

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 381/2009

In the case between:-

THE STATE

and

GOODWILL NAPO PHAHLANE

CORAM: VAN DER MERWE, J *et* JORDAAN, J

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 30 JULY 2009

[1] This matter was submitted in terms of section 304(4) of the Criminal Procedure Act by the Senior Magistrate of Bloemfontein for special review.

The accused was charged with assault with intent to do grievous bodily harm in that he unlawfully and intentionally assaulted one Themba Dway by hitting the said Dway with a bottle on the left eye with intent to do him grievous bodily harm. He was also charged with trespassing in that he

allegedly unlawfully and without permission entered a storeroom lawfully occupied by one Paulina Mahlaba without her permission.

The accused was represented by an attorney, pleaded guilty to both charges and, through his attorney, handed in a statement setting out the basis of his pleas in terms of section 112 of the Criminal Procedure Act.

In regard to the basis of his plea of guilty to the first count the following was set out in the statement, namely:

“On the 1st November 2008 I visited the premises of Thabo Hendriks. Thabo Hendriks is selling liquor at his place. I arrived there around 4 to 5 p.m. and when I arrived there I was already drunk. There I consumed a few quarts of Black Label. After I finished the last quarts of the Black Label I threw away the empty bottle. Before I threw the empty bottle away I did not both myself by checking whether is there anyone at the place where I was throwing the empty bottle. I noticed that as I threw the empty bottle that I hit Themba, that is the complainant, with the bottle

round his left eye. I admit that I unlawfully and intentionally assaulted the complainant with the intention to do grievous bodily harm. This form of intention falls under *dolus eventualis* because I did foresee that the empty will hit someone but I decided to throw the bottle despite that possibility.”

Regarding the second count of trespassing the statement contains the following:

“On the 21st of March 2009 whilst I was coming from the tavern I met with a group of boys. They called me and they were requesting the matches. I did not heed to their request, instead I ran away and the group of boys gave me a chase. I then ran into the certain house. I opened the door. I entered into the house. After I entered I closed the door and slept in the place. I admit that I did unlawfully and without permission of Paulina Mhlaba (complainant) the lawful occupier of the building or storeroom entered upon the storeroom or building.”

On the strength of the aforesaid the accused was found guilty on both charges. For purposes of sentence the charges were treated as one and the accused was sentenced to 12 months

imprisonment, wholly suspended for a period of 5 years on certain conditions. He was also declared unfit to possess a firearm.

The senior magistrate who submitted the matter for special review commented as follows:

“2.1 In respect of count 1, I respectfully submit that *dolus eventualis* is present if:- A person (a) subjectively foresees the possibility that, in striving towards his main aim an unlawful act may be committed or the unlawful result may ensue, and (b) he reconciles himself to that possibility. ...

Applying the above definition to the facts it is my view that since accused was not aware of the presence of Themba in the vicinity where he threw the bottle, subjective foreseeability is lacking and a conviction cannot stand.

2.2 In respect of count no. 2, I respectfully submit that unlawfulness is lacking since accused acted under necessity and conviction can also not stand.” (sic)

- [2] The senior magistrate then requests that both convictions be set aside and a suitable order be made.
- [3] It appears that the senior magistrate is correct in his view that the convictions cannot stand. The statement on behalf of the accused creates the impression that he did not know that there were any people in the vicinity of where he threw the empty bottle. His admission following upon the factual background set out in the statement to the effect that he admits that he unlawfully and intentionally assaulted the complainant with the intention to do grievous bodily harm is contradictory to the factual averments in the statement. The factual averments are, in the least, not sufficient to justify a conclusion that he had the intention to do grievous bodily harm and can at most justify a finding of common assault. The statement regarding the second count is similarly insufficient to justify a finding of unlawfulness and the presiding magistrate should have entered a plea of not guilty and proceeded in terms of section 113 of the Criminal Procedural Act.

[4] In the result both convictions and sentence are set aside and the matter is remitted to the trial court to act and proceed in terms of the provisions of section 113 of the Criminal Procedure Act, nr 51 of 1977.

A. F. JORDAAN, J

I agree.

C. H. G. VAN DER MERWE, J

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