THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A424/13
DPP Ref: 9/2/5/1 – 270/13
Kuilsriver Case No: BDSH 2/78/11

In the matter between:

LWAZI NONTYI **PETITIONER/APPELLANT**

And

THE STATE **RESPONDENT**

Coram: GAMBLE & ROGERS JJ

Heard: **13 MARCH 2015**

Delivered: **20 APRIL 2015**

JUDGMENT

ROGERS J (GAMBLE J concurring):

[1] In this matter we directed in terms of s 309C(6)(b) that the petitioner's application for leave to appeal against conviction be argued before us. We did so because, although there appeared to be sufficient prospects of success to grant the petition, an appeal against sentence (leave to pursue which had been granted by the magistrate) had already been heard and decided by two other judges. We directed that the heads of argument address inter alia the procedural implications, for the petition, of the finalised appeal against sentence. We also directed that the legal representatives should be ready to address not only the merits of the petition but the merits of the appeal itself if we were inclined to grant the petition. We gave these directions by way of an order dated 25 March 2014. For reasons which are not clear to us, and which are to be regretted, the matter was only set down for hearing before us on 13 March 2015.

[2] The petitioner was charged with assault with the intent to cause grievous bodily harm, the alleged victim being the petitioner's eight-year-old nephew, [A…..]. The assault was alleged to have occurred on 7 February 2010. The petitioner was then 33 years old. Because of the victim's age, the petitioner faced a minimum sentence of ten years' imprisonment in terms of s 51(2)(b)(i) of the Criminal Law Amendment Act 105 of 1997 read with Part III of Schedule 2. He was released on bail, which remained the position until he was sentenced.

[3] The trial began on 3 August 2012. The petitioner, who was legally represented, pleaded not guilty. The State called the alleged victim (who testified through an intermediary), his mother (N……..) and his grand-aunt (N…….). (I refer to them by their first names, because they share the same surname – I mean no disrespect thereby.) The J88 form, recording the results of a medical examination of the victim conducted on 7 February 2010, was handed in by agreement. The doctor was not called to testify. The petitioner testified in his own defence.

[4] The magistrate delivered judgment on 18 December 2012. He convicted the petitioner as charged. The State proved two prior convictions, one for theft in 1997 (the sentence being a fine of R120 or 60 days' imprisonment) and one for malicious damage to property in 2004 (the sentence being a fine of R300 or 60 days' imprisonment, suspended for three years). The matter was then adjourned for purposes of obtaining a probation officer's report. This report was handed in when proceedings resumed on 8 February 2013. The probation officer recommended a sentence of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977. The parties made submissions on sentence. On 5 March 2013 the magistrate handed down sentence. He found that there were no substantial and compelling circumstances to depart from the minimum sentence of ten years' imprisonment.

[5] During July 2013 the petitioner, still legally represented, applied for leave to appeal against conviction and sentence and for condonation for the late filing of the application. On 6 September 2013 the magistrate refused leave to appeal against conviction but granted leave to appeal against sentence.

[6] On 25 September 2013 the petitioner prepared and signed a detailed handwritten petition for leave to appeal against conviction.

[7] The appeal against sentence came swiftly before this court. On 29 November 2013 Salie-Samuels AJ (as she then was), with Yekiso J concurring, upheld the appeal and substituted a sentence of ten years' imprisonment of which three years were suspended for five years on appropriate conditions. At that stage the appellant's petition for leave to appeal against conviction was pending. It is clear that the appeal must have been argued and judgment given in ignorance of the petition. The judgment made no reference to the petition.

[8] During March 2014 the petition came before Gamble J and me. We gave the directions previously mentioned.

