



**IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION,
KIMBERLEY.**

Reportable/Not reportable

Case no: CA & R 39/2018

In the matter between:

IZEKA MRWETYANA

APPELLANT

And

THE STATE

RESPONDENT

Heard: 28 January 2019

Delivered: 08 March 2019

Coram: Phatshoane ADJP and Mamosebo J

The appeal upheld, the conviction and sentence set aside.

JUDGMENT

PHATSHOANE ADJP

Introduction:

- [1] Constable Izeke Mrwetyana, the appellant, was 27 years old when he was tried by Magistrate OS Mazwi in the Magistrate Court for the District of Gordonia, sitting in Groblershoop, on a count of assault with intent to do grievous bodily harm ("assault GHB") in that on or about 27 August 2017 at or near Groblershoop he unlawfully and intentionally assaulted 34 years old Mr Elvin Baitsiwe ("the complainant") by hitting him with open hands and fists with the intention to cause him grievous bodily harm.

- [2] The appellant pleaded not guilty to the charge but tendered a plea explanation in which he admitted that on 27 August 2017, on two occasions, acting in self-defense, he pushed the complainant away from him and hit him with a fist in his face. These admissions were formally recorded in terms of s 220 read with s 115(2)(b) of the Criminal Procedure Act, 51 of 1977.
- [3] The trial Magistrate rejected the appellant's self-defense ground of justification. He found him guilty of common assault and sentenced him to pay a fine of R2000 or, in default of payment, to undergo five months imprisonment wholly suspended for a period of three years on condition that he was not convicted of assault or assault GBH committed during the period of the suspension. He now appeals against his conviction only with leave of the Court *a quo*.
- [4] Before us it was contended, for the appellant, that the Magistrate erred in finding a number of contradictions in the evidence presented by the state to be immaterial. It was further argued that the Magistrate misdirected himself in concluding that the complainant's evidence was corroborated by the evidence of the other two state witnesses, Mr Michael Booysen and Dr Molefe Godfrey Moletsane. Furthermore, the Magistrate erred, it was argued, in rejecting the appellant's version as improbable and convicting him of assault *simpliciter*. The state concedes that the conviction is not justified.

The Background:

- [5] The factual milieu to which this appeal gives rise is as follows. The complainant says that he was a spectator of a soccer match on 27 August 2017 at Samuel Gouws Stadium, Groblershoop, where his team, Topline, was playing against Wits. In the course of cheering on his nephew, Jerome Links, who was playing for Topline, he coached him not to play too deep into the soccer pitch because he was not a fast runner. The appellant approached him and warned him not to talk to the player in that manner. Out of the blue the appellant struck him once with an open hand on his left cheek. He enquired from the appellant if he was done hitting him but he slapped him once more on the same cheek. As a consequence, his left ear was bleeding. He had consumed alcohol and was not "completely sober".

- [6] The complainant departed the scene for a local police station to lay a criminal charge against the appellant. The police requested him to return on the Monday following the incident because: *“Die mense maak sake dan trek hulle dit die volgende dag terug.”* He consulted Dr Moletsane the next day who examined his ear and told him that it was internally injured. He referred him to an ear specialist. He was booked off sick for a week because his ear was swollen.
- [7] Dr Moletsane confirmed having examined the complainant and completing the J88 form. The complainant relayed to the doctor that he was “punched in the face twice” and that his left ear was bleeding. However, on his otoscopic examination, the doctor says, he did not find any abnormality (obvious inflammation/redness or injury) in any of the complainant’s ears. The meatus and its membrane were clean. He only observed that the complainant had a bruise below his left eye.
- [8] Mr Michael Booysen was seated high on the pavilion of the stadium while the complainant and “others” stood near the soccer pitch, some unmeasured distance from Booysen. He only observed the appellant striking the complainant once not twice with an open hand. He did not see what happened between the antagonists before this incident but afterwards noticed that the complainant had a nose and mouth bleed.
- [9] The above was a sum total of the evidence presented by the state. Prior to the closure of its case the prosecutor informed the Court that he would not call any further witnesses because their evidence would best serve the interest of the defence.
- [10] The appellant says he was a reserve player on the day in question. He stood next to the football pitch (close to the touch line) and heard the complainant screaming that the players were playing “s...it” (unprintable expletive). He cautioned the complainant not to abuse the players as they would lose concentration. The complainant accosted him in a confrontational mood and enquired what he wanted to do to him. The appellant pushed him backwards

with open hands to his face. This may probably explain the bruise found by the doctor below the complainant's left eye. The security personnel removed the complainant from the scene.

