IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
DATE:	23/3/2018
SIGNATURE:	[signature]

Case No. A171/2016

In the matter between:

MARTHINUS GERHARDUS OLCKERS **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MILLAR AJ

1. This is an appeal against conviction granted on petition to this court on 22 February 2016.

2. The appellant was convicted on 1 September 2015 in the Magistrates Court at Secunda on one count of common assault and one count of *crimen injuria*. He was sentenced to a fine of R1 500,00 or three months imprisonment, half of which was suspended for five years and to a fine of R3 000,00 or three months imprisonment, respectively.

3. This is a case which arose out of an altercation in a parking lot. Only two witnesses were called to testify, the complainant and the appellant. That the incident occurred was not in issue – it is what is alleged to have transpired during the incident that formed the basis for the complaint and prosecution.

4. The evidence of the complainant was that he had been driving in a parking lot, against the direction set out by the road markings. He was in the vicinity of the vehicle of the appellant, who was parked, and saw, out of the corner of his eye, that the appellant was gesturing at him. He stopped, and the appellant waved him on. He started to move and saw that the appellant was speaking and proceeded to stop again and opened his rear window to hear what the appellant was saying. The evidence of the appellant confirmed this. The complainant was alone in his vehicle; the appellant was with his wife and child in his vehicle. The incident was up to this point in time unremarkable and something that happens on a daily basis wherever there are drivers in parking lots.

5. The appellant then climbed out of his vehicle and walked to the complainant's vehicle. The complainant was still seated in his vehicle and opened his window, on the driver's side to talk to the appellant. The appellant was angry and said that the complainant had almost

caused a collision. The complainant testified that he had asked him if he was "playing" as there had been no collision.

6. The complainant testified that the appellant had put his hands through the window and had tried to throttle him. He had put both his hands around the neck of the complainant. This was described as "strangling". The complainant leant to his left and broke the appellant's hold. He then told the appellant that he was going to report him to the police and it was then at this point that the appellant swore at him. The appellant went back to his vehicle and drove off; the complainant followed and took down his registration number before going to the police to make a report.

7. The evidence of the appellant was, from the time he arrived at the window of the complainant's vehicle, that he had simply asked the complainant if he had a driver's licence. The complainant had been arrogant and had asked him if he was "playing" and he had then left, got back into his vehicle and driven off.

8. The learned Magistrate made no adverse findings as to the credibility or the demeanor[1] of either the complainant or the appellant and the case was decided on the respective versions.

9. The test to be applied in the present matter is set out in *Olawale v S*[2] where the Supreme Court of Appeal held as follows:

"Onus of proof – Prosecution must prove its case beyond reasonable doubt and a mere preponderance of probabilities is not enough – In view of this standard of proof in a criminal case, a court does not have to be convinced of every detail of an accused's

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[1] *S v Francis* 1991 SACR 198 (A) at 198 D-E.
[2] [2010] 1 ALL SA 451 (SCA) at 451 B-C and also *R v Dhlumayo and Another* 1948 (2) SA 677 (A).

version is true – If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version."

10. The two versions as to what transpired at the window of the complainant's vehicle are mutually destructive. One is the truth and one is not. Is the version of the appellant "*reasonably possibly true in substance*"?

11. It was not disputed that the complainant and the appellant did not know each other before the incident and that there was no reason for any acrimony between them. Furthermore, on both versions the complainant was seated in his vehicle throughout the incident and did not alight from it. The appellant corroborated the evidence of the complainant that he had asked him, when he had gone to his window, whether the appellant was "playing".

12. The state of mind of the parties at the time of the incident and the evaluation of their respective versions in light thereof is crucial to the determination of this appeal. The complainant was entirely passive throughout the incident. The appellant on the other hand not so.

13. Just prior to alighting from his vehicle the state of mind of the appellant is apparent – when he testified:

    "*He stopped right behind my car. Now he was blocking me your worship, from driving any further, and I did at that time realize that something is going to happen*," (my underlining).

14. It is in this state of mind that the appellant alighted from his vehicle and went to the complainant. The version of the appellant that he simply went to ask the complainant if he had a driver's licence is in the circumstances "not only improbable, but also falls beyond reasonable doubt[3]", when regard is had to all the circumstances of the incident.

15. The complainant had no reason whatsoever to lie and no reason was suggested, or basis laid for this by the appellant. While the complainant was the only witness[4] called by the respondent, it has been held that "*in evaluating the evidence of a single witness, a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities.*[5]"

16. In the present instance, the evidence of the complainant is entirely consistent with the probabilities whereas the evidence of the appellant is so improbable so as to be untrue. It is for this reason rejected.

17. After argument was concluded and judgment reserved, counsel for the appellant indicated that the appellant had not been given proper notice of the hearing of the appeal. This was not raised when the matter was called or during argument.

18. In the result, the following order is proposed:

The appeal is dismissed.

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[3] *S v V* 2000 (1) SACR 453 (SCA) at 453 B-C
[4] See Section 208 of the Criminal Procedure Act 51 of 1977.
[5] *S v Texeira* 1980 (3) SA 755 (A) at 761 A-B.

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE

M TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE, AND IT IS SO ORDERED

P MABUSE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	23 MARCH 2018
JUDGMENT DELIVERED ON:	28 MARCH 2018
COUNSEL FOR THE APPLICANT: -	ADV. D VAN DEN BERG
INSTRUCTED BY:	CRONJE DE WAAL ATTORNEYS
REFERENCE:	MR A BECKER
COUNSEL FOR THE RESPONDENT:	ADV. S SCHEEPERS
INSTRUCTED BY:	THE STATE ATTORNEY
REFERENCE:	VB26/2017