

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A207/2007

26/7/2011

In the matter between:

EUGENE DE VASCONCELOS FIRST APPELLANT
STEVEN DE VASCONCELOS SECOND APPELLANT

And

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
26-07-2011	
DATE	SIGNATURE

RESPONDENT

JUDGMENT

MAVUNDLA J.

[1] The appellants were on 20 May 2005 convicted at the magistrates court Nelspruit of assault with intent to do grievous bodily harm and sentenced to R2 000, 00 or 12 months imprisonment each.

[2] After the issues were ventilated before us, we called for supplementary heads of argument, which were subsequently furnished. Subsequent to the additional heads having been furnished, a draft judgment was prepared. Due to various factors there was a delay in preparing the judgment. The delay was further compounded by the fact the laptop I had used for preparing the draft judgment crashed. I had to wait for some considerable time to know whether the data could be retrieved. On it transpiring that it was not possible to retrieve that data, I had to commence *de novo* preparing this judgment. In order not to cause further prejudice to the appellants and the State, by further delay, we deliberated about the merits of the matter and submissions made and agreed that the magistrate erred in finding the appellants guilty, that the appeal must succeed and that the conviction and sentence should be set aside. As part of our effort to avoid further delay and prejudice to the appellants, we deemed it prudent to deliver our order to that effect, with the reasons to follow. These our reasons for that order.

- [3] The appellants were charged with the two counts of assault with intent to do grievous bodily harm in that:

Count 1:

On or about 14 January 2004, at Bester Brown Centre in Nelspruit, they wrongfully and intentionally assaulted Mr. Bongani Peter Vilakazi, by hitting him with first, kicking him, hitting him with hard object, all over the body, face and head;

Count 2:

On or about 14 January 2004, at Bester Brown Centre, in Nelspruit, they wrongfully and intentionally assaulted Ms Thandiwe Susan Mbuyane by kicking her on her kidneys.

- [4] The appellants were found not guilty in respect of count 2 and were discharged at the end of the trial. They were, however, convicted and sentenced in respect of count 1 and sentenced as stated hereinabove.

- [5] The appellants were duly represented through out the trial. They pleaded not guilty and did not disclose their defence. The

State lead the evidence of the following witnesses: Mr. Vilakazi, the complainant in count 1, Ms Thandiwe Susan Mbuyane, the complainant in count 2, Ms Helda Johann Aborough; Dr Lawrence Mathebula and Ms Elzaan Groenwald. After the close of State case, only the first appellant testified, whereafter the second appellant closed his case without testifying or calling any witness.

[5] I do not intend to chronicle in minute detail all the evidence that was lead in this matter. The evidence of Mr. Vilakazi is that the first appellant hit him with clenched fists and kicked him. As he was falling backwards, he fell on the second appellant who was behind him. The second appellant hit him and two of the appellants' friends also joined in the assault and hit him on his jaw and also kicked him. At one stage he landed on the ground and was kicked several times. Friends of the appellant trampled on him as he was on the ground.

[7] According to Ms Mbuyane, the appellants, were four in number, met the first complainant in a passage. The first appellant hit

the first complainant with clenched fists and also kicked him. She knows both the appellants but not the two boys they were with. She rushed to the scene to assist the first complainant. The second appellant kicked her on her tummy as she was grabbing the first complainant. At that stage the first appellant had the first complainant in his legs¹.

[8] According to Ms Alborough, the accused was hit with a chair by the first appellant. The other person who was with the first appellant also grabbed a chair and hit the first complainant therewith. The first complainant was all along standing when the assault took place. The second complainant came to the scene and called on the fighting people to stop. The first appellant also kicked the first complainant while he was on the ground².

[9] The evidence of Dr. Mathebula merely confirmed that he examined the first complainant and completed the J88 form which reflected that he had a swollen upper lip, tenderness on

¹ Vide paginated page 34

² Vide paginated page 35

the neck, soft tissue on the upper lip, neck, the chest and the genital area. Dr Groenewald's evidence related to the examination of the second complainant. For purposes of this judgment, as it would appear herein below, there is no need to say more about her evidence.

[10] According to the first appellant, he had witnessed a group of men outside the shops trying to open a vehicle belong to someone who was doing signaging at the shopping complex. When he confronted these men, one of them produced a knife threatened him therewith. He produced his service pistol and the men fled. He went back into the shopping complex to his shop. He saw the first complainant speaking to the second complainant. He told the first complainant that he is not doing his work when he is busy talking: the first complainant became abusive and even followed him to his shop making noise. He guided the first complainant out of his shop. The complainant hit him in the face, cutting open his mouth. He pushed the first complainant back and they started punching each other. His girlfriend pulled him back. He was bleeding profusely from his

mouth. He rinsed his mouth at the back of his shop. There were a lot of people milling around. His girlfriend telephoned his brother, who arrived thereafter and took him home. He did not witness the assault of the first complainant by other people as he was at the back rinsing his mouth. The whole incident happened very fast.

