



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE 2011/12/07


SIGNATURE

CASE NO: A81/2011

DATE: 9/12/2011

IN THE MATTER BETWEEN

GOPOLANG PATRICK ASANENG

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

LEGODI, J

1. Before us, is a criminal appeal against convictions and sentences on charges of inconsiderate driving, *crimen injuria*, and assault common.

2. The appellant, a director in the South African Police Services, initially appeared on these charges in the Magistrate's court for the district Potchefstroom. He was legally represented through out the proceedings in the court a quo. He pleaded not guilty to all these charges and as regard the assault charge, he raised self-defence. As regards the other two charges, he denied all allegations levelled against him.
3. He was ultimately convicted on the assault, *crimen injuria*, and inconsiderate driving charges. Subsequent to his convictions, he was sentenced as follows:
 - 3.1 Charge 1 : Assault; Sentenced to R10 000.00 or 12 months imprisonment half of which was suspended on certain conditions.
 - 3.2 Charge 2: *Crimen injuria*; Sentenced to R5000.00 or six months imprisonment.
 - 3.3 Charge 3: Inconsiderate driving, sentenced to R2000.00 or two months imprisonment.
4. This appeal before us, is with the leave of the court a quo. The state led the evidence of four witnesses and the appellant also testified in his defence, after which, the state applied for the reopening of its case and the fourth witness for the state testified in rebuttal on some of the evidence adduced by the appellant. It is not my intention in this judgment, to deal with the evidence of each witness in detail or separately, unless it becomes necessary to do so.

5. In a nutshell, the evidence by the state against the appellant was to the following effect: It was during the day, at around about 13H00. All of it happened on the 8 January 2007. The complainant was on his way to school to fetch his children.
6. He was driving his motor vehicle along Van Welligh Street in Potchefstroom. He was travelling from a westerly direction towards the east. At a robot intersection of Van Welligh and Tom Street, he was to turn to the left, towards a northerly direction into Tom Street. The robots were red for him and he stopped at the intersection, to wait for his right of way. When the robot turned green for him, he then turned to the left. The appellant's vehicle which was on the opposite side also turned to the same direction into Tom Street. It got in front of him. Both vehicles proceeded towards the north in Tom Street.
7. By the way, the road at the robot intersection aforesaid has two lanes on both sides of Van Welligh Street. The one allowing vehicles coming from a westerly direction to turn to the left and similarly, the one allowing vehicles coming from a easterly direction to turn to the right into Tom Street. Tom street has single lanes. From the robot intersection up to a distance away from the intersection, there is a cement pavement and also drainage hole. There is also a garage on the left hand side as one moves from the robot intersection towards the north into Tom street.

8. From the robot intersection and after you have passed the garage, there is a stop sign. It was at this stop sign that the complainant moved from behind the appellant and stopped at the first stop sign on the appellant's right side. He opened his window and uttered words to the following effect: *"Chief, you cannot make me to drive the way you made me to drive"*
9. The appellant is said to have responded by uttering the following words in Setswana *"Polo ya gago"*. This was translated as, *"Your penis"*. From that first stop sign, both the appellant and complainant drove towards the next stop sign. At that stop sign, the complainant turned to the left towards Steers-Take Away outlet.
10. The complainant made a U-turn, after having turned to the right. He followed the appellant. He took a photo of the appellant as the appellant was getting out of his vehicle. Apparently, the appellant did not realize the complainant at that stage. The complainant was not satisfied with the quality of the photo. The appellant went into Steers. The complainant followed him. At Steers, and in full view of everyone, including the appellant, the complainant took photos of the appellant. The appellant realizing what the complainant was doing, tried to take the camera from the complainant. They struggled over possession of the camera. In the process, the appellant slapped the complainant. The appellant could not succeed in taking the camera from the complainant. Other people assisted the complainant in ensuring that the camera was not taken

away from him. This alleged conduct on the part of the appellant, led to the charges aforesaid, being preferred against him.

