THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 272/12

REPORTABLE

In the matter between:

STEVEN MALCOLM MUSIKER **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Steven Malcolm Musiker v The State (*272/12) [2012] ZASCA 198 (30 November 2012)

Coram: Mthiyane DP, Leach and Tshiqi JJA

Heard: **7 November 2012**

Delivered: **30 November 2012**

Summary: Assault with intent to do grievous bodily harm – the assault not placed in dispute – identity of the assailant placed in dispute – appellant identified as assailant – his alibi defence not challenged – versions of the State and defence mutually destructive – onus resting on the State not discharged – conviction not sustainable.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Tlhapi and Kollapen JJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

‘The conviction and sentence are set aside’.

JUDGMENT

MTHIYANE DP AND LEACH JA CONCURRING):

[1] The appellant was convicted of assault with intent to do grievous bodily harm in the Magistrates’ Court and was sentenced to a fine of R4 000 or 12 months’ imprisonment. A further period of 12 months’ imprisonment was suspended for five years on condition that he was not convicted of similar offences during the period of suspension. In addition he was declared unfit to possess a firearm. His appeal to the North Gauteng High Court, Pretoria (per Tlhapi and Kollapen JJ), against both the conviction and sentence was dismissed. His appeal is now before this court, with the leave of the high court, against conviction only.

[2] The only point in issue during the trial was and in the appeal before us is the identity of the complainant’s assailant. As the appellant’s defence was an alibi, most facts relating to the assault were not placed in dispute.

[3] The complainant, Mr Motlana, was assaulted on 6 September 2007, between 20h30 and 21h00, whilst he was walking on a street in Brooklyn. He sustained injuries in his eyes. His assailant inflicted the injuries by spraying him with a pepper spray on his face. A report completed by an authorised medical practitioner (J88) describes the injuries as 'bilateral inflamed conjuctivis'. Motlana identified the appellant as his assailant. He stated that he recognised him as a security officer he had seen previously in the area where the assault took place but did not know his name at that stage. During the assault he was able to see him because there was adequate lighting in the area and because the assault took place approximately a metre and a half from him. He described his clothing as a pink shirt and khakhi shorts.

[4] The appellant was further implicated through the evidence of Mr Mabena, a car guard, who works in the area. Mabena stated that he witnessed the assault. He also recognised the appellant as a security officer he had seen before the incident on several occasions in the area.

[5] The appellant testified in his defence and denied any involvement in the assault. He confirmed that he was a security guard and also worked in the area where the incident occurred. He stated that he 'would have' been in the area that day around 18h00 and 18h30 and 'would have' left between 19h30 and 19h45 to go back home. He 'would have' been home between 20h30 and 21h00. He 'would have' been wearing his uniform, a black trouser and a stripped golf shirt in tones of grey and white. He recalled no incident involving the complainant on that day and at that time. The reason why he could recall that he was at home on the day of the incident was because it was the anniversary of the death of his wife's brother and he had to give her emotional support. He denied ever seeing the complainant at any time before, other than the time he met him in court for the first time. As for Mabena, he agreed he had seen him but could 'not associate him with any specific incident'. During questioning by the magistrate he was asked to explain why he stated that he 'would have been at home' and 'would have been wearing his uniform' instead of giving definite answers to those questions. He acknowledged that he probably did not express himself well and that what he really meant was that he was at home and was wearing his uniform. He closed his case without calling his wife.

[6] It appears from the judgement of the magistrate that the decision to convict the appellant and for rejecting his alibi defence was based on his failure to call his wife, a misconstrued perception by the magistrate that the appellant was not forthright with his alibi and had been positively identified by both the complainant and Mabena. The magistrate in his judgment stated:

'What the accused is submitting to the court is an alibi. He says at the time when the State alleges and the complainant for the State says this happened, I was home, commemorating the anniversary of my brother-in-law's death, I had to be home. I would have been home with my wife because that is the day that her brother passed on. That is an alibi.

Now the law is clear. When you have the evidence of an alibi then the alibi, so to speak, must come and testify. I have not heard a single word as to why the wife of the accused was not called to come and say 20:30 and 21:00 on the day of the 6th my husband was with me, we were commemorating the passing of my brother.

I have not heard why she is not in court. Particularly in the face of the accused insisting that this was so important that it would have made it imperative for him to be at home with his wife on that particular day, so as to mark the day….

This is what the accused says, but there is no evidence to support that. The wife is not called….

She is an alibi witness. She is the alibi, as we say, who would then refute the complainant's assertion as well as the witness for the State's assertion, the second witness. She is one person who is in the most suitable position to come and tell us independently as to the whereabouts of the accused. But she is not called….'

[7] Then the magistrate addressed the issue of identity as follows:

'The fact of the matter is that there are two witnesses who identified Mr Musiker as being the attacker. One knows him. ... That alone satisfies me as to the identity of the person that they are fingering'.

