REPORTABLE ZLR (76)

Judgment No. S.C. 140/99
Crim. Appeal No. 808/97

TACO KUIPER vs THE STATE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA & SANDURA JA
HARARE, NOVEMBER 25, 1999 & JANUARY 7, 2000

Z F Joubert SC, with him *E T Matinenga*, for the appellant

H S M Ushewokunze, for the respondent

SANDURA JA: The appellant was charged with common assault and appeared before a senior magistrate at Karoi magistrate's court. He pleaded not guilty but was convicted and sentenced to a fine of two hundred dollars or, in default of payment, thirty days' imprisonment with labour. He appealed against the conviction but not against the sentence.

The background facts are as follows. The appellant and the complainant ("Julie") were husband and wife until their marriage was dissolved in November 1996. When they divorced they had only one child, a daughter aged about sixteen months. The custody of that child was granted to Julie subject to the appellant's right of access.

At the relevant time Julie was thirty-two years old and lived with her mother ("Hazel") and her stepfather ("Brian") on a farm in the Karoi District in Zimbabwe. The appellant, who was fifty-six, lived in Johannesburg in South Africa.

At about 8 am on 5 January 1997 the appellant arrived at the farm intending to see his daughter. He had in his possession a video camera ("the camera") because he wanted to videotape his daughter.

As the child was having breakfast in the kitchen, the appellant started videotaping her. Julie objected to this and told the appellant to wait until the child had finished eating breakfast. She added that the pictures should then be taken, not inside the house, but outside and under her supervision.

In the course of the argument which ensued, Julie took possession of the camera in the kitchen and went to the lounge. The appellant followed her in order to retrieve the camera from her. What happened thereafter was not common cause.

According to Julie, what happened was as follows. She took away the camera because she objected to the appellant videotaping the child whilst she was eating breakfast. When she entered the lounge, the appellant followed her, carrying the child. After throwing the child onto a sofa, he advanced towards her, stamped on her foot with his booted foot and pushed her backwards against a coffee table behind her. She fell onto the floor on her back. As she lay on her back, the appellant bent over her and assaulted her with clenched fists on her face and chest. Acting in self-defence, she struck the appellant's face with the camera several times. Hazel then

came into the lounge and took away the child. Shortly thereafter, Brian came in and pulled the appellant away. Julie then got up and struck the appellant's face with clenched fists several times before the appellant was taken out of the house by Brian.

It was Julie's evidence that when she followed the appellant outside the house she had a scuffle with him near his motor vehicle as she tried to take the camera, which he had earlier recovered, back from him. She finally succeeded in doing so after Brian and Brian's gardener came to her assistance. She said that she took the camera because, having used it in attacking the appellant in self-defence, she required it as evidence of that fact.

On the other hand, the appellant's version was as follows. When Julie took the camera from the kitchen into the lounge he followed her in order to retrieve it from her. She refused to hand it over to him and started moving backwards as he advanced towards her. As she moved backwards, she tripped over a coffee table and fell onto the floor on her back. As she fell, the appellant grabbed the camera from her and was about to leave the lounge when Brian arrived and severely assaulted him with clenched fists on the face. The appellant then left the house with the camera, which all along had been switched on and had recorded what had been said. He went to his motor vehicle which was parked outside.

Shortly thereafter, Julie followed the appellant and talked to him at the motor vehicle. He told her that the camera had recorded what had happened. It was only then that she showed renewed interest in the camera and called out to Brian, informing him that everything had been recorded. Brian and his gardener then came

to the motor vehicle and assisted Julie in forcefully taking the camera from the appellant. The appellant then went to the police station and reported the matter.

He later returned to the farm with a policeman in order to retrieve the camera, but discovered that Brian had taken it to a neighbouring farm. He and the policeman then went to that farm and collected the camera. They later returned to the police station where it was decided to charge the appellant with common assault.

At the trial, the appellant denied having assaulted Julie. He stated that on the day in question he was not in a position to risk being involved in any assault because he had a fractured jaw. He denied that it was Julie who assaulted him and maintained that it was Brian who did so.

The senior magistrate disbelieved the appellant and found him guilty. The question which now arises is whether that decision was correct.

A few days before the appeal was heard, the appellant filed an application in this Court seeking an order setting aside the conviction and sentence, and remitting the matter to the trial court so that the appellant could lead further evidence. That evidence related to the events recorded by the camera during the altercation on the day in question. The appellant contended that the evidence corroborated his version of what happened. The application was opposed by the respondent.