11. Before I deal with the evidence of the appellant, and the defence raised by him, it might be necessary to briefly sketch out what is required of the state in any criminal case. The court is required to consider the evidence as whole in considering whether the state has discharged its onus. Defects in the evidence of the accused, not assisting state therein, if evidence of state witnesses is open to serious criticism. An accused does not have to convince or persuade a trial court of anything. If the court finds the accused's version might reasonably be true, such is sufficient for acquittal. (See S v Fochems 1991(1) SACR 208 (A).
12. Assessment of mutually destructive factual accounts, although relative honesty of two versions is of a great importance, not only their honesty has to be considered, but also and more particularly, their reliability. Truth of the version of onus bearing party has to be proven and not merely the honesty of the witness or witnesses who put it forward. (See S v Saban en'n Ander 1992 (1) SACR 199(A).
13. The trial court when confronted with mutually destructive versions, is required to apply its mind not only to merits and demerits of the state and defence witnesses, but also to the probabilities of the case. The best indication that the

court had applied its mind, in a proper manner, is to be found in the reasons for judgment, including reasons for acceptance and rejection of respective witnesses. (See S v Bhengu 1998 (2) SACR 231 (W)).

11 I now turn to deal with findings by the trial court. As regards to reckless, negligent or inconsiderate driving, the trial court at the start of its discussion on the charge, expressed itself as follows: *"The complainant's version is fairly simple and straight forward, although the accused did dispute some material aspects in it."* I do not agree with the suggestion that the evidence was "fairly simple and straight forward". In my view, with regards to the charge of reckless, negligent or inconsiderate driving, the first question should have been seen as being whether the state had proved beyond a reasonable doubt that the robots were red for the complainant and that the complainant stopped at the robots before he turned to his left into Tom streets. Secondly, whether there was any such cutting in and if so where it happened on the road. The evidence of the complainant in chief proceeded as follows:

"What happened then?... I have turned and this Mercedes Benz also turned and turned in and get in front of my vehicle.

When you turned which of the two vehicles had the right of way?...It is my car.

So the did the Mercedes Benz have to cross your lane in order to turn in the same street as you were turning into?... Yes, it get into my lane."

15. The third question quoted above, was clearly leading, and it also did not make any sense. The appellant did not have to cross any lane. There was no lane to cross. Remember, into Tom Street, there was only one lane towards the north. So, if the appellant was from east turning to the right towards the north into Tom lane, he did not have to cross any lane of the complainant. The statement, *" I have turned and this Mercedes Benz also turned and turned in, and get in front of my vehicle"*, did not suggest any wrong doing on the part of the appellant. But, because the prosecution was not happy with the explanation of what had happened at the intersection, it found it necessary to put leading questions.

16. Remember, the version as quoted above had given a brief account of what the appellant had already done with regards to count three, the reckless, negligent or inconsiderate driving. Not been satisfied with an outline of the events, the prosecution then put a question as follows:

"I want to take you back to the situation when you turned into Tom Street. The Mercedes Benz, then drove in front of you, is that correct?...That is correct.

"Did you have to do anything when he came in front you?... I swerved to the garage just to avoid an accident."

16.1 The question should have been stopped there and then. It was leading and suggestive. The witness was asked to tell a story by putting questions like "What happened?", and "you may proceed sir." When he

failed to do so, a somewhat leading and suggestive question as indicated in paragraph 16 above was put to him.

17. I do not see all of these as having been 'a simple and straight forward' version by the complainant. The complainant's version should further be seen in the context of what unfolded later in his evidence. Remember, it was the "swerving to the garage just to avoid an accident" that brought the appellant to be convicted on the inconsiderate driving charge.
18. Under cross examination he made a statement to the following effect: "...I stopped at the robots and I was turning left and that is when this car came in". Having said this, a question was then put to the complainant as follows: "Did the accused's car overtake your car, because he was the first to turn?... After I avoided this collision, it passed by."
19. This piece of evidence might suggest that the swerving and avoiding of the collision had occurred whilst the appellant's car was behind or had not yet passed the complainant. If that was so, why then was it necessary to do the "swerving" and "avoiding" of the collision? All of these do not suggest a simple and a straight forward version as to how the alleged inconsiderate driving was committed.
20. Now, the complainant wished to suggest that the collision took place almost at the corner of his left, at the intersection. Perhaps to make it clearer, during

cross examination, the complainant was confronted with the sketch plan and key thereto. A, on the sketch plan denotes the direction of the appellant's vehicle at the intersection. B, denotes the position of the complainant's vehicle at the time the appellant was entering the intersection. C, is the left corner of the intersection as one comes from a westerly direction, turning to the left towards the North at the intersection. The distance between C and where the complainant's vehicle was observed by the appellant when he turned at the intersection towards his right, is 37 paces. By the way, the appellant's car coming was from the east and it turned to the right towards the north. D, on the sketch plan was not properly explained, but the distance between C and D, was recorded as 37 paces. E is the northerly corner of the intersection as one comes from the east. In other words, the corner on the right hand side of the appellant at A. F is positioned next to A. That is, the right edge of the lane from east. This is the lane for cars wishing to turn to the right at the intersection from the east, into Tom Street towards the north.