[11] Not long afterwards the complainant accosted the appellant once more and said to him: *"ek hou my lankal hardegat."* He prodded the appellant's chest, who in turn pushed the complainant back. The security personnel intervened again and removed the complainant from the scene. A while later, the complainant approached the appellant and attempted to pummel him with a fist but he ducked. The fist struck Mr Henny Horn, who stood next to the appellant. The complainant punched the appellant twice in his face. The appellant retaliated by hitting the complainant once with a fist on the left side of his face. The complainant fell.

[12] Two mutually destructive versions regarding the fracas were therefore placed before the Magistrate. Each party disputed the other's version. In addition, a number of contradictions, enumerated below, emerged in the case presented by the state which the appellant contended were material:

12.1 As already highlighted, the complainant intimated that when he attempted to lay a criminal charge against the appellant he was told to return on the Monday because *"Die mense maak sake dan trek hulle dit die volgende dag terug."* When confronted with his statement to the police in which he said: *"I was advised to come the following day because I was under the influence of alcohol,"* he changed his version and intimated that the police officer also said: *"More is dit 'n ander storie want sy sien ons is 'n bietjie gedrink."*

12.2 The complainant denied having conveyed in the police statement that he was struck with a fist on the right ear. He went on to say that he informed the prosecutor that that part of his statement was incorrect but the prosecutor advised him to proceed with the statement as is. Quite remarkably, the prosecutor did not move for any amendment of the charge sheet to reflect that the complaint was merely slapped in the face.

- 12.3 The complainant was also confronted with the doctor's report (the J88) which indicates that he had a bruise below his left eye. He denied that he had the bruise. However, he later conceded that the doctor may have detected injuries which he may have been unaware of.
- 12.4 The doctor testified that the complainant informed him that his right ear was injured. The complainant denied this.
- 12.5 On the evidence that the doctor did not find any abnormality in any of his ears the complainant explained that when he was ferried home by ambulance, from the police station, the ambulance crew saw his ear bleeding and gave him some medicine to clean it. This does not explain why the doctor had recorded that he did not observe any inflammation in his ears.

The Judgment of the Court *a quo*:

- [13] The Magistrate found it inconceivable that the complainant would have sworn at his cousin who had been playing for his team or at the other players. He rejected the innuendo that the complainant was in an inebriated state and reasoned that the complainant recalled how many times the appellant slapped him and that he managed to walk to the police station which was situated approximately three km from the scene.
- [14] The Magistrate went on to hold that: *"The mere fact that the doctor examined the right ear and further observed bruising below the left ear seems, in my view, to corroborate the version by the complainant that he was slapped twice on the left cheek and on the right side of the ear. Other than that it seems, in my view, that there would be no logical explanation as to why one, if the complainant was hit with a fist once, would cause bruising on the left eye and still cause the need for medical examination on the right ear."* The Magistrate found the contradictions in the evidence presented by the state to be immaterial. He held that the complainant's evidence was clear and by no means exaggerated. He was of the view that if the complainant intended to implicate the appellant falsely he would have conceded that the appellant struck him with a fist to make the charges appear more severe. Resultantly, he

accepted the complainant's version as the truth and rejected the contention by the appellant that he acted in self-defence. Having concluded that the appellant slapped the complainant twice he was unpersuaded that he did so with intent to cause the complainant grievous bodily harm. As already alluded to, he convicted the appellant of assault *simpliciter*.

The analysis:

[15] Stripped to its bare essential the question arising for consideration is whether the Magistrate correctly concluded, in light of all the contradictions pointed out, that the state proved its case beyond a reasonable doubt. It should also be determined whether the Magistrate correctly rejected the appellant's version that he acted in self-defense.

[16] Although the Magistrate referred to *S v Chabalala*¹ in his judgment he paid no attention to the holistic approach enunciated therein of weighing up all the elements which points towards the guilt of the accused against all those indicative of his innocence; and further of assessing the probabilities and improbabilities on both sides of the spectrum.

[17] In my view, some of the contradictions, although may seem inconsequential, brings into sharp focus the complainant's credibility as a witness. He did not fare well under cross-examination; was a bit argumentative when he had to respond to questions posed and somewhat prevaricated. He intimated that there were many people who saw what happened but none of them were called to testify. As already mentioned, the state opted not to call them because they could not have furthered its interest but that of the appellant. It is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court. Where an accused is represented, the prosecutor is not obliged to call evidence which is destructive of the state's case, or which advances the case of the accused.²

[18] Mr Booysen, the only eye witness called by the state, did not witness the whole brawl and contributed little support to the state's case. Neither was the

¹ 2003 (1) SACR 134 (SCA)

² *S v Van Der Westhuizen* 2011 (2) SACR 26 (SCA) at 32i-36g paras 9-13

complainant's version corroborated in all material respects by the doctor who examined him.