The basic requirements which must be satisfied by an applicant in an application of this nature were set out by HOLMES JA in *S v De Jager* 1965 (2) SA 612 (A). At 613 A-E the learned JUDGE OF APPEAL said:

> "This Court can, in a proper case, hear evidence on appeal; see *R v Carr* 1949 (2) SA 693 (AD); but the usual course, if a sufficient case has been made out, is to set aside the conviction and sentence and send the case back for the hearing of the further evidence, as was done, for example, in *R v Mhlongo and Anor* 1935 AD 133. However, it is well settled that it is only in an exceptional case that the Court will adopt either of the foregoing courses. It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty. Accordingly, this Court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the Court's reluctance to re-open a trial. They may be summarised as follows:
>
> (a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
>
> (b) There should be a *prima facie* likelihood of the truth of the evidence.
>
> (c) The evidence should be materially relevant to the outcome of the trial.
>
> See *R v de Beer* 1949 (3) SA 740 (AD) at p 748; *R v Weimers and Ors* 1960 (3) SA 508 (AD) at pp 514-5; *R v Madikane* 1960 (4) SA 776 (AD) at p 780; *R v Nkala* 1964 (1) SA 493 (AD) …".

Subsequently, the requirements set out above were quoted with approval by this Court in *S v Mutters and Anor* 1987 (1) ZLR 202 (S) at 204G-205B; and *S v Osborne* 1989 (3) ZLR 326 (S) at 336 C-G.

Applying the test set out by HOLMES JA to the facts pertaining to the appellant's application, we were satisfied that the appellant had made out a good case

for either this Court hearing the further evidence or setting aside the conviction and sentence and remitting the case to the trial court for the hearing of the further evidence.

In the first place, the appellant gave a sufficient explanation why the further evidence which he sought to lead had not been led at the trial. This is what he said in his founding affidavit:

> "On my arrival at the magistrate's court, I went to the prosecutor's office together with my legal representatives. I was then represented by Advocate Carter. I then saw that the prosecutor was, together with Mrs Ribnick (Julie), listening to a sound recording by using a set of headphones at the time. The prosecutor indicated that the entire contents of the videotape had been erased, including the sound recording. The battery of the camera also became flat, so that there and then the tape contents could not be checked by anybody. I reluctantly accepted the assurance of the prosecutor that the tape was wiped clean. I believed at the time that the stepfather (Brian) had purposely wiped the tape clean in order to destroy the evidence which would have supported my version. I was a little reluctant simply to accept the word of the prosecutor. My Advocate, the late Mr Carter, however, trusted the word of the prosecutor that the tape was wiped clean. Upon his assurance that we would not have been misled in any way, I reluctantly accepted that the tape could contain no evidence although I was hopeful that it still might have done. As will emerge hereunder, the prosecutor, either in error or on purpose (which I do not insist was the case), misinformed us as to the fact that the tape was wiped clean. In fact, it contains crucial evidence which I will advert to hereunder and which I submit would have had a significant bearing on the finding that the trial court made in this case."

At this stage I think that it should be pointed out that from the time the police took the camera from Brian to the time the appellant saw it in the prosecutor's office the appellant had no access to it. It was only after the completion of the trial that the camera was returned to the appellant. Thereafter, the appellant discovered that, contrary to what the prosecutor had said at the magistrate's court, the videotape had not been wiped clean.

Secondly, the appellant also satisfied the second requirement laid down by HOLMES JA in *S v De Jager, supra,* i.e. that there be a *prima facie* likelihood of the truth of the evidence which it is sought to lead. As indicated earlier, the further evidence which the appellant intended leading consisted of a recording of what happened and what was said when the altercation between the appellant, Julie and Brian took place on the day in question. In this regard, counsel for the respondent did not challenge the genuineness of the recording.

Thirdly, it is clear that the final requirement, i.e. that the further evidence which it is sought to lead should be materially relevant to the outcome of the trial, was also satisfied. In this regard, the appellant averred that the further evidence which he intended leading supported his contention that on the day in question he did not assault Julie. After viewing the videotape and listening to those parts of the audio recording which had not been erased, we formed the opinion that the further evidence which the appellant intended to adduce was materially relevant to the outcome of the trial. That opinion was subsequently strengthened by the contents of the transcript of the audio recording which was made available to us after the hearing of the appeal.