[8] The appellant was then convicted and sentenced. He thereafter applied for and was granted leave to lead further evidence in terms of s 309B 5*(a)* of the Criminal

Procedure Act 51 of 1977[1] to support his alibi defence and to appeal against both the conviction and sentence. To that end the magistrate resumed the trial and received the evidence of the appellant's wife in terms of s 309B 5*(c)*(i) of the Criminal Procedure Act. It appears ex facie the record that the failure to lead his wife's evidence at the appropriate time was as a result of incorrect legal advice that his wife was not a competent witness, but her evidence corroborated the version of the appellant in all material respects.

[9] The essence of her evidence was that the appellant was at home on the date of the incident from approximately 19h00 to 19h10 and did not leave home after that. She stated that she was able to recall what happened that day because the 6 September 2007 was the anniversary of her brother's death. She was heart-broken and needed the comfort of her husband. She did not, testify earlier during the trial because her husband had told her, relying on legal advice, that she could not testify because she was his spouse. In response to a question suggesting that her husband was wearing a pink shirt she stated: 'My husband has a phobia, he would never wear pink, never ever'.

[10] In response to the question what the appellant was wearing on the day she stated: 'He would wear, he always wears his uniform. It is the black t-shirt with the emblem, the S13 emblem and would either be a black trouser or a denim trouser'. None of those material aspects of her evidence were disputed. Her cross-examination was restricted to a single question that did not challenge her evidence at all and that is how she remembered that her husband was at home on the day of the incident.

[11] When the matter came before the high court it transpired that the magistrate had not complied with the provisions of s 309B 5*(c)*(ii) in that he had not recorded his findings with regard to her evidence. The high court (per Tlhapi and Kollapen JJ) remitted the

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[1] Section 309B 5*(a)*(i) of the Criminal Procedure Act provides:

'An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted'.

matter to the trial court for the magistrate to comply with the provisions of s 309B 5*(c)*(ii) of the Criminal Procedure Act.

[12] In response the magistrate gave the following reasons:

'Suffice to say her evidence was led long after the conviction and sentence of her husband, in accordance with the provisions of the said section of the Act.

I may as well make mention of the fact that the probative value of her evidence was, in my humble view, minimal. I treated it with particular caution and circumspection.

In other words, in the circumstances in which it was submitted, timing, content and context, it has not swayed me from my original finding and the subsequent sentence imposed. For reasons I will presently mention, the conclusion on my part, that it is tailored to conveniently dovetail with the now known facts, with the singular aim to exonerate the accused, doesn't seem to be remiss. The motivation is undoubtedly there (the witness being the spouse), and the damage it seeks to militate is enough of an incentive. I will presently elaborate:

1. Firstly, in what I will refer to as the "original trial", Mr Musiker was represented by an advocate of the High Court of South Africa. One would surmise that since his defence was an alibi, this would have been ventured vigorously. It was not.

2. Secondly, Mrs Musiker's recollection of her husband's whereabouts on the day is premised on the "sanctity" of the day, and that it is virtually religiously, observed by her with her husband always by her side. It becomes more remarkable then that the alibi evidence was not recollected by both of them, and not submitted. To be accused on the very day when for you the world stops and you don't recall? It begs credulity.

3. Thirdly, Mrs Musiker is a well-known figure in the area of the crime scene. He walks his beat there, with his men, and the residents, both formal and informal, know him well. The workers too. If I recall, they even have a nickname for him. The State witness fall within this category. They were not seeing him for the first time. They identified him. Still no alibi testimony in any material sense was led to counter this. The burden of rebuttal, not proof, coming into play.

4. No reasons were ventured as to the failure to lead the evidence of Mrs Musiker originally. No impediments were placed before the court, no time was requested, and being a spouse living in the same house as the accused, her whereabouts presented no discernible challenges to the defence. Yet her evidence was not led then'.

[13] There is, with respect to the magistrate, no merit in the criticism regarding the belated decision to lead the evidence of the appellant's wife. The evidence by Mrs Musiker that the appellant had obtained legal advice that she could not testify was undisputed. The criticism gives no credence to such undisputed evidence. His further criticism that the appellant was not forthright in stating his whereabouts on the day of the incident is also without merit. From the onset, during the plea stage, his legal representative responded to questions posed by the court in that regard as follows:

'COURT: Is he also denying that he was there on the day on 6 September in Hatfield?

MR JANSEN VAN VUUREN: No your worship he is not denying that he was not there, but he is denying that he was there at the date and at that time.

COURT: I see.

MR JANSEN VAN VUUREN: He was there, that will come through in his evidence, but without going into the evidence I can just indicate quickly to the court, he is not denying that he was … there on that day. I have not even consulted with him whether he was actually walking around or whether he was outside but he was in that area.

