



**IN THE COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

CASE NO: CA&R 62/12

Heard on: 26/11/2012

Delivered on: 08/02/2013

In the matter between

FRANCOIS ARNOLDUS LOMBAARD

APPELLANT

AND

THE STATE

RESPONDENT

Coram: PAKATI J et COETZEE AJ

JUDGMENT ON APPEAL

PAKATI J

1. The Appellant, Francois Arnoldus Lombaard, was charged in the Magistrates Court, Kuruman, with two counts. In count 1 he was charged with *Crimen injuria* and in count 2, he faced a charge of assault with intent to do grievous bodily

harm. He pleaded not guilty to both charges. He was convicted on 30 March 2012 on both counts. The charges were treated as one for purposes of sentence. He was sentenced to pay a fine of R1500.00 or in default of payment to undergo three months imprisonment. The Magistrate refused leave to appeal against his convictions. This Court granted leave to appeal against the convictions.

2. On 06 January 2011 the appellant, the Manager of Price City Shop in Kuruman, had parked his bakkie in a loading zone in front of the shop. The complainant, Mr Albert Moseke, was in the company of his cousin (name undisclosed) in front of the shop close to the appellant's vehicle. He had placed his foot against a pole situated in front of the shop. The appellant approached him from behind and pushed him. His foot that was leaning against the pole got twisted and was injured as a result. The appellant uttered some derogatory words at him. The complainant asked why he insulted him. In response the appellant intimated that he had scratched his vehicle and should move away. An argument ensued. The appellant reached for his car and took out pepper spray and sprayed the complainant in the eyes causing him to be treated in hospital.
3. The complainant disputed that he was leaning or sat on top of the appellant's vehicle, let alone scratching it. He testified that before the appellant pepper-sprayed him he did not warn him. He intimated that when he confronted the appellant, the appellant had nothing in his hands. He disputed that he prevented the appellant from closing the door of his vehicle.
4. The appellant testified that on the day in question he was on his way to the bank to deposit some money. He noticed the complainant in front of the shop sitting on the bumper of his vehicle scratching it. He asked him politely to move away. The complainant in response screamed at him. The appellant opened the door of his bakkie. At that stage the complainant prevented him from closing the said door. He thought that the complainant was about to rob him. He warned him twice to move away from him. When the complainant did not heed the warning he pepper-sprayed him. He denied that he uttered any derogatory words.

5. It was common cause that on the day of the incident the appellant and the complainant had an altercation. It was not in dispute that when the appellant came out of the shop he asked the complainant why he was scratching his car. The complainant's version that he did nothing to offend the appellant lacks conviction in the circumstances. His conduct was the main reason why the appellant approached him and insulted him. The appellant on the other hand testified that he spoke politely to the complainant and told him to move away from his vehicle even though he saw him sitting on top of the bumper and scratching it. That would be a strange reaction by a person whose property is being damaged.

6. The principle on appeal is that in the absence of a material misdirection by the Court *a quo*, its findings of fact are presumed to be correct and will only be disregarded or disturbed if the evidence shows them to be clearly wrong. See **R v DHLUMAYO AND ANOTHER 1948 (2) SA 677 (A)**.

7. In convicting the appellant the magistrate noted that the State and the defence versions are mutually destructive. In his judgment he said: *"I cannot find that there's evidence on record that there was an attack or an attack eminent and or threatened and or that his life was in danger as to resort to the actions that transpired on this particular day."* The appellant said: *'Dinkendenouhierdie is moontlik 'n rooftog'* without justifying why he thought the complainant was about to rob him. He testified that the complainant was standing in his way such that he was unable to close the door. The following transpired during cross examination: *"PP: So if I understand you very correctly you opened the door and then instead of yourself getting into the door, this complainant was standing or somewhere there?"*
Accused: I was trying to get in the car, by that time. When I opened, when you open a door, you climb in. I was trying to do that, when I was trying, I was already halfway in the vehicle this guy - I could not get the door [closed], so what am I supposed to do, give him [the] money, hey take this and go.