21. In the course of the cross- examination of the complainant, the trial court had the occasion to go for inspection in loco. On its return, it expressed itself on record as follows:

"I think the court may record that there is not much difference or disputes around the area at which the alleged reckless or negligent driving occurred. In addition the following observations are recorded: We measured the distance between, rather, from the corner of shall I say, the intersection to the entrance

of the garage and that was measured at 15 meters. We also measured the distance between the tree and the curb and that was about three paces. We measured the distance between G and C, or K, if you wish, and that was about four paces, yes. I think the rest of what appears on Exhibit E was confirmed by both the accused, through his legal representative, and Mr Wanyane and the public prosecutor."

22. In addition to these recordings upon return from inspection in loco, the defence placed the following on record:

*"And, finally, it should also noted that there is, that the road is lower than the pavement and there is a cement (inaudible) there."*To this, the trial court responded by saying "yes".

23. Further, the defence placed on record the other observations during inspection in loco as follows: *"Ja, but what I am saying, your worship is there is (inaudible) the pavement, right from the corner there is a pavement and then there is the water drain thing, which is not even bigger than or longer than a metre and those embankments(inaudible).*

24. The defence then concluded with what he wanted to be placed on record as follows: *"what I am saying, I am just trying to show your worship that what we want to have seen, for anybody to get out of the road he must have gone onto that thing. That is, what I am trying to explain."*

25. The recording of observations during inspection *in loco* as indicated by the defence during trial, sought to suggest that if there was any attempt by the complainant to avoid the alleged collision, he would have bumped against the pavement or the embankment, something which the complainant said never happened. Remember, that the court *a quo* placed on record after the inspection *in loco* that from the intersection, from C to the entrance of the garage, is 15 meters.
26. I think it makes sense why the complainant did not bump against the pavement or even the sewerage drainage. It was the appellant's version that there was never such an interruption that could have caused the complainant to want to avoid a collision. The appellant's version in this regard, should also be seen in the context of the complainant's evidence. At the risk of repeating myself, it unfolded as follows: "*I swerved to the garage just to avoid an accident.*"
27. '*Swerved to the garage just to avoid on accident*', in my view, dispelled the suggestion that the cutting in, in front of the complainant, was at the intersection at round about point C. If the state really wanted to suggest that the "swerving and avoiding of the collision," was not at the entrance of the garage, such a point where the swerving and avoiding of the collision took place, could have been pointed out during inspection *in loco*. But of course, in my view, it makes a sense, why it did not become an issue during inspection in

loco. Simply, it was not the complainant's evidence that it happened at C or between C and before the entrance of the garage, which was measured as 15 meters from the robot intersection. The version was that the "swerving and avoiding" was at the direction towards the garage. Remember, when the court went for inspection in *loco*, the complainant had already said: "I swerved to the garage just to avoid an accident."

28. Bearing all of the above in mind, the next question is whether the state had proved beyond reasonable doubt that the appellant cut in front of the complainant. The state's version in the court *a quo*, was in my view, clarified with regard to the suggestion that at the intersection, the appellant unexpectedly cut in front of the complainant's car. I have already dealt with the evidence in this regard. If it was to be true he swerved to the garage just to avoid the collision, it can't also be true that the cutting in was at the intersection.
29. Counsel for the respondent in this appeal sought to suggest that the case for the state should be seen in context. That is, why would the complainant confront the appellant and enquired as to how he was driving, if it did not happen as explained by the complainant. The "why" question is a rhetoric question. Absence of motive to incriminate accused not conclusive. It is only one of the factors to consider. (See *S v M* 1999 (2) SACR 548 (SCA). It is

necessary to guard against putting the onus on the accused to explain why a state witness would lie. (See *S v Lesito* 1996 (2) SACR 682 (O)).