He will testify during the course of the proceedings regarding the patrols he does, in which areas, and I assume that he will testify, I am not sure, that he must have been there to either drop off or pick up guards or stop at a control point or what the case might be.

As I say, I am not giving any evidence but I am quite sure that he will not testify that he was not in the vicinity that day, but he will indeed testify, to some extent, that he was in that vicinity somewhere along that day.' (My underlining)

[14] The fact that the appellant's legal representative had not properly consulted was not the appellant's fault. The failure to state the appellant's defence with precision was also not his fault. Whilst the appellant's defence may not have been clear from the plea statement in terms of s 115 of the Criminal Procedure Act, the appellant disclosed during his testimony that he was at home at the time of the incident and proffered an explanation on why he would have been at home. That explanation was not disputed and was corroborated by his wife, albeit later on when she was called. The conclusion that the alibi must have been an afterthought was in the circumstances unwarranted.

[15] The fundamental problem with the decision of the magistrate is the approach he adopted in regard to the evidence of the appellant, his alibi defence and that of the two

State witnesses. He, with respect, failed to take into account the fact that it was the State that bore the onus to prove the guilt of the appellant. Once the appellant raised the alibi defence, that alibi had to be accepted unless it was proved to be false beyond reasonable doubt. That did not happen. The evidence of the appellant's wife that he was at home at the time of the incident was not challenged. The magistrate was faced with the evidence of two State witnesses who placed the appellant at the scene of the incident and the appellant's own evidence, together with that of his wife which placed him at home. In effect the magistrate was faced with two mutually destructive versions. This being the case:

'The magistrate had no sound reason to prefer the evidence of the complainant [and Mabena] to that of the appellant'. (*Petersen v S* [2006] JOL16082 (SCA) para 8).

[16] This court in *S v Liebenberg* 2005 (2) SACR 355 (SCA) paras 14 and 15 stated: '(O)nce the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false. In *S v Sithole and Others* 1999 (1) SACR 585 (W) the test applicable to criminal trials was restated in the following terms at 590*g-i*:

"There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, 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 in hand, each one being the corollary of the other. 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".

See also *S v Van Aswegen* 2001 (2) SACR 97 (SCA).

Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution's evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct. This is consistent with the approach to alibi evidence laid down by this Court more than 50 years ago in *R v Biya* 1952 (4) SA 514 (A). At 521C-D Greenberg JA said:

"If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime."'

For these reasons there was no basis for the magistrate to reject the version of the appellant nor to prefer, instead, that of the State witnesses. On this basis alone, the conviction cannot stand.

[17] Strictly speaking that conclusion makes it unnecessary to deal further with the matter, but one issue of concern that must be mentioned is the unacceptable manner in which the magistrate conducted the trial. A convenient starting point is the failure by the magistrate to guide the clearly inexperienced defence counsel. It was clear from the onset, in the manner in which the legal representative tendered the plea on behalf of the appellant, that he was inexperienced. I have already referred to the convoluted s 115 statement he proffered on behalf of the appellant during which he informed the court that he had not consulted with his client and was not able to state his version with precision. How the court proceeded and conducted a trial after counsel had made such an admission is inexplicable. During the conduct of the trial there were again several instances that showed that counsel was not able to deal with issues that were pertinent to the defence case. The presiding magistrate did not assist.

[18] In *S v Rall* 1982 (1) SA 828 (A) at 831B-C this court, quoting the well-known dictum of Curlewis JA in *R v Hepworth* 1928 AD 265 at 277, stated:

'"A criminal trial is not a game … and a Judge's position … is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he

is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."
Inter alia a Judge is therefore entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seem to him desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case.'

[19] The second area of concern in this matter and probably the most disturbing aspect concerns the unwarranted interruptions by the learned magistrate which, taken in totality, clearly undermined the fairness of the trial.

[20] During the cross-examination of the complainant the defence counsel attempted to question the complainant on what appears to have been a previous inconsistent statement. The court interjected and ordered him to lay a basis therefor. Counsel, clearly because of his inexperience, abandoned that line of questioning; thereby missing an opportunity to deal with the credibility of a State witness. When counsel attempted to ask the second State witness about his statement, the court again interjected and asked counsel to lay a basis for the question. It became clear from the exchange between the court and counsel that counsel was confused about what to do exactly. Instead of giving guidance on a very important aspect concerning credibility of a witness, the magistrate got agitated and in the process also misled counsel. It is helpful to quote directly from the record to illustrate the seriousness of the misdirection by the magistrate:

'MR JANSEN VAN VUUREN: As the court pleases your worship. May I then firstly refer the witness to his affidavit that was made under oath.
COURT: If you want to cross-examine from the statement a person has made you have got to lay a basis for such statement. You cannot just dive into it.
MR JANSEN VAN VUUREN: Your worship, I would lay a basis. The basis would be that this affidavit conflicts with evidence.
COURT: If you want to cross-examine from a document sir you have got to lay a basis. I am not talking relevancy, but the basis.
MR JANSEN VAN VUUREN: Yes, your worship. Sir, you said that he was working for a security company but you cannot remember the name of the security company, is that correct? --- Yes.
Was he wearing, what clothes, was he wearing a uniform on that night?

