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NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT – PRETORIA

(REPUBLIC OF SOUTH AFRICA)

APPEAL NO: A 807/11

DATE:04/02/2013

In the matter between

KAREL FREDERIK GROENEWALD

Appellant

and

THE STATE

Respondent

JUDGEMENT

Van Schalkwyk, A J

[1] The Appellant was convicted of Assault Common, on 10 June 2010 in the Magistrate's Court for the district of Ellisras, and sentenced to a fine of R500.00 or 60 (sixty) days imprisonment.

[2] The Appellant appeals against both conviction and the sentence imposed on him.

[3] The salient facts which led to the conviction of the Appellant are as follows. The complainant a 17 year old boy testified that on the 12th January 2010, at Ghorum Farm Leppalala he was instructed by his dad to call Lennox, one of the farm workers. When he located Lennox he noted that Lennox was assisting the Appellant to off-load a fridge from a vehicle. He called Lennox who responded. Whilst in the process of walking away, the appellant came from behind and pushed him away. The appellant then hit him with his open hands on the chest in what he described as a 'karate move' causing him to fall backwards. The appellant came from behind and threw him over a small step.

[4] He experienced a sharp pain to the chest. The appellant was aggressive. Their relationship was acrimonious as a result of something that happened in the past.

[5] The appellant testified that on the 12th January 2010 Lennox, himself and his son F, were busy off-loading a fridge from his bakkie. The complainant approached them and became aggressive. He called Lennox and told the appellant that he does not pay Lennox but they do. A confrontation ensued. The appellant requested him to leave.

[6] The appellant requested him to stay out of the adult's affairs. The complainant kept advancing and invited the appellant to hit him. The appellant then pushed him on the shoulder, turned him around and said he must leave. The complainant refused to do so, and approached the appellant and asked him to 'slap him'. He told him he needed more than a 'klap' and that he needed education.

[7] The appellant's appeal is based on the grounds that the learned Magistrate erred and misdirected herself by not considering the following factors

7.1 By accepting the testimony of a 17 year old single witness as sufficient evidence above reasonable doubt.

7.2 The said complainant admitted in cross examination that his version has been fabricated.

7.3 Not to accept the appellant's version as correct.

7.4 Not to draw an adverse inference by the State's refusal to call the two other witnesses.

7.5 By accepting that the appellant acted with intent and not to find that the appellant's actions were reasonable under the circumstances.

[8] A court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court (see *R v Dhluma* 1948 (2) SA 677 (A) and will only interfere where the trial court materially misdirects itself insofar as its factual and credibility findings are concerned. In *S v Francis* 1991 (1) SACR 198 (A) at 198j - 199(9) the approach of an appeal court to findings of fact by a trial court was crisply summarised as follows 'The powers of a court to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness's evidence a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony'

[9] The issue for determination is whether the State established the guilt of the accused beyond reasonable doubt.

[10] It is trite law that in criminal proceedings, the State must prove its case beyond reasonable doubt. In *Olawale v S* [2010] 1 All SA 451 (SCA) at paragraph 13, the court held that 'a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's 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. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true'.

[11] The State's case rested on the evidence of a single witness, being the complainant, a 17 year old male. In evaluating the evidence of a single witness, regard must be had to the probabilities and improbabilities of the evidence. In *Olawale v S* [2010] 1 All SA 451 (SCA) at paragraph 14, the court held that¹¹ 'In evaluating the evidence against the appellant, one must look at the reliability and credibility of the witnesses, consider if any of them had a motive to falsely implicate the appellant, and further look at the probabilities of the State's version'. And in paragraph 15 thereof The evidence of a single witness has to be clear and satisfactory in every material respect. The evidence has to be treated with caution. A court can accept the evidence of a single witness if it is satisfied that it is truthful beyond reasonable doubt.

[12] I now turn to the evaluation of the complainant's evidence. The complainant's evidence-in-chief, gave the impression to the court a quo that he did nothing wrong on the day in question, and that he merely went to call Lennox, on instruction from his father, and that thereafter, he walked away when the appellant came from behind and assaulted him. Under cross examination, the complainant conceded that the appellant had responded that Lennox was helping him and that he told the appellant that Lennox does not work for him, he works for us and we pay him. He also conceded that when asked by the appellant to leave, he refused to do so. This confirms the appellant's version that the complainant was provocative right from the onset.

[13] The complainant's version ought not to have been accepted without considering the history of acrimony and trouble between the parties. One cannot deny the fact that it is probable that the complainant may have fabricated his story to incriminate the appellant. He certainly had a motive to do so, given the acrimonious relationship which existed between the appellant and the family of the complainant. From the record it is clear that the complainant was embroiled in an incident with the appellant previously, when he allegedly turned off the appellant's water.

[14] The complainant's evidence cries out for corroboration. One has to make an adverse finding by the State for not calling Lennox or even Fritz as witnesses. The State's explanation that it did not call Lennox because he no longer worked at the farm is unsatisfactory and the State furnished no explanation for his unavailability. The State's failure to call Fritz, the son of the appellant is also unclear and without any explanation. The onus does not rest on the appellant to prove his case, therefore it was not his duty to call his son Fritz to give evidence.

[15] The appellant's version, in my view, is more reasonably possibly true, and that the appellant had requested the complainant to stay out of the adult's affairs, the complainant responded and challenged the appellant to 'klap' him. The appellant's version that he responded by suggesting that the complainant needed more than that, and that he needs an education, and that he grabbed the complainant by the shoulders, turned him around and pushed him away, seems more probable.

[16] The court misdirected itself by accepting the evidence of the complainant, a single witness, as satisfactory and reliable in light of the shortcomings in the complainant's evidence, and further that there were no objective facts which corroborates the complainant's version with regard to the actual alleged assault, despite other witnesses being present on the day of the incident. The trial court failed to approach the evidence of the complainant with a sufficient degree of caution, and erred in concluding that the complainant's evidence was satisfactory in every material respect.

[17] The appellant's version, in my view can be said to be reasonably possibly true, and I am not satisfied that the guilt of the appellant has been proved beyond reasonable doubt. In the light therefore, the appellant's conviction and sentence cannot stand.

[18] In the result, the following order is made

- (a) The appeal succeeds on conviction and sentence.
- (b) The conviction and sentence are set aside.
- (c) The appellant is found not guilty and discharged.

Van Schalkwyk AJ

I agree and it is so ordered.

Pretorius J