[9] At the hearing before us both sides submitted that the judgment on sentence had to stand unless reversed on further appeal to the Supreme Court of Appeal. I do

not agree. In certain circumstances a court is entitled to correct or rescind its own judgments. Although rescission is encountered mainly in civil proceedings and at first instance, there is no reason in principle why it should not apply to orders on appeal, including criminal appeals. In terms of Uniform Rule 42(1)(c) a court may rescind an order granted as a result of a mistake common to the parties. Rule 42 is not in terms confined to civil proceedings or to proceedings at first instance, even though that is where it usually finds operation. In my view, the order of this court in the appeal against sentence was granted as the result of a mistake common to the parties, ie in ignorance of the pending petition. Alternatively, and if the High Court does not already at common law have the power to rescind a judgment in these circumstances, the High Court nevertheless has the inherent power in terms of s 173 of the Constitution to protect and regulate its own process and to develop the common law, taking into account the interests of justice. Having regard to the fair-trial rights conferred by s 35(3) of the Constitution, the interests of justice would favour the rescission of an order on appeal granted in the circumstances of the present case if this were necessary to enable a convicted person to have his petition considered in accordance with the law.

[10] Nevertheless, if we were to dismiss the petition or the resultant appeal against conviction, it would seem to me to be undesirable for us to give either side a 'second bite at the cherry' insofar as sentence is concerned. There is a considered judgment of this court on the sentence appeal. In such circumstances we could properly decline to rescind the order on the sentence appeal. If, however, we were to conclude that the petition and resultant appeal against conviction should succeed, the order on the sentence appeal would not stand in our way and could in so far as needs be rescinded by us by virtue of the mistake common to the parties or in the exercise of our inherent jurisdiction.

[11] It may be that rescission of the order made on the sentence appeal is not necessary to clear the way for a subsequent appeal against conviction. It may be said that where an appellate court has before it only an appeal against sentence, its order is by its nature without prejudice to any right which the convicted person may then have or may thereafter acquire to appeal against the conviction. Ms Thaiteng, who appeared for the State, referred us to the judgment of a full bench of this court

in *King v The State* A79/2011 delivered on 22 August 2014. In that case the appellant had sought leave from the magistrate to appeal against conviction and sentence but was only granted leave in respect of sentence. On 13 May 2011 his appeal against sentence was dismissed. Thereafter he delivered a petition for leave to appeal against his conviction together with a condonation application. Two judges of this division refused the petition but on further application to the Supreme Court of Appeal he was granted leave to appeal against his conviction to a full bench. Although the Supreme Court of Appeal did not give reasons, it seems likely that the judges of appeal who granted the petition were aware of the unsuccessful appeal against sentence and did not see it as standing in the way of an appeal against conviction. That case differs, of course, from the present one, in that the dismissal of the appeal against sentence was not vitiated by any error – the appellant only petitioned for leave to appeal against the conviction after the appeal against sentence was finalised. Be that as it may, and for the reasons I have given, the power of rescission could be exercised in the present case in the interests of justice in so far as needs be.

[12] I turn to a consideration of the proposed appeal against conviction. In view of the conclusion we have reached, I intend to assess the merits as on appeal rather than with reference to the lower test of reasonable prospects of success applicable to petitions.

[13] On the day in question the petitioner went to N…….'s house to drink. N……, N…… and several other persons were there. It is common cause that an argument, which turned violent, broke out between the petitioner and N……. because she wanted him to leave. N……. and N…….. testified that during the course of the fight the petitioner threw a bucket of water containing glasses at N……. She said that he also threw a bottle at her and that she threw an unbroken bottle back at him. He testified, by contrast, that all he threw at her was a bottle and that she retaliated by breaking a bottle against the wall and throwing it at him.

[14] While this was going on [A…….] was standing near the front gate, which was a couple of metres from the open front door.

[15] On the State's version. the petitioner was physically ejected from the house. Shortly thereafter [A…….] was found to be bleeding from a wound on his right side just above the hipbone (this fleshy area of the abdomen is called the right iliac fossa, being the expression used in the J88).

[16] The State's case was that the petitioner left the house with a broken bottle in his hand and stabbed [A……] as he departed. The petitioner denied having walked out with a broken bottle and denies having stabbed [A……...] He said the broken bottle which (on his version) N…… had thrown at him missed and went through the open front door. He surmised that the broken bottle had struck [A…….], causing the wound.