COURT: What is the relevance of this line of questioning as to the assault Mr Jansen?
MR JANSEN VAN VUUREN: Your worship, I want to confirm whether the person that the witness saw was indeed the accused.
COURT: The person that who?
MR JANSEN VAN VUUREN: That the witness allegedly saw.
COURT: Ja, but you are not asking him about the accused, you are asking him about the complainant, if I follow your cross-examination?
MR JANSEN VAN VUUREN: Yes.
COURT: How will he, knowing the complainant, knowing that, identify the accused as you are saying?
MR JANSEN VAN VUUREN: Your worship, what wrong would there be in asking the witness what …(intervenes)
COURT: Relevance, I do not have time. Relevance?
MR JANSEN VAN VUUREN: Your worship… (intervenes)
COURT: I will only allow questions which are relevant. I will not allow any fishing expedition that is taking me nowhere.
MR JANSEN VAN VUUREN: Indeed. How do you know he was working for a security company? --- Because he used to tell us that he is employed.
COURT: Still my question remains.
MR JANSEN VAN VUUREN: Indeed so your worship, I would not take the matter any further….'

[21] The above misdirection is probably the most serious because the magistrate not only failed to guide counsel but misled counsel by questioning the relevance of his line of questioning. First, the clothes the appellant was wearing on the day of the incident were pertinent to his identification. Second, the magistrate was wrong in saying to counsel: 'Ja, but you are not asking him about the accused, you are asking him about the complainant, if I follow your cross-examination?' With respect to the magistrate, that question was dealing with the identity of the appellant and not the complainant.

[22] When counsel again attempted to cross-examine the complainant about a statement he had made to the medical doctor who had examined him after the incident, the court interjected and questioned what counsel sought to achieve with that line of questioning. Counsel explained that he sought to show that the complainant was

contradicting himself about the identity of his assailant because he had informed the doctor that he did not know his assailant. The court asked: ‘where is the contradiction?’, after which counsel again abandoned that line of questioning. Yet again a question dealing with credibility and identity of the assailant was aborted because of an unwarranted interruption by the magistrate. The record is riddled with similar interruptions from the court and it would be fruitless exercise to deal with all of them.

[23] In *S v Rall* (supra) this court refrained from defining precisely the limits within which judicial questioning should be confined but mentioned the following useful limitations at 831H-832H:

(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 586 (A) at 589G; *Solomon & another NNO v De Waal* 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 Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 570E-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 - '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.

[24] In S v Scott-Crossley 2008 (1) SACR 223 (SCA) this court said that the approach of the trial judge in conducting the trial was unfortunate and misconceived 'both because he descended into the arena and expressed a firm view as to the appellant's credibility whilst he was still testifying' and that that was 'plainly desirable'.[2]

[25] The skewed approach adopted by the magistrate when he conducted the trial is also evident in the manner in which he analysed the evidence. His criticism of the evidence of the appellant had no basis. For instance, he criticised the fact that the appellant stated that 'he would have been at home' and that 'he would have been wearing his uniform'. Yet on the same breath when he analysed the evidence about what the appellant was wearing he criticised him for recalling that he was wearing his uniform. The magistrate rejected the evidence of the appellant that he was wearing his uniform, presumably when he got home or when he was with his wife that evening, because according to the magistrate 'he was not at work. Why would he be wearing a uniform commemorating his brother-in-law's death?'. It is not clear why the appellant would not wear his uniform at home nor what led the magistrate to come to that conclusion.

[26] Had it not been for my conclusion that the appellant's alibi was wrongly rejected, these various factors, taken together, may well have justified a finding that the appellant had not had a fair trial. In light of that decision, however, it is unnecessary to reach a conclusion in regard to this latter issue. I do not intend to deal with the judgment of the

[2] Para 30.

high court. Like the trial court, it adopted a wrong approach to the evidence, hence its decision. The conviction by the trial court cannot be sustained.

[26] I therefore make the following order:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

‘The conviction and sentence are set aside’.

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Z L L TSHIQI

JUDGE OF APPEAL

APPEARANCES:

For Appellant:	JJ Strijdom SC
	Instructed by:
	Mark W Nixon Attorney, Pretoria
	Hill, McHardy & Herbst Inc, Bloemonfontein
For Respondent:	MT Moetaesi
	Instructed by:
	Director of Public Prosecutions, Pretoria
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