IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A554/2009

DATE: 21 MAY 2010

In the matter between:

JIMMY KLAASEN Appellant

and

THE STATE Respondent

J U D G M E N T

BLOMMAERT, AJ:

The appellant was found guilty on 18 May 2009 on a charge of assault with the intent to do grievous bodily harm, before the Honourable Magistrate, Mr Matalong in the Beaufort West Magistrate's Court. On the same day the appellant was found guilty by the learned magistrate on the said charge and fined R2 400,00 or six months imprisonment, suspended for a period of five years. The appellant appeals only against his conviction. At all relevant times the appellant was legally represented.

The only two witnesses that testified were the complainant and the appellant. According to the complainant, one Ms Tanja Plaatjies, and this seems to be common cause, she and appellant were at the home of the complainant's late brother, one Mr Isak van Rooy. According to Ms Plaatjies, she told those present at the time, namely her parents, her brother and sister-in-law, that she was going to the outside toilet. The appellant thereafter came to the outside toilet, whereupon the complainant closed the door. According to her, the appellant again pushed open the door and entered the toilet and without any reason started hitting her with his open hand.

She testified that her mouth thereafter bled and she called for help through the toilet window, but nobody came to her assistance. She explained that the TV in the house was on and the toilet was some distance from the house. Upon leaving the toilet, the appellant, according to her, also threw a rock at her, but missed her. She ran into her brother's house and told them that the appellant had hit her in the toilet. The appellant explained that the complainant was busy playing with her *gat*, in evidence it emerged that it was more likely to be interpreted as with her private parts.

The complainant was standing in the door and the appellant approached her, grabbed her in front of her chest and threw

her out the door. She fell on her backside and whiles she was trying to get up, he stepped on her leg on two occasions with the result that her leg broke. According to the complainant the only person who witnesses this, was her late brother, who went outside and saw the attack, as well as possibly her sister-in-law.

The appellant's version was somewhat different. He testified that he was drinking with the complainant's late brother, whereupon he ran out of money and went to his home to fetch more money. On his return to the home of the complainant's late brother, she stood in the door and prevented his entry. According to him, she asked him for money, he testified that he moved her sideways and entered the room. Thereafter the complainant's late brother went outside and an argument ensued and appellant avers that he saw nothing further.

It would immediately be apparent from the aforesaid very brief and cryptic version of events, that one is here dealing with a single witness and the so called cautionary rule needs to be applied. It is well known that to base a conviction on the evidence of a single witness, has inherent dangers. The result is what has become known as the cautionary rule, has developed in practice. In that respect see R v Makona 1932 (OPD) 79 at 80. I will not deal with all the evidence, but list

hereunder some discrepancies that emerged from the complainant's evidence.

The only other evidence admitted by the State was the so called J88 of the complainant's injuries. What is of importance, is that no mention is made in this document of the bleeding of complainant's mouth as a result of the alleged assault in the toilet. As pointed out by appellant's counsel in his heads of argument, one would have expected that her face would be swollen, bruised and bleeding and that she would have mentioned this to the medical officer. It is true that the medical certificate was completed ten days after the incident, but one would have expected the complainant to have mentioned this to the medical officer.

Furthermore, this was not mentioned in complainant's statement to the police that she had bled from her lips as a result of the assault in the toilet. In her evidence in chief, the complainant failed to mention any action being taken by any family members after she had alleged that she was slapped in the face and was bleeding. However, in cross-examination she did say that her father confronted the appellant after she came back from the toilet. In her police statement she mentions all the people present at the house on the day of the incident, but no mention is made of the mother and father.

In her evidence in chief she says they were all there and they should have seen how she had been pushed out of the house. It is strange that she should not have mentioned the presence of her father, seeing that according to her she was transported to her mother's house in her father's wheelchair. In court the complainant alleged that she did not move from the place where the appellant had allegedly trampled on her leg. However, in her police statement, she said that she crawled towards the gate. The learned magistrate was critical of the appellant, because the denial of the assault in the toilet was not specifically put to the complainant during cross-examination. However, the appellant's version of events was he was never present in the toilet and his version of events was put to the complainant. To my mind, by implication, this contains a denial of the alleged assault in the toilet.

The complainant's testimony was to the effect that her late brother went outside and witnessed the assault and stood there laughing while her leg was being trampled on. In her police statement she also mentioned that her sister-in-law, one Jacqueline Afrika, witnessed the incident. Further she testified that her late brother only went out after she was allegedly pushed out of the house, that there was no action by the complainant's family who, she testified, loved her. It is, therefore, strange that the learned magistrate found her late

brother went outside to help her and, therefore, it was acceptable that the family did nothing to come to her aid.

What is further particularly strange is the complainant alleges that she lay outside for an hour and was then fetched by children playing in the vicinity and taken to her mother's house in her father's wheelchair. This was not mentioned in her evidence in chief and to the police. The fact she made no mention of the presence of her father and her mother to the police is, in my mind, particularly strange. If the complainant was lying outside for an hour, and then according to her she had, prior to the assault, been busy cooking in the house, how was it that nobody noticed or bothered to open the door to look for her?

The learned magistrate made some mention of the fact that why would the complainant charge the appellant with assault, which would in turn mean that he might have a fine or a prison sentence, if he was supposed to assist with money to buy tomatoes and potatoes. Why the learned magistrate asked would the complainant's late brother assault her? The point is that the evidence showed that the child that the complainant and appellant had together was already 22 and, therefore, probably no longer dependent upon the appellant. One would imagine that equally a false charge could simply teach the

appellant a lesson for not assisting her financially or for any other reason.

The worrying thing about the record of this appeal, is that it is quite clear that the complainant's and appellant's versions of the events were translated from Afrikaans to English by a translator who did not know what she was doing. For example, the translation plaster of Paris, which is *gips* in Afrikaans, to cement. Reading of the record reveals many more like problems. Of greater concern is the fact that it would seem that the learned magistrate never asked himself the question could the appellant's version reasonably be true. All the aforesaid contradictions indicate there is some doubt as to the complainant's version of events and to my mind, appellant's version could possibly be true.

It is further to be noted that the learned magistrate did not at any stage make any credibility findings as to the complainant or the appellant. The trite proposition that a court of appeal should not likely interfere with a credibility finding by the court *a quo* is, therefore, not applicable in this case. What is further of concern is that the State made no attempt to lead any corroborating evidence. Certainly there was corroborating evidence available as to aspects of the State's case. Also it is to be noted that the State made no attempt to explain when the

complainant's brother died and why no statement was taken from him. This also troubled the learned magistrate.

In the result, in my view, the appellant should be given the benefit of the doubt, especially if regard is had for the cautionary rule. His version of events could reasonably be true. Therefore, the appeal succeeds and the learned magistrate's conviction and sentence is set aside.

BLOMMAERT, AJ

FOURIE, J: I agree.

FOURIE, J