[11] It is trite that the trite that a court of appeal has limited powers to interfere with the trial court's factual findings, unless they are palpably wrong and the court has misdirected itself³.

[12] It is also trite that the State bears the *onus* of proving the guilt of the accused beyond reasonable doubt. The accused person bears no *onus* of proving his innocence, it suffices if his version is reasonably possible true, even if the court does not believe him, he is entitled to his acquittal⁴.

³ Vide *S v Francis* at 1999 (1) SACR 198 at 204c

⁴ Vide *S Mafiri* 2003 (2) SACR 121 (SCA) at 125c-e.

[13] What is important is that it is common cause that there was a fracas on the night in question, between the first appellant and the first complainant. The magistrate found that the appellants were the aggressor who assaulted the first complainant. The Magistrate accepted the evidence of the first complainant that he was assaulted by the appellants. The assault upon the first complainants is supposed to have been witnessed by the complainant in the second charge. She too testified that she was also assaulted by the appellants and that the complainant in the first count witnessed the assault on her.

[14] The Magistrate rejected the version of the appellants that it was Mr. Vilakazi who assaulted them and that they acted in self defence. The Magistrate found that M. Alborough's evidence materially contradicted that of the first and second complainants. He also found that the evidence of Ms Albough somehow corroborates that of the first appellant in respect of his testimony that the second appellant was not there.

[15] The Magistrate found that the State did not prove its case against the appellants in respect of the second count and found the appellants not guilty on this count. The Magistrate, however, rejected the version of the appellants and convicted them on count 1.

[16] It was not refuted by the State that the first appellant received treatment. The magistrate found that the evidence of Ms Alborough materially contradicted that of the complainants. The import of these findings is that the State's case was then premised on evidence of witnesses who contradicted one another. The second complainant had testified that she was kicked by the second complainant. Ms Alborough did not testify about the assault of the second complainant. The second complainant said nothing about the first complainant being assaulted with a chair, as testified by Ms Alborough.

[17] The Magistrate was correct in finding that there were material discrepancies in the evidence of Ms Alborough and that of the complainants. The State's case was premised on the evidence

of witnesses who materially contradicted themselves. It is wrong, in my view, to selectively accept that evidence of the State, which impale an accused person. The State's case must be seen as a whole. If the witnesses conflict materially on their evidence, that puts a question mark on their veracity and on their observation of the events they testify about, as a collective and individually, bearing in mind the version of the accused person. It can be accepted, from the evidence as a whole, that there was a fracas that took place and that it happened very fast. The question to be asked is whether the version of the appellants must be discounted. Is it not reasonably possibly true? What is of importance from the evidence of the first complainant and Ms. Albourough is the fact that there were other people who joined in the fracas. The possibility cannot be excluded that the first complainant was also assaulted by the other persons who joined in the fracas and not by the second appellant. The version of the first appellant cannot be, in my view, be said not to be reasonably possibly true. Even if one does not believe him, if the version is reasonably possibly true, he is entitled to his acquittal. In my view the Magistrate

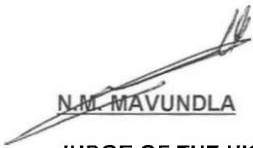
misdirected himself in accepting the evidence of the State, regardless of the material contradictions in it, and finding that the State has proven the guilt of the appellants beyond reasonable doubt. He should have found that the version of the appellants is reasonably possibly true, should have given him the benefit of any doubt he entertained in that regard and thus found him not guilty and acquitted him.

[18] It follows, in my view, that if the State evidence is inadequate to convict the first appellant, on account of material discrepancies in it, it is equally inadequate to convict the second appellant, even though he did not give evidence.

[19] It is for the aforesaid reasons that I recommended the following order:

- 1 That the appeal of both appellants against the conviction and sentence by the Magistrates Court at Nelspruit on 20 May 2005 is upheld.

- 2 That both the conviction and sentence of both appellants are set aside.
- 3 That the order of the magistrate is substituted with the following:
"That both accused are found not guilty and discharged."


N.M. MAVUNDLA

Order delivered on 27 May 2011

JUDGE OF THE HIGH COURT

I agree and it is so ordered. Reasons delivered on 26 July 2011


J.M. POSWA

JUDGE OF THE HIGH COURT