

DELETE WHICHEVER IS NOT APPLICABLE

- 1) REPORTABLE: YES/NO.
 2) OF INTEREST TO OTHER JUDGES: YES/NO.
 3) REVISED.

11/08/2021
 DATE

SIGNATURE



IN THE HIGH COURT OF SOUTH AFRICA
 LIMPOPO DIVISION-POLOKWANE

CASE NUMBER: A08/2020

JOYCE MOKGAETJI MBIZA

APPELLANT

And

STATE

RESPONDENT

JUDGEMENT

AML PHATUDI J

Introduction

[1] The appellant, an educator at Marota Primary School, Motodi Village, Limpopo, was arraigned at Burgersfort Regional Court for contravention of section 305 (3) (a) read with section 1 of Children's Act 38 of 2005 (the Act) also read with Children's Amendment Act 41 of 2007. She was, in the alternative, charged with assault with intent to do grievous bodily harm read with section 51(2) of Criminal Law Amendment Act 105 of 1997.

[2] It is alleged, as worded in the charged sheet, that "on or about 27 July 2017 and at or near Motodi Village, ... the accused, being the parent(s) or guardian(s) or the person(s) having custody of the child(ren), to wit, O... S... , did wrongfully abused or deliberately neglected the child(ren) or allow him/her/them to be abused by hitting her with stick and open hands". The alternative charge is worded—"upon or about 27 July 2017 and at or near Motodi Village... the accused did unlawfully and intentionally assault O... S... by hitting her with a stick and open hands with the intent of causing him/her grievous bodily harm."

[3] The appellant enjoyed legal representation when pleading not guilty to the charge preferred against her. She exercised her rights to remain silent. The Burgersfort Regional Magistrates' Court (per MD Mabitsela) found the appellant guilty of assault common.

[4] The appellant is before this appeal court, with leave of the trial court, only against conviction.

Factual background

[5] The evidence the state led dictates that the child OS was allegedly assaulted by the appellant at Marota Primary School on the 26 July 2017. She backed home and lied on top of the bed. Her mother Katlego Bessy Hlongwa, enquired from her if she was okay. OS told her mother that the appellant assaulted her with open hands. The following day, Hlongwa took OS to Dr Phetla.

[6] Dr Phetla confirmed in his testimony that he medically examined OS on 27 July 2017. He completed a document headed: Report on a Medico-Legal Examination by a Health Care Practitioner. This is commonly known as J88. He penned in it- 'oral history as provided by the mother. The child was assaulted, hit by teacher with an open hand to the face and on the head with a stick'. The document was handed in and accepted as evidence. During cross examination, Dr Phetla confirmed to have consulted and medically examined OS on 27 July 2017 for seizures.

[7] It is evident that Hlongwa only managed to cause registration of the complaint with the police in November 2017. When making the statement with the police, she is recorded to have reported that the incident occurred on the 27 July 2017. Contestation of the occurrence date led to the leading the evidence of the police officer who reduced the statement to writing.



The police officer confirmed that what he reduced to writing was exactly what he was told by Hlongwa.

[8] OS testified that the alleged assault occurred on the 26 July 2017. She alleged to have been assaulted with open hands and a stick on her head. She bled from her forehead. She changed tune when showered with a hail of questions during cross examination. She confirmed that she encounters seizures attacks at irregular intervals. When so attacked, she experiences a black out and does not know as to what happened to her thereafter.

[9] The appellant testified that she is an educator and a class teacher of grade 2B. OS is a pupil at grade 2C. The class teacher for grade 2C was not at work for the week ending 28 July 2017. She took care of both grades 2B and 2C pupils. She indicated that OS was not at school on the 26; 27 and 28 July 2017. The school register certifying the absence of OS from school on the said dates was handed up and accepted as an exhibit. She denied, vehemently so, to have assaulted OS on the day in question. She remained firm on her version notwithstanding her lengthy cross examination. She stated that Hlongwa solicited some money from her. She (Hlongwa) initially sought R50,000 and later R35,000 which was ultimately reduced to R30,000. She refused to accede to the "offers" because she did not assault OS.

[10] The trial court evaluated the evidence led and applied the applicable law as defined. An emphasis was added when the definition of the offence was placed on record. The trial court pronounced that 'section 1 of Children's Act 38 of 2005 defines abuse in relation of child as a form of harm, or ill-treatment that is deliberately inflicted on a child and includes the following, assaulting a child or inflicting any form of deliberate injuring to a child'. (emphasis added)



[11] This is what the trial court had to say in its findings:

'...can we say in the results or in this instance that the accused person before this court Ms Mbiza deliberately inflicted any form of harm or ill-treatment on the complainant? It is true that corporal punishment is no longer allowed in South Africa, but did she do that? Clearly she did not cause any harm or ill-treatment on the child, that is, taking into consideration the evidence before this court and therefore I am not satisfied that the accused person abused the child on the day in question'.