30. It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the state witnesses would falsely implicate him. The accused has no onus to prove any such explanation. The true reason why a state witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to carry favour with their supervisors, they sometimes seek to please and impress police officers, and on other occasions, they have secret ambitions and grudges unknown to the accused. It is for these reasons that the court has repeatedly warned against the danger of the approach which asks: "Why should the state witnesses have falsely implicated the accused?" (See *S v Ipeleng* 1993 (2) SACR 185 (T) at 189 c-d.) I think the complainant in the present case has conducted himself as a man with many colours. A man who pretends to be the kind of a person who wants to see justice to be done, but at the same time a very confrontational and angry man who stops at nothing.
31. It is the wrong approach in a criminal case to say: "Why should a witness for the prosecution, come here to commit perjury? It might equally be asked: "why does the accused come here to commit perjury? True, an accused is interested in not being convicted, but it may be that a state witness also have

an interest in securing a conviction. It is therefore, quite the wrong approach to say, 'I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that, therefore his evidence must be true and the accused must be convicted.' The question is whether the accused's evidence raises a doubt. (See remarks by late Millin in *Schulles v Pretoria City Council*, a judgment delivered on 8 June 1950, but not reported). This judgment was also quoted in *Ipeleng supra* at 189. I think, the trial court in the present matter before us, adopted the same approach which is said to be wrong, in rejecting the appellant's version. His evidence on all the charges in my view, raised a doubt, especially seen in the manner in which the complainant conducted himself, not only during questioning, but also as displayed by his conduct towards the appellant and, his conduct towards the other police officials at the police station.

32. However, it must be remembered that, the appellant's version was that the complainant was not at the intersection when the appellant made a turn to the right into Tom Street. Now coming back to the "Why" question, the manner in which the complainant conducted himself towards the appellant, in my view, displayed the kind a person who lacks the attributes of patience and tolerance. He displayed the attitude of a person who wants to take charge of every situation. In doing so, he displayed a confrontational attitude. Such people loose it at a slightest provocation. It could well be that the complainant expected the appellant to stop at the stop sign and waited for him to turn left

into Tom Street, despite the fact that he was still a distance away from the intersection when the appellant turned to the right from the easterly direction.

33. Ordinarily, one would wait for the car turning to the left, before the one wishing to turn to the right in the same direction could turn. The rhetoric "why" question very often tends to call for speculation. Just to show how intolerant and confrontational the complainant was or could be, he drove behind the appellant. Approached a stop sign on a single lane road. At the stop sign, stopped on the lane of the oncoming vehicles, just for the sake of confronting the appellant by uttering the words to this effect.

"Chief, you cannot make me to drive the way you made me to drive."

34. By that time when he so confronted the appellant, he was aware that he was talking to a police official in uniform. Still that did not deter him from continuing with his subsequent conduct. I am saying this because after he was allegedly insulted at that stop sign, he took the registration number of the appellant's vehicle. The suggestion was that, because he was insulted and he wanted to report the insults to the police. One would have thought that it would end up there. But, not with the complainant. At the next stop sign, when he realized that the appellant had turned to the left, the complainant having turned to the right, decided then to make a U-turn, with the sole purpose of confronting the appellant again. He did this by taking photos of the appellant and his car at a parking bay. Apparently, not content with the photo or photos, he continued

pursuing the appellant until he got to Steers. There, in full view of everyone, he started taking pictures of the appellant again.

35. You really need to be a persistent person and an angry person to do all of these. You need to be the kind of a person who wishes to display how far he or she can go in pursuing other people, and confront them, no matter what other better options you have. I do not know whether I should call the complainant a brave and a daring person. For example, having arrived at the police station, and whilst the appellant was still somewhere at the police station to report the incident, the complainant arrived there. His conduct at the police station was described by Senior Superintendent Molate, who testified on behalf of the defence as follows:

"When I entered, there was certain gentleman who was speaking very loud and screaming. I just heard him saying, waar is daardie man, waar is daardie man. Ek sal hom stop. Waar is daardie man, waar is daardie man. Then I came nearer to him I saw other members like scared or surprised of what was happening. Then I came closer to him, then he said 'ever since I was born I was never assaulted by a young boy like Asaneng'. Then I thought okay maybe that is the man who had a problem with Director Asaneng"

Question: All right now this man you say he was swearing and he said waar, is daardie man ek sal hom stop. In what mood was this person?

