

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

30/7/14

CASE NO: A628/2014

In the matter between:

FRANS STONE

Appellant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	<u>29/07/15</u> DATE	<u>[Signature]</u> SIGNATURE

THE STATE

Respondent

JUDGMENT

Tuchten J:

- 1 The appellant was charged in a regional court with the crime of malicious injury to property. The allegation against him was that on 21 October 2011 and on the Watermeyer Street off ramp leading from the N4 North motorway, he deliberately broke the driver's door window of a Mercedes Benz motor car, then being driven by the complainant.
- 2 The appellant pleaded not guilty but was convicted as charged and sentenced to a fine of R2 000 or two months imprisonment with a

further four months wholly suspended for five years. He was refused leave to appeal by the court below but granted leave on petition to this court against both conviction and sentence.¹

3 Only the complainant and the appellant gave evidence before the court below. Except for a sketch made by the appellant's attorney during the course of cross-examination of the complainant, there was no evidentiary material before the court below other than the testimony of these two witnesses. Immediately before the incident, it seems that the complainant executed a risky manoeuvre to avoid a tail back of traffic she saw ahead of her. She had wanted to take the Rossouw Street off ramp, which is to the north of the Watermeyer Street off ramp. When she saw that traffic ahead of her was congested she swerved onto the Rossouw Street off ramp and parked on the yellow chevrons in the off ramp because there were vehicles ahead of her that had entered the off ramp in a more conventional manner.

4 At the time the complainant swerved her Mercedes Benz off the N4, the appellant was driving a motor cycle. He intended to leave the N4 at the Rossouw Street off ramp. The swerve executed by the

¹ I was one of the members of the court who granted the appellant leave to appeal. I raised with counsel whether it was proper for me in these circumstances to hear the appeal. Counsel had no objection to my hearing the appeal.

complainant placed him in danger. The appellant managed to avoid any collision but he decided instead of proceeding on his way to confront the complainant and remonstrate with her.

5 it is common cause that the appellant parked his motor cycle and approached the complainant as she sat in the driver's seat of the Mercedes Benz. It was clear that the appellant was very angry as he believed that the complainant's conduct had recklessly endangered his life. There is a dispute as to whether the driver's door window was open or not when the appellant approached the complainant. The complainant said that the window was closed and that she opened it "slightly" to hear what the appellant was saying. The appellant said that the window was about "half a foot"² open when he reached the Mercedes Benz.

6 It is common cause that the appellant put it to the complainant in strong terms that she had endangered him. The complainant said that the appellant was shouting at that stage and I accept that he was. But there the accounts diverge.

- 7 The complainant testified that she told the appellant that she was sorry and that she had not seen him, whereupon the appellant grabbed the window glass and pulled it, causing the glass to shatter and pieces of glass to fall into the car.
- 8 The appellant, on the other hand said in evidence that he was wearing riding gloves with rubbers both inside and on the outside of the gloves to afford protection to the rider if he came off his machine. It was not disputed that the appellant was indeed wearing such gloves. The appellant said that he rested his gloved hands on the glass of the partially opened window when he admonished the complainant.
- 9 The appellant said that when he admonished the complainant she laughed and said something in a language he did not understand and activated the mechanism to close the window. The appellant said that he tried to withdraw his gloved hands from the closing window but as he did so the friction of the gloves on the window caused the window to shatter. The appellant testified:

I surmise that the rubbers got gripped onto the glass of the window, and that is why it pulled back when my hands pulled back. I cannot say hundred percent surely, but there is marks on top of my gloves that I believe was caused by the window sole [?] of the car when I pulled back.

- 10 This proposition was strongly challenged by the prosecutor in cross-examination. He put it to the appellant that the appellant was lying:

So, and I put it to you, sir, that if, if, your fingers were inside the window as the window was going up, obviously it was going to stop and you were going to take it out without the window being broken. How possible can the window break?

- 11 To this the appellant responded that some vehicles do not have auto stop protection on the window mechanisms, that he did not know whether that specific vehicle had such protection and that he was not prepared to take the chance of his fingers being crushed.

- 12 No effort was made to secure the production of the gloves which the appellant said bore the marks on their tops which would demonstrate the truth of his version.

- 13 In dealing with this central issue, the regional magistrate said in his judgment:

Common sense says that if you are simply removing your hands from a window that is closing, you would release your grip from that window and you would move your hands away as swiftly as possible. Swiftly cannot be equated to forcefully. Now it is clear to me that the fact that the window broke, that there was no swift movement of the fingers away from the

window. The fact that the window broke also leaves the court to conclude, that the window was [being] gripped as opposed to being released.

...

There is no evidence to indicate that [the appellant's] fingers were actually caught between the channel of the window and the window itself.³

- 14 In my view this passage from the judgment shows that the regional magistrate fully appreciated the appellant's defence which was that during the process when the appellant was withdrawing his gloved hands, there was contact between the gloves both on the glass below them and on the top of the window above them and that the rubber protections on the gloves increased the friction between the gloves and the two surfaces in question.
- 15 But in finding that there was no evidence on the strength of which the regional magistrate could legitimately conclude that the appellant's fingers were actually caught in the manner described, I think that the regional magistrate erred. There was such evidence, given by the appellant. And in addition, there was a claim by the appellant, which was left uncontradicted and uninvestigated by the prosecutor, that objective evidence, ie the gloves themselves, would support the appellant's version. In these circumstances, I think that the appellant

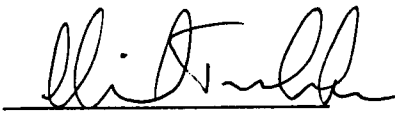
ought to have been given the benefit of the doubt and that his evidence on the crucial issue should have been found to be reasonably possibly true.

- 16 The issue raised in the court below by the appellant's defence was whether the appellant had the requisite intention to damage the complainant's property. It is common cause, as was of course appreciated by the regional magistrate, that the State bore the onus of proving beyond a reasonable doubt that the appellant had the requisite intention. The appellant said that he had no such intention and that the damage occurred while the appellant was acting to protect himself from injury to his fingers. For the reasons given, I think that the magistrate erred in concluding that the intention to damage property had been proved beyond reasonable doubt.

- 17 it follows that the appeal must succeed. I make the following order:

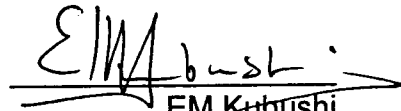
- 1 The appeal against conviction succeeds.
- 2 The conviction and sentence imposed upon the appellant in the court below are both set aside and replaced with the following: The accused is found not guilty and discharged.

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NB Tuchten
Judge of the High Court
29 July 2015

I agree.



EM Kubushi
Judge of the High Court
29 July 2015