contained in a protection order. Despite his plea of not guilty, he was convicted as charged and sentenced to imprisonment.
2. It is common cause that on 13 January 2020 the magistrate's court at Middledrift issued an interim protection order at the instance of the accused's mother, the complainant. In terms of that interim order, the accused was prohibited from physically, verbally or psychologically abusing and intimidating the complainant; entering her premises; and demanding money from her. The interim protection was made final on 18 February 2020. The accused was arrested and charged with having contravened the prohibitions contained in

the protection order on 20 January 2023 “*by insulting the complainant [by] swearing at her by her private parts and chasing her*”. The magistrate found the accused was in contravention of the prohibitions contained in the protection order and convicted him, as charged. The accused was sentenced to 18 months’ imprisonment.

3. The accused was not charged with having entered the complainant’s residence or that he demanded money from her, in contravention of two of the prohibitions contained in the protection order. The magistrate was accordingly required to consider only whether the state proved that the accused physically, verbally or psychologically abused or intimidated the complainant. There was no evidence that the accused physically abused or intimidated the complainant. What should be determined is whether the magistrate correctly found that the state proved beyond reasonable doubt that he did so verbally or psychologically.
4. The complainant testified that she was at home on 20 January 2023 when the accused arrived and enquired from her what the outcome was of a meeting that his family members were supposed to hold. They were meant to discuss his demand for money from her and calling her a liar, which caused “fights”. She told him that the meeting had not taken place. She testified that the accused shouted and swore at her and swore at her neighbour.
5. The next state witness, Nomfuneko Thamba, testified that on the day in question she was doing laundry when the complainant and her daughter arrived at her house. She heard the complainant saying to her daughter that the accused was misbehaving by demanding a sword. She did not hear or see the accused saying or doing anything on the day in question.
6. The accused testified that before the day in question he went to the complainant’s house because she had called him during January 2023 to repair a kraal. While cleaning the house on the day in question, he asked the complainant where his sword was, as he did not see it in the house where he had left it the previous night. She told him where she had put it. He did not

find it. She retrieved the sword and put it next to his bed where he had placed it before. After a while, the police arrived and told him that they were looking for the sword. He handed it to the police officers. He was arrested. He denied that he had an argument with the complainant on that day.

7. There were two versions before the magistrate. The state's version, based on the complainant's evidence, was that on the day in question the accused arrived at her home and made an enquiry regarding a family meeting. He also asked her about the whereabouts of his sword. He insulted her. She went to her neighbour, Ms Thamba, and thereafter to the police station. The accused, on the other hand, testified that he went to the complainant's house before the day in question because she had called him to repair the kraal.
8. Having looked at the two versions, the magistrate convicted the accused on the basis that he was unable to explain why the complainant testified that he had insulted her. The magistrate's finding in this regard, which forms the *ratio* of his judgment, reads as follows:

“When the accused denied having insulted the complainant, on cross-examination he was asked why would the complainant, who was living with him for months prior to the date of the incident, allege now that he has insulted her. His response was he did not know. With all of the above considerations, it is clear to this court that the accused was indeed in contravention of the domestic violence protection order issued on 18 February 2020 and made himself GUILTY of the crime.”
9. I have a difficulty with the way in which the magistrate arrived at the decision to convict the accused. It is impossible to understand what “*the above considerations*” are to which the magistrate referred, when the judgment consisted only of a summary of the evidence given by the witnesses and the above quotation.
10. The magistrate placed an onus on the accused to advance a reason why the complainant testified that he insulted her when, according to him, he did not insult her. There is no such onus on the accused. In *S v BM*¹ it was held that the approach, that accused persons are necessarily guilty because the complainants have no apparent motive to implicate them falsely and they are

¹ *S v BM* 2014 (2) SACR 23 (SCA) at par 25.

unable to suggest one, is fraught with danger. That danger was articulated as follows by Mahomed J (as he then was) in *S v Ipeleng*:²

“It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no *onus* to provide any such explanation. The true reason why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors; they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks: ‘Why should the State witnesses have falsely implicated the accused?’”

11. To secure a conviction, the onus is on the state to establish beyond reasonable doubt that an accused person is guilty. An accused person cannot be convicted if there is a reasonable possibility that his or her version might be true. A determination of whether the state proved its case beyond reasonable doubt must be based on a consideration of all the evidence.³

12. It is against the above background that it must be considered whether the magistrate correctly found that the state proved beyond reasonable doubt that the accused verbally or psychologically abused or intimidated the complainant by swearing at her. The undisputed evidence is that, after the accused had made enquiries about the family meeting, he asked the complainant where his sword was. His evidence was that he had left the sword in a room the night before, whereas the complainant said that he had left it in that room when he last stayed there. The evidence as to what happened thereafter is unclear. The complainant’s evidence was that, when the accused asked about the whereabouts of the sword, she told him that it was in that room, albeit that she had covered it and hidden it in that room. He became angry and went to collect the sword. At that stage she left home to go to the police station because she did not know what he was going to do with the sword. He was angry at that stage and her experience taught her not to trust him when he was angry. On the complainant’s own evidence, she left her premises before the accused did anything. Although she testified that he was angry, it is unclear what caused his anger, to whom it was addressed and how he expressed his anger.

² *S v Ipeleng* 1993 (2) SACR 185 (T) at c-d.

³ *S v Van Der Meyden* 1999 (1) SACR 447 (W).

13. At one stage, the complainant testified that he swore at her. Only she gave evidence relating to the alleged swearing. She testified that after she had told the accused that the family meeting had not taken place, he said that she was a liar. That was an insult, according to her. But that is not the insult with which he was charged. According to the charge sheet he insulted her by referring to *“her private parts and chasing her”*. The complainant did not testify that the accused referred to her private parts. Her direct evidence, relevant to being chased, was that she ran away because the accused *“was angry. He did not chase me, Your Worship. I noticed or I saw that he is going to chase me, Your Worship, then I ran to the neighbours.”*
14. In all the circumstances, there was no evidence to support a finding that on 20 January 2023 the accused insulted the complainant by referring to her private parts and thereby either physically, verbally or psychologically abused or intimidated the complainant in any way. The state accordingly failed to establish its case against the accused beyond reasonable doubt. The conviction and accordingly sentence must be set aside.
15. In the result, it is ordered that the conviction and sentence of the accused be and are hereby set aside.

GH BLOEM
Judge of the High Court

I agree.

MJ LOWE
Judge of the High Court