Answer: O, he was very angry, he was very aggressive."

36. Further in an answer to a question as to what kind of a person was the complainant at that time, Superintendant Molate responded as follows:
- "You know what, I saw it was just anger. He was angry and I tried to calm him down, but because he was angrier he could not even hear what I was trying to say. So I just saw anger on his face like fight. He was someone who is like really to fight because he was speaking very loud."*
37. You really ask yourself what was the anger all about at that time? But, this is the kind of a person who is said to have had no reason to confront and implicate the appellant. As I said, it could well be that he expected the appellant to wait for him despite the fact that he was still at a distance.
38. I think what was 'simple and straight forward', with regard to the inconsiderate driving charge, was the appellant's version. He approached the robot intersection in question. As he was approaching, the robot turned green for him. He did not stop. He indicated to turn to the right. He turned to the right. There was no car that he nearly bumped into. The complainant's car was not there at the robot intersection when he turned to the right. The complainant's car at the time the appellant made a U-turn to the right was about 30 to 60 meters away from the intersection. This distance was measured at 37 paces. After having turned to the right, a distance away from the intersection, he saw the complainant's vehicle from behind. This evidence, in my view, was not in any way destroyed under cross examination and I do not think that it could be

said it is not reasonably possibly true. The trial court therefore, should have found that the guilt of the appellant was not proved beyond a reasonable doubt with regard to count 3, for which the appellant was found guilty of inconsiderate driving.

39. I now turn to deal with the *crimen injuria* charge. According to the charge sheet, the offence was committed by saying "fuck off" and by saying "*Polo ya gago*" (your penis) referring to the complainant. The trial court found the appellant guilty on this charge for having said "*Polo ya gago*". As for the "fuck off", the complainant himself did not hear any such words being uttered. And therefore, even if they were uttered by the appellant, there could not have been any case on the words which the complainant did not complain about or did not hear.
40. Therefore, the question is whether the state had proved beyond reasonable doubt that the appellant uttered insulting words by saying "*Polo ya gago*". According to the complainant, these words were uttered by the appellant at the first stop sign after the robot intersection. Remember, it was when the complainant confronted the appellant complaining about the manner in which the appellant allegedly drove his vehicle.
41. According to the appellant, he was approaching the first stop sign after the robot intersection. Before reaching the stop sign, there, there was the complainant's vehicle, on his right hand side and on the lane of the on-coming traffic. The complainant whose face was unknown, was obviously unhappy.

The complainant then accused the appellant of cutting in, in front of him. When the complainant realized that the appellant was a police officer, he then said to the appellant words to the following effect:

"Just because you are a police officer, you think I am afraid of you. I can hit you."

42. This is typical of the complainant as already indicated earlier in this judgment. When the complainant uttered those words, both vehicles were approaching the stop sign, with the complainant's vehicle on the lane of the on-coming cars. As they were so driving, the appellant uttered words to the following effect:

"Look here before you do something unnecessary, you can die of heart. You are causing yourself a heart attack."

43. The complainant continued talking until they reached the second stop sign. By that time, the appellant had closed his windows. It is clear from this account of events that the complainant must have been showing the same attitude as he did at the police station. Indeed, he seems to be afraid of no one. But similarly, he seems not to have a listening skills. For example, he did not hear when the appellant said "fuck off". Although, the appellant in his evidence sought to deny that he said this, in the statement that is in his handwriting, he did confess or admit that he uttered the words "fuck off". I am therefore prepared to accept that he uttered those words.