In the circumstances, the appellant made out a good case for leading the further evidence. However, instead of setting aside the conviction and sentence and remitting the matter to the trial court for the hearing of the further evidence, we decided to receive the further evidence and then determine the appeal in the light of that evidence. We adopted that course in order to achieve an early final determination of the matter, and with the concurrence of counsel.

Having said that, I now wish to determine whether, in view of the further evidence before us, the appellant was properly convicted. I do not think so.

It is clear from the transcript of the audio recording that during the relevant time neither Julie nor Brian ever alleged that the appellant had perpetrated the alleged assault by means of clenched fists, or that he had stamped on Julie's foot with his booted foot. According to the transcript, the only allegation made by the two witnesses during the altercation was that the appellant had "thrown her (Julie) over the table". Unless one interprets this allegation to mean that the appellant had pushed Julie against the table, it was not even made by Julie when she gave evidence at the trial. Nevertheless, it is clear from the transcript that the allegation that the appellant had thrown Julie over the table was repeatedly denied emphatically and unhesitatingly by the appellant.

It does, therefore, seem to me that the further evidence adduced by the appellant tends to support his contention that he did not assault Julie as alleged or at all.

However, quite apart from the effect of the further evidence adduced on appeal, I do not think that the learned senior magistrate was justified in rejecting the appellant's version.

The test to be applied before the court rejects the explanation given by an accused person was set out by GREENBERG J in *R v Difford* 1937 AD 370. At 373 the learned Judge said:

> "… no *onus* rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal …".

Similarly, in *R v M* 1946 AD 1023 DAVIS AJA said the following at 1027:

> "And, I repeat, the Court does not have to believe the defence story; still less has it to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."

In my view, the explanation given by the appellant, i.e. that as he advanced towards Julie she walked backwards, tripped over the coffee table, and fell on her back, was not improbable. It seems to me that what was highly improbable was that Julie was assaulted by the appellant with clenched fists on her face and chest. In her statement to the police Julie said:

> "… the accused was pinning me down and at the same time delivering to me a flurry of blows".

If that had occurred, and bearing in mind that the appellant is a much bigger person than Julie (he is well over six feet tall and she is only five feet tall), Julie would have received serious injuries. And yet the doctor who examined her only observed bruises on the left forearm, left thigh and right foot, as well as a tender left shoulder. It is of great significance that the doctor did not observe any injuries on Julie's face and chest.

In addition, it was not improbable that Julie might have sustained the minor injuries observed by the doctor when she forcefully dispossessed the appellant of his camera as the appellant resisted that unlawful act which was carried out near the appellant's motor vehicle parked outside Brian's house. In any event, the doctor conceded that the injuries could have been caused by a fall or by bumping against furniture.

Furthermore, there were other unsatisfactory features in the evidence of the State witnesses. I shall refer to only two of them because they are the most important ones.

The first unsatisfactory feature was the reason given by Julie for the desire to retain the appellant's camera in her possession. She said that she required the camera as evidence of the fact that she had used it in attacking the appellant in self-defence. In my view, that was a ridiculous explanation.

However, the real reason, in my opinion, came out when she was cross-examined, as the following question and answer show:

> "Q. Your allegation that (the) accused further assaulted you after (he) caught up with you at his car. Did you have his video camera with you?
>
> A. No. He had it and I was demanding … the video camera. He had said he would turn (the) evidence against my stepfather and lodge an assault charge against him. It (the camera) was of evidential value to me." (The emphasis is mine).

Julie's answer clearly indicates that the real reason for taking the camera from the appellant was to deprive him of the evidence on the videotape. After all, he had told Julie that the whole incident had been videotaped.

The second unsatisfactory feature in the State evidence was that shortly after Julie and Brian had taken the camera from the appellant, Brian took it to a neighbouring farm. It was later collected from that farm by a policeman. Surprisingly, the State gave no explanation for Brian's conduct.

In my view, these two features strengthen the suspicion that it must have been Julie and Brian who attempted to erase the videotape. If that is correct, they could only have done that because they knew that the videotape would provide evidence which would be damaging to their case.

In the circumstances, I am satisfied that the appellant's conviction was not justified, having regard to the evidence.

The conviction and sentence are, therefore, set aside.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Musunga & Associates, appellant's legal practitioners