[19] This should be compared to the case presented by the appellant. His plea explanation accorded to the evidence he adduced. More pertinently, the Magistrate did not point to anything in his evidence which placed his demeanour in question. This notwithstanding, he found his version to have been highly improbable. He held that the appellant's version, that the complainant made derogatory remarks against the players, was highly improbable and concluded: *"As a consequence thereof anything that flowed from such a suggestion in particular, the suggestive advances by the complainant to Mr Mretyana [the appellant] would suffer the same fate and be rejected as false as they would be without any basis."*

[20] In concluding as set out above the Magistrate implied that all the events leading up to the brawl including the scuffle itself, as explained by the appellant, were by parity of reasoning improbable. This is not the correct way to assess the evidence. The fact that a witness may have been mendacious on one aspect of his/her evidence does not necessarily have to result in the Court jettisoning the evidence in its entirety. In *S v Mtsweni*³ the Court cautioned that the conclusion that because an accused is untruthful, he therefore is probably guilty, must be guarded against.

[21] The Magistrate concluded that it was highly improbable that the complainant, who was not 'completely sober', would not have said to a soccer player *"hy speel k..."*. The unprintable epithets may well have been said. It is difficult to understand why the appellant would confront the complainant if he had given sound advice to the players.

[22] What remains to be determined is whether on an objective consideration of the facts of this case the appellant acted reasonably and legitimately in order to protect himself against the complainant. In *S v Jackson*⁴ the Appellate Division restated the principle applicable to self-defense as follows:

³ *S v Mtsweni* 1985 (1) SA 590 (A)

⁴ 1963 (2) SA 626 (A) at 628G-H

'In this Court there is the judgment of WATERMEYER, C.J., in the case of *Rex v Attwood*, 1946 AD 331, which deals with the matter as follows on p. 340:

'The accused would not have been entitled to an acquittal on the ground that he was acting in self-defence if it appeared as a reasonable possibility on the evidence that the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, that the means of self-defence which he used were not excessive in relation to the danger and that the means he used were the only or least dangerous means whereby he could have avoided the danger.'

[23] The following dictum in *S v Steyn*⁵ is instructive:

'[19] Every case must be determined in the light of its own particular circumstances and it is impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence. However, there should be a reasonable balance between the attack and the defensive act as 'one may not shoot to kill another who attacks you with a flyswatter'. As Prof J Burchell has correctly explained'. . . modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether, taking all the factors into account, the defender acted *reasonably* in the manner in which he defended himself or his property'. Factors relevant to the decision in this regard include the following (the list is by no means exhaustive):

- the relationship between the parties;
- their respective ages, genders and physical strengths;
- the location of the incident;
- the nature, severity and persistence of the attack;
- the nature of any weapon used in the attack;
- the nature and severity of any injury or harm likely to be sustained in the attack;
- the means available to avert the attack;
- the nature of the means used to offer defence;
- the nature and extent of the harm likely to be caused by the defence.'

[24] The complainant confirmed that he was much older and well-built than the appellant. The fact that he was removed twice from the scene by the security personnel but kept pursuing the appellant is an indication that he was the

⁵ 2010 (1) SACR 411 (SCA) at 417 para 19

aggressor to the brawl. Whether the appellant ought to have retreated as opposed to retaliating is a difficult question as the Court observed in *S v Steyn* (supra). When the complainant hit the appellant with a fist he, to avert harm to himself, promptly retaliated in an attempt to defend himself by striking the complainant with a fist. Apart from the complainant's version, which was contradictory in the respects already shown, the state did not lead evidence which demonstrated the unlawfulness of the attack by the appellant and disproving his version that he acted in self-defense or that he exceeded its bounds.

[25] From the foregoing analysis, the appellant's version cannot be said to be not reasonably possibly true. In my view, the Magistrate misdirected himself in rejecting his version as improbable. It bears reminding that there is no onus upon an accused person to convince the Court that he is not guilty. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation may be improbable.⁶ The concession by the state, that the conviction was unsustainable on the facts of this case, was well made. It follows that the appeal must succeed. In the result I make the following order.

Order

1. The appeal is upheld;
2. The appellant's conviction and sentence are set aside.

MV Phatshoane ADJP

Mamosebo J concur in the judgment of Phatshoane ADJP

⁶ *S v V* 2000 (1) SACR 453 (SCA)

APPEARANCES:
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