44. But whether or not he uttered words "*Polo ya gago*" (your penis) is another story. "You can die of a heart. You are causing yourself a heart attack" in Setswana can be translated as follows: "*Otla hwa ka pelo, O ke hlolela bolwetsi ba pelo*". Words "*Polo ya gago*" could easily be confused especially when conveyed to a person who is angry and busy talking as the two cars were moving. By the way, "*Pelo*" means "heart" and "*Polo*" in the context in which it was alleged to have been used means "penis". "Fuck off" turns to be loud when uttered, but still, the complainant did not hear those words. The appellant in his evidence suggested that the complainant may not have heard him properly. Why should the appellant admit in his statement having said "fuck off" but not mention for having said "*Polo ya gago*". "Fuck off", and 'your penis' are both insulting. 'Fuck off' could even be more hurt full. If the complainant had heard "fuck off" when they were uttered, these could have caused hurt to the complainant. The appellant could have been correctly convicted on these words. But, that did not happen. The complainant was not hurt by the words "fuck off" words. One might be tempted to say, the appellant contradicted himself, for example, that in his oral evidence, he denied having uttered the words " fuck off" ,whilst in the statement that he made to the police, he wrote that he said those words. The fact that an accused person could lie or lied on a particular aspect, does not mean that the whole of his or her evidence should be seen as false. An accused may think that by colouring his or her evidence or denying a particular fact, will make his case better.

45. Now to say to the complainant that, *"you are causing yourself a heart attack,"* should really be seen in context. In the statement that was submitted to the police, the appellant described the conduct of the complainant as follows:
- "As soon as I had turned, I heard a car hooter behind me and when I looked at my rear view mirror, I noticed that it was the same white vehicle which was now driving behind me. The driver was gesticulating and pointing fingers at me I confirmed to drive and stopped at the first four way stop. The driver of the vehicle without a registration plate in front then did not stop, but drove next to me while he was now falling on coming traffic. I slowed down my window and asked the driver whether there was a problem and I could see that he was angry and aggressively asked me why I entered the intersection before him as he had the right of way."*
46. Very often you get tempted to tell people who are fuming to cool down before they cause themselves a heart attack or a stroke. Shouting, screaming at people and getting too angry, is not good for anyone. Therefore, to say to complainant, 'you can die of a heart. You are causing yourself of heart attack', was not in the circumstances of the case farfetched to reject it as false or as not been a reasonably and possibly true. It is a reaction consistent with human experience.

47. Again one is here faced with two contradictory versions I do not think that the version of the appellant could be said not to have been reasonably possibly true, neither can it be said that it was proved to be false beyond reasonable doubt. He should have been given the benefit of doubt.
48. I now turn to deal with the conviction on the common assault charge. It was common cause that the appellant did slap the complainant at Steers restaurant. The state said the complainant was slapped twice. On the other hand, the appellant said he slapped the complainant once. I do not think that it makes any material difference.
49. Whilst the evidence tendered on behalf of the state seems to be in agreement that the slapping took place when the complainant and the appellant were struggling over possession of the complainant's camera, the contention was that there was no cause for the appellant to have slapped the complainant. I cannot agree with this contention. I think, the suggestion would have been different, had the appellant succeeded in taking the camera, and then thereafter slapped the complainant.
50. But that was not to be. The struggle over the camera should be seen in context. In fact it was not the camera that the appellant wanted, but rather, the film inside the camera. Remember, the appellant having been confronted by an unknown angry person, he was followed by that angry man into Steers.

That angry man was the complainant. The appellant is a police man, who was in uniform when he was confronted at the stop sign. By that time, the appellant was aware that many police officials had been killed. Whilst there was a suggestion that at Steers, the complainant was cool and collected, I do not think so, particularly seen in the context of his conduct before Steers and after Steers, at the police station.

51. What came to the appellant's mind when he saw the complainant taking pictures of him? He felt threatened. What did the complainant want the photos for? To compile a hit list or what? I do not think that anyone can be blamed for having had all these questions in mind at the Steers when pictures of him were taken. The next question would have been, what to do then? Allow the appellant to take pictures of the appellant and leave him to do whatever he wanted to do with them? I do not think so. Put yourself in the position of the appellant. On all probabilities, one would have done the same, by ensuring that the film is not utilized to develop the appellant's pictures.
52. You do not have to stand by for an imminent threat. Immediate threat was that the pictures of policeman in uniform could be used for unlawful activities. But besides this, the appellant sought to explain the circumstances under which he slapped the complainant. He put it this way in his evidence in chief:

"I wanted to take the film and destroy it, ...I held the camera as he was holding the camera. Your worship, when I wanted to take the camera, he did not give up, we struggled. Your worship as we were struggling over the camera, I noticed that this person tried to overpower me, in other words he wanted to trick me your worship. Seeing that I was overpowered your worship, it was at that stage when I slapped him. I then realized that this person is overpowering me and if he can manager to get me on the ground that is when he is going to assault me."