[17] The J88 described the wound as a deep laceration through fat and muscle, about 6cm long. The child was said to be thin. Curiously the doctor identified the child as a girl. The only evidence as to the treatment [A…….] received was his own – he said the wound was stitched and he was given some medicine.

[18] If one could safely eliminate a misdirected projectile as the cause of A……..'s wound, the inference would be inescapable that the petitioner stabbed A…….. Given the fight between the petitioner and N…… and the fact that he was not wanted at the house, it is plausible that he struck [A……..] out of spite as he departed. He was the only person in the vicinity of the child at the relevant time.

[19] However, I do not think the J88 on its own, in the absence of evidence from the doctor, enables one to conclude beyond reasonable doubt that a thrown broken bottle could not have caused the wound. Both on the State's version and the defence's version, the wound was caused by a broken bottle. The only question is whether the broken bottle was used as a stabbing weapon or was a misdirected projectile. If N…… in anger threw a broken bottle with some force and it went through the open front door and struck the child, I do not think I can safely exclude the possibility that it caused the injury described by the doctor. Although the laceration was described as 'deep', the depth was not recorded in the J88. Since the child was described by the doctor as thin, there was presumably not much fat and muscle at the site of the wound. Although [A……] claimed to have been wearing a

thick jacket because it was cold, N……. and N……. denied he had been wearing a jacket – N…….. described his top as a striped sweater, N…… described it as a white shirt with stripes (Cape Town is generally warm in February). The J88 did not in terms state that the wound was a stab wound.

[20] One thus needs to assess whether the evidence as a whole justifies the conclusion beyond reasonable doubt that a thrown bottle did not cause the injury. That depends essentially on the reliability and credibility of the State witnesses. The key witness was [A……] himself, because N…… and N…….. did not claim to have seen the stabbing. [A……..] Was ten years old when he gave evidence and he was testifying about events which had occurred two and a half years previously. Because he was a single witness and a child, there was a need to view his evidence with caution, as the magistrate acknowledged.

[21] As is well known, one of the reasons for exercising caution in assessing the evidence of children is that they are impressionable and easily influenced. There was a particular need for caution on these grounds in the present case. At the time [A……..] was wounded N…… had been involved in a fight with the petitioner. There was also evidence of prior tension between the petitioner and N……..'s side of the family.

[22] Not only did N……. and N……. potentially have reason to be hostile to the petitioner; they would have had a motive to shift blame to the petitioner if the real cause of the injury was a broken bottle thrown by N…….. In that regard it is not without significance that in the statements which N……. and N…… made to the police no mention was made of the fact that N……. had thrown a bottle at the petitioner.

[23] [A……..] testified that he saw his uncle being pushed out of the door. The petitioner had a bottle neck in his hand. He held it behind his back. As he passed Ayabonga the petitioner turned around and stabbed him with the bottle and also kicked him on his back. [A……] testified that the petitioner then called to N……. and told her 'to come and take her corpse'. As noted, and contrary to the evidence

of N…….. And N……, he testified that he was wearing a thick jacket. The J88 did not reflect any injuries from kicking.

[24] N……. testified in chief that after the petitioner had been ejected from the house, they heard him saying, 'Thanks God, N…….., come and pick up your corpse'. N……. went outside and asked [A……] what happened. He replied that as the petitioner had walked past him the petitioner had 'pushed' him. She then saw the blood. In cross-examination the way she expressed the child's answer to her question is that as the petitioner walked passed '*toe stamp hy teen my*' and *'hy het iets gevoel hier in sy sy'*. There was an interpreter on duty during the trial but it is unclear to what extent the evidence in the record reflects the words of the witnesses or a translation. Nevertheless, N....."s version of [A.....]'s immediate response does not reflect an unequivocal assertion by Ayabonga that his uncle had stabbed him. On her evidence, [A.....] did not tell her that the petitioner had been carrying a broken bottle or that he had used it to stab him.

