



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal number: A274/2018

In the matter between:

GERT PIETER LABUSCHAGNE

Appellant

and

THE STATE

Respondent

CORAM: MBHELE, J et MATHEBULA, J

HEARD ON: 18 MARCH 2019

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 28 MARCH 2019

- [1] The appellant was charged in the Magistrate's Court at Hoopstad with assault with intent to do grievous bodily harm. Despite his plea of not guilty, he was convicted as charged. I will return to the phrase "guilty as charged" at a later stage. He was sentenced to

pay a fine of R800.00 or three (3) months imprisonment which was wholly suspended for a period of three (3) years. The trial court granted him leave to appeal against both conviction and sentence.

- [2] The Notice of Appeal was not filed timeously within the prescribed time period in terms of the Uniform Rules of Court. The application for condonation supported by affidavits deposed to by Joachim Venter (attorney of record) and his city correspondent Jonathan Le Riche served before us. The respondent did not file any opposing papers and in oral submission counsel for the respondent confirmed that the application is not opposed. The reason relied upon for the noncompliance with the rules resulting in the lateness of the filing of the notice is a perennial problem of the compilation and submission of the typed record by the transcribers. Satisfied that there was no wilful default on the part of the appellant, we granted the application.
- [3] An outline of the facts is necessary as a background. On 4 December 2015 in the evening the appellant and the complainant were at Vennaker bar . The complainant spoke to the appellant's father. It appears that he took an exception because the complainant was speaking ill about him in his absence. Accordingly he was pretending to be friendly to his father. He walked up to him to deal with this matter.
- [4] The tempers flared between them as they were both speaking in high pitched voices. This bust-up led to the appellant pushing the complainant. In a blink of an eye he followed it up with a clenched

fist on the face of the appellant who hit the canvas and remained unconscious for some time. The intervention of other patrons probably saved him from further punishment. His injuries recorded in the J88 are abrasions on the nose, contusion on the left upper eyelid, contusion and subcutaneous bleeding on the frontal head as well as subconjunctival haemorrhage (bleeding in the medial eye) colloquially referred to as a “blue eye”.

- [5] An appeal court can interfere where it is shown that the trial court was wrong in its analysis of the facts.¹ In this matter the trial court made certain factual findings. On appeal I could not find any reason(s) to interfere with those factual findings.
- [6] The trial court was aware that it is incumbent on the State to prove its case against the appellant (accused) beyond reasonable doubt. Equally if the version of the appellant (accused) is reasonably possibly true, then he is entitled to an acquittal. The trial court also proceeded to analyse the evidence holistically aware of the inherent improbabilities on both sides and correctly rejected the version of the appellant and preferred that of the complainant and his witness Johan de Bruin.
- [7] The version of the appellant was that they had a heated argument with the complainant. He pushed him and noticed him clenching a fist. Fearing that he might be attacked, he unleashed a blow that left the complainant poleaxed.

¹ R v Dlumayo and another 1948(2) SA 677 (A) and
S v Francis and others 1991 (2) All SA 9 (A)

- [8] In order for self-defence to succeed, it must be shown that the defensive act undertaken was necessary for protection purposes. There must also be a reasonable relationship between the attack sought to be averted and the defensive act employed for that purpose.² As the Supreme Court of Appeal observed in *Grigor supra*, there must be a balance between the attack and the defence.
- [9] In this matter, it is unequivocally clear that on the day in question the appellant was the aggressor. He walked up to the complainant to confront him about being friendly to his father when he is badmouthing him. He even had the audacity to tell him to leave the bar even though they were at a public space.
- [10] When he did not get his way, he pushed the complainant. This on its own constituted an assault. He was not charged with it. There is no evidence that the complainant even attempted to resist or retaliate. The evidence is that the complainant was holding a glass of beer in one hand while the other hand was in his side pocket. There is a contradiction between witnesses as to what is it that he was holding. I conclude as the trial court did, that this is a minor contradiction which is not material to the evidence tendered on behalf of the respondent. The fact of the matter is that he was not posing any danger to the appellant.
- [11] According to the appellant he attacked the complainant because he saw him clenching his fist and ready to launch an attack. This is a fallacy. When he pushed the complainant, logic dictates that

² *Grigor v S* 2012 ZASCA 95

there was now some space between them. His counsel submitted that at that stage he was well within his rights to attack because if he had turned his back, it would have rendered him vulnerable. I find this submission unsound. He could have easily walked away. Moreso, there is no evidence that the complainant moved an inch towards him to attack. Therefore his view that he thought the attack was imminent is misplaced and not consistent with the evidence before the trial court.

[12] In pronouncing the verdict, the trial court concluded that the appellant is guilty as charged. On the J15 the learned magistrate wrote “guilty assault”. In my opinion this does not cause any confusion. It is a simple mistake. The appellant pleaded not guilty to the “assault with intent to do grievous bodily harm” charge. The evidence tendered before the trial court proved the commission of that offense. This then lays the contention to rest.

[13] The next instalment to be considered in this appeal is the issue of sentence. Counsel for the appellant correctly conceded that there is nothing shockingly inappropriate in the sentence imposed by the trial court. In fact the trial court was lenient to impose such a sentence. It is unnecessary to deliberate any further on this point.

[14] Therefore, I propose the following order:-

14.1 The appeal against both conviction and sentence is dismissed.

MA MATHEBULA, J

I concur and it is so ordered.

NM MBHELE, J

On behalf of appellant: Adv. S. Van Rensburg
Instructed by: Phatshoane Henney Inc.
Bloemfontein

On behalf of respondent: Adv. E. Van Rensburg
Instructed by: Director of Public Prosecutions
Bloemfontein

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