PP: Was he handling the door so that you could not close the door?

Accused: No he was standing in the way.

PP: So you couldn't even pull the door and see as to what his response will be?

Accused: I could.

PP: So why didn't you do it?

Accused: I do not want to hurt that person. That's why I gave him warning after warning.

PP: But you ended up hurting him by pepper spraying him?

Accused: That was last defence.

PP: You could just have closed the door and see what was going to happen?

Accused: No I couldn't have closed the door.

PP: Were you seated by then when you wanted to close the door?

Accused: I was still halfway in the vehicle, I tell you that.

PP: So how were you going to be able to close the door whilst you were still half way, you were not inside the car?

Accused: If this person is preventing me from getting in the car, then obviously it's not easy for me to get in the vehicle."

8. If the appellant was trying to get into the vehicle and was already halfway or partly in there is no way that the complainant could have prevented him from getting in without even touching him. On the other hand if the complainant prevented him from closing the door it means he was already inside and therefore could not have prevented him from getting in at the same time. It is improbable that the appellant did not want to hurt the complainant, who on his version, tried to rob him. This version came out for the first time in his evidence-in-chief. It was never mentioned in his plea explanation nor was this version put to the complainant under cross-examination. He also did not report it to the police.

9. Mr Manswho appeared for the appellant during the trial put to the complainant that the appellant had the money in his hands. The appellant contradicted this statement when he stated that the money was in his pocket.
10. The proper approach that should be adopted by a magistrate in dealing with conflicting versions was explained by HeherAJA in **S v CHABALALA 2003 (1) SACR 134 (SCA)** at 139 i-j as follows:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused' guilt."

11. In the instant case the magistrate in his judgment mentioned that *'there were no red lights flickering and there were no material differences in the examination in chief and/or the cross-examination by the defence'* but did not specifically deal with the improbabilities. The fact that he did not deal with the improbabilities does not mean that he did not consider them. See **S v FRANCIS 1991 (1) SACR 198 (A)** at 204b-c. *In casu* the appellant's version was an after-thought and a fabrication. The magistrate correctly convicted him of *crimen iniuria*.
12. As far as the conviction on the charge of assault with intent to do grievous bodily harm is concerned it is common cause that the appellant sprayed the complainant with pepper spray. According to the complainant this happened when he told the appellant that he had injured his leg. The appellant on the contrary said that this took place after he realized that the complainant was about to rob him. The State led no evidence showing that the complainant was assaulted with the intention to cause grievous bodily harm. The extent of the injuries he sustained was also not explored. Although the complainant received medical attention, no J88 medical form was completed. The doctor who treated him was

also not called to testify. The doctor could have cleared this up. See **S v MELROSE 1985 (1) SA 720 (ZSC)** at 724H.

13. The magistrate misdirected himself in having found that the appellant was guilty of assault with intent to do grievous bodily harm. The conviction must accordingly be set aside and be replaced with a conviction of assault common. The conviction in the first count of *crimeniniuria* must stand.
14. In our view the sentence in respect of both counts, taken together for purposes of sentence, is a just and proper sentence in the circumstances and must not be disturbed.

In the circumstances I make the following order:

- 1. The appeal against conviction on count 1 (*crimeniniuria*) is dismissed.**
- 2. The appeal against conviction on count 2 (Assault with intent to do grievous bodily harm) succeeds. The conviction of assault with intent to do grievous bodily harm is set aside and replaced with a conviction of assault common.**
- 3. The sentence of One Thousand Five Hundred Rand (R1500-00) or in default of payment to undergo three (3) months imprisonment must stand. Both counts are taken as one for purposes of sentence.**

BM PAKATI
JUDGE

I CONCUR,

W COETZEE
JUDGE AJ

For the Appellant: *Adv IJ Nel on instructions of De Bruyn and Strauss Inc,*
Jan Kempdorp

For the Respondent: *Adv AH van Heerden*