The Law

[12] Section 305 (3) of Children Act provides that '[a] parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person (a) abuses or deliberately neglects the child or abandon the child'. The act defines the word "abuse" to include assaulting and any form of ill-treatment.¹

[13] Assault is defined as the unlawful and intentional application of force to the person of another or inspiring a belief in that person that force is immediately to be applied as threatened.²

Evaluation

[14] The trial court found that the state failed to prove its case beyond reasonable doubt as charged in the main count. Instead of the acquitting the appellant, the trial court considered the alternative charge- assault with intent to do grievous bodily harm. Once more, the trial court found the state to have failed to prove its case beyond reasonable doubt. The trial

¹ "abuse", in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes- (a) assaulting a child or inflicting any other form of deliberate injury to a child

² Burchell and Milton Principles of Criminal Law (Juta & Co Ltd, Cape Town 1991) at page 423

court, notwithstanding its findings, found the appellant guilty on assault common.

Can common law offences (assault common and/or assault with intent to do grievous bodily harm) be deemed to have been repealed by the provisions of section 305 (3) of the Childrens Act, in so far as it relates to perpetration of such offences against a child(ren).

[15] It is stipulated in section 28 of the Constitution of the Republic of South Africa that every child has the right to be protected from maltreatment, neglect, abuse or degradation.³ The objective of the Children's Act read with the provisions of section 12⁴ of the Constitution is to protect the children against any form of abuse at any place where the child(ren) may be at⁵, at any given time. The Act defines the word "abuse", in relation to a child, to mean any form of harm or ill-treatment deliberately inflicted on a child and includes (a) assaulting a child or inflicting any other form of deliberate injury to a child.(emphasis added)

[16] The Children's Act created a statutory offence in relation to abuse or any kind of harm perpetrated against a child. It further provides for

³ 28. Children.-

(1) Every child has the right-

(a) ...;

(b) ...;

(c) ...;

(d) to be protected from maltreatment, neglect, abuse or degradation;

⁴ Freedom and security of the person.-

(12) Everyone has the right to freedom and security of the person, which includes the right-

(a) ...

(b) ...

(c) to be free from all forms of violence from either public or private sources;

(d) ...

(e) not to be treated or punished in a cruel, inhuman or degrading way

⁵ Either at home or at any care centres.

sentencing provision as clearly set out in section 305 (6)⁶ and (7)⁷ respectively.

[17] It is trite law that an Act of Parliament overrules the common law if both apply in the same area. Some Acts explicitly repeals certain common law offences⁸. Other Acts do add to definitions of common law offences, which, in my view, replaces the common law completely-such as section 305 of the Childrens Act. It is further in my view, perhaps developing the common law with the inherent powers vested in this court in terms of section 173 of the Constitution⁹, that where common law has been replaced, such common law offence should not be regarded as a competent verdict to the provided statutory offence(s).

[18] It is clear from the trial court's judgment that the state failed to prove its case beyond reasonable doubt the guilt of the appellant as charged and, based on the principle enunciated above, the trial court ought to have acquitted the appellant. In any event, is the appellant guilty of the offence- 'assault common'?

[19] It is perhaps an opportune time to consider the trial court's guilty verdict. The complainant said she was assaulted with open hands and a

⁶ Section 305

(6) Subject to subsection (8), a person convicted of an offence in terms of subsections (1);(2);(3);(4) or (5) is liable to a fine or to imprisonment for a period not exceeding ten years, or to both a fine and such imprisonment.

⁷ Section 305

(7) A person convicted of an offence in terms of subsections (1);(2);(3);(4) or (5) more than once is liable to a fine or imprisonment for a period not exceeding 20 years or to both a fine and such imprisonment.

⁸ Section 68(1)(b) reads as follows:

(1) The common law relating to the

(a)...

(b) crimes of rape, indecent assault, incest, bestiality and violation of a corpse, insofar as it relates to the commission of a sexual act with a corpse, is hereby repealed.

⁹ Section 173. Inherent power.-

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of just

stick. She bled and sustained a blue eye injury. When testifying in chief, OS denied having ever had seizures in her life. She, during cross examination, conceded to have had seizures before and she often gets attacked at irregular intervals. She even said that when so attacked, she does not see herself. Immediately after having said that, the trial court intervened and condescended to the defence counsel who then discontinued with the cross-examination on that issue.