[25] N…….. testified that after the petitioner had been ejected she heard him say 'Thanks N…….. come and pick up here is your child's corpse'. (Later she expressed his utterance thus: 'Thanks God N…….. come fetch your child's corpse.') N……. opened the door and N……. went outside and saw [A…..] holding his side. She lifted up his top and saw a wound. She asked him what had happened and he replied that the petitioner had stabbed him and after stabbing him kicked him from behind.

[26] N…….'s evidence suggests that she was the one who spoke with Ayabonga and asked what had happened. N……..'s evidence, by contrast, suggests that she was the one who spoke with the boy. Their evidence differs as to what his reply was.

[27] All three State witnesses testified that the petitioner made an utterance to the effect that N……. should come and fetch her son's 'corpse'. N…… and N……, though not [A……..], said that the words 'Thanks God' also formed part of the utterance. It is possible that something has been lost in translation, but the words attributed to the petitioner sound odd in context. Nobody suggested that [A…..] was lying on the ground as if dead, making the reference to 'corpse' peculiar.

Furthermore, the expression ‘Thanks God’ sounds like an expression of relief rather than one of anger or vindictiveness.

[28] The petitioner version was that he only left the house after he and the others heard [A……..] crying outside. The petitioner says that they saw blood and a ‘straight cut, open wound’. He then said ‘Thank you Lord because your mother wanted to kill me with that empty and now she threw it against her son’.

[29] In my view, the magistrate, while acknowledging the need for caution, did not sufficiently apply it in his assessment of the evidence. Although he made favourable credibility findings in respect of the State witnesses and remarked negatively concerning the petitioner, his criticisms of the petitioner were based on supposed contradictions in the instructions he gave his attorney. The petitioner’s evidence can certainly be subjected to some criticism but the evidence of the State witnesses was not without blemish, as I have tried to explain.

[30] However, the critical flaw in the magistrate’s reasoning is the weight he attached to the J88 and the nature of the wound. He said that the doctor’s report favoured the State’s version. He also found that the probabilities, ‘according to human knowledge and experience’, did not favour the defence’s version, because a broken bottle thrown from inside the house could not have injured [A…….] ‘to such an extent’. The bottle ‘penetrated his clothes’ and inflicted a deep laceration. In the magistrate’s view, the injury ‘could not have been inflicted in another manner as the one described by the complainant’. There was in fact no evidence that [A……’s] clothing was penetrated by a bottle though unless there was, at the critical moment, a gap between [A……’s] shorts and his top (for example, because he was stretching or bending down or simply fidgeting as children do), one would be entitled to assume such penetration. More importantly, however, I do not think that the J88 report and its description of the wound were such as to entitle the magistrate to find, in the absence of further medical evidence, that the wound could not have been caused by a broken bottle thrown with force (even if it did penetrate [A…..’s] top). One might think the stabbing thesis more probable than the projectile thesis but the case did not fall to be decided merely on the probabilities. My own ‘human

knowledge and experience' is not such as to give me confidence that Ayabonga's wound could not have been caused by a thrown broken bottle.

[31] I thus consider that the petitioner was and is entitled to the benefit of the doubt. This is very far from saying that his version was more probable than that of the State witnesses or that the State witnesses were not telling the truth. They may be distressed by our finding. They need to understand, however, that the petitioner was entitled to be acquitted unless the case against him was proved beyond all reasonable doubt.

[32] In the circumstances, the following order is made:

(a) The petitioner's petition for leave to appeal against his conviction in the court are quo on 18 December 2012 is granted.

(b) The resultant appeal against the said conviction succeeds and the said conviction is set aside.

(c) In consequence of the order in (b), the sentence imposed on the petitioner in the court are quo on 5 March 2013, as varied by this court's order on appeal on 29 November 2013, is set aside.

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GAMBLE J

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ROGERS J

APPEARANCES

For Appellant Ms T Mahlasela

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For Respondent	Ms PA Thaiteng Office of the Director of Public Prosecutions Western Cape