[20] It is evident from the record that OS was medically examined by Dr Phetla on the 27 July 2017 for seizures as presented to him by Hlongwa. The doctor opined that the injury could have been caused by the falling of OS when attacked by seizure.

The Law and legal principles applicable

[21] As a point of departure, the principle set in *R v Dhumayo and Another*¹⁰ is that

'A court of appeal must bear in mind that a trial court saw the witnesses in person and could assess their demeanour. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. The court of appeal will only reject a trial courts assessment of evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court's judgement must remain in place. The court of appeal does not zealously look for points upon which to contradict the trial courts conclusions, and the fact that something has not been mentioned does not in itself mean that it has been overlooked.'¹¹

[22] It is trite law that an appeal court decides the appeal on the facts before it as contained within the four corners of the record on appeal. The appeal court is thus duty bound to establish from the record if the trial

¹⁰ 1948 (2) SA 678 (A)

¹¹ See: *S v Robinson* 1968 (1) SA 666 (A) @675 H; *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) @ 645; *S v Mononyane and Others* 2008 (1) SACR 543 (SCA) [15]

court has either misdirected itself on the facts or has applied the law erroneously to the facts. In coming to its findings and a verdict on assault common, the trial court had this to say:

'According to her (the appellant), she was reprimanding the child and on the alternative count of assault with the intention to do grievous bodily harm, can it be said that the accused person had the intention to cause grievous bodily harm on [OS] as a result of assault?'

[23] I perused the record placed before this appeal court and considered the evidence led before the trial court. I am unfortunately unable to find a shred of evidence where the appellant testified to have said that "she was reprimanding the child." In fact, the appellant denied, throughout her testimony, having ever committed the offence. She even led an uncontested evidence that OS was in fact not at school on the day and date she (OS) alleged to have been assaulted.

Report on a Medico-Legal Examination by a Health Care Practitioner

[24] Counsels for the appellant submits that it is not possible to complete a Report on a Medico-Legal Examination by a Health Care Practitioner-J88, before reporting the matter to the police. The police are the people who provide complainant(s) with J88 for completion by a qualified medical practitioner. He submits that it is common cause that the case was only reported to the police in November 2017. He further submits that it is surprising to note from the evidence tendered that Dr Phetla completed the form on 27 July 2017.

[25] On perusal of the record, I find it apposite to look into how the J88 was completed. This is how the evidence unfolded:



Mr. Sithole: ...I mean you complete this document, the J88

Dr Phetla: Yes

....

Mr. Sithole: Now let us fast forward a bit. The mother, when she came to your surgery, she came...regarding what? I just want to get clarity on that.

Dr Phetla: When she came, it was not for the first time though, she brought me this form to fill in.

[26] Counsel for the appellant submits that it be inferred that Hlongwa had a motive of incriminating the appellant. Can it be said that the motive was to solicit money from the appellant as the evidence show that she sought R50,000 and later R35,000 which was ultimately reduced to R30,000 from the appellant? I am afraid of venturing into the issue of motive in the absence of evidence to that effect.

Conclusion

[27] I, having read from the record of proceedings and having heard counsel, find that there was a misdirection on facts by the trial court that led to the pronouncement of the guilty verdict on assault common which warrants interference by this appeal court. The trial court's conclusion cannot, in my view, be said to be correct. I am persuaded to accept that the trial court's assessment is wrong. I am thus duty bound to reject its assessment of evidence relating to assault common which the appellant is found guilty of.

[28] I further find, based on the evidence placed on record, that the state failed to prove its case beyond reasonable doubt the guilt of the appellant as charged even on any competent verdict that was preferred. The trial court's conviction falls to be set aside.

[29] I, in the result, would make the following order.

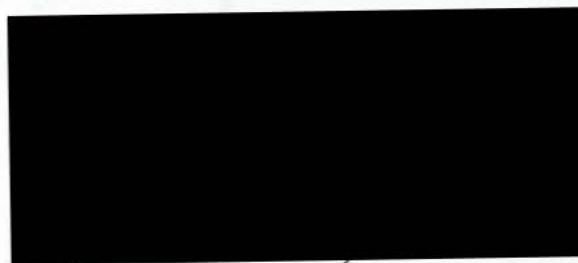


Order

29.1 The appeal is upheld.

29.2 The trial court's conviction of assault common is set aside and replaced with the following:

“ The accused is found not guilty and must be discharged and released.”



AML PHATUDI

JUDGE OF THE HIGH COURT

I agree and it is so ordered



MV SEMENYA

DEPUTY JUDGE PRESIDENT

LIMPOPO DIVISION-POLOKWANE



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Polokwane-Limpopo

Heard on: 23 April 2021

Judgement delivered on:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 12 August 2021.