53. Unless one was to find this version of the appellant to have been false or not reasonably possibly true, there would have been no basis to have found that the appellant did not act in self-defence. In its judgment, the trial court in rejecting the appellant's version, expressed itself as follows:

"The conduct of the Accused did not constitute self defense. At most it constituted an act of attack on the Complainant. During cross examination on this aspect no coherent answer was forthcoming. He was at pains to explain where the struggle for the inside or outside and denied having followed the Complainant outside Steers. When, it was clear from the evidence that he in fact did so. It confirmed by the Complainant during cross examination and confirmed by the Accused in evidence in chief. That during the struggle for the possession of the complainant camera, the complainant grabbed the accused with his belt

and attempted to trip and fell him. That when accused realized that the complainant was overpowering him he slapped him once with an open hand in self defense. The complainant refuted this suggestion and told the court that he could not have held the accused in the manner explained. Nor could he have tried to trip him because he is limping. The accused did not raise this suggestion with Misses Babegang who was about seven passes\meters away from the accused and the complainant at the critical moment. It will be recalled that misses Bobegang corroborated the complainant version. That when the accused slapped him twice he was telling him that he was not fighting him. The accused was under no apprehension of danger and could therefore not raise the issue of self defense. There is sufficient corroboration between the evidence of the complainant, Mister Molebatsi and Misses Bobegang about what happened at Steers."

54. I do not think that it was ever in dispute that there was a struggle over the possession of the camera and the reasons thereof. Therefore, it was immaterial whether it was inside and outside Steers. It was also immaterial whether the complainant was moving away from the appellant at the time the appellant followed the complainant to take the camera from the complainant.
55. The point of the matter was that pictures of a policeman who was in uniform was taken by an angry unknown man who was going away. As I said, to have

expected the appellant to sit back and not want to retrieve the film in the circumstances of the case, would have been unreasonable.

56. I think the trial court in seeking to rely on the evidence of Mr Molebatsi and Ms Bobejang , to come to the conclusion that there was no provocation to have slapped the complainant, needs further consideration and evaluation.

57. Let me just start with Mr Molebatsi. He clearly took sides. He could have come to the defence or assistance of a policeman who was in uniform. He had seen when the complainant took pictures of the appellant. He must have known that the purpose for the struggle over the camera, was to ensure that the complainant did not use those pictures of the appellant.

58. Now coming back to the suggestion that his evidence was that the slapping took place when there was no provocation to do so, one needs to closely examine his evidence in chief. The evidence went around like this:

"You worship I was waiting there on the corner, that is where we are loading the passengers. That was at that stage when I saw where Mister Moilwa alighting from his vehicle and he was having a camera, a Samsung.

Your worship, it was a minute after he alighted from his vehicle, can then went in the direction of Steers. When he arrived there, he was shooting or he was taking photographs. After he took the photographs,

it is when I noticed the police officer in a uniform approaching mister Moilwa and I only heard when mister Moilwa said to the said Police officer, why are you swearing at me? I was just across the street, above thirty meters away from him. They were fighting over the camera. Your worship, I then crossed the street and I went to them and whilst I was on my way I saw the accused slapping the complainant twice."

59. This evidence does not tell what prompted the slapping. Neither does it suggest that nothing was happening to the appellant when the slapping took place. At the risk of repeating myself, in his evidence in chief, the appellant articulated the danger to himself as follows:

"...as we struggled over the camera, I noticed that this person tried to overpower me, in other words, he wanted to trip me your worship. Seeing that I was overpowered, Your worship, it was at that stage, when I slapped him...I then realized that this person was overpowering me, and if he can manage to get me on the ground that is when he is going to assault me."

60. Once one accepts that this is what had happened, or that the appellant's version in this regard cannot be seen as false or as not been reasonably possibly true, then self defence stands. In addition to this, is the complainant's refusal to hand over the camera, which the appellant believed that it could be used to put his life at a risk. I am referring here, to the pictures of him having been taken by the complainant.

61. I cannot see how self defence raised by the appellant had "at most constituted an act of attack on the complainant" To come to this conclusion, you need to disregard the fact that in the circumstances of the case, the appellant was entitled to take from the complainant, the film that had in it, his pictures. Again, he wanted to take the film for fear of those pictures been used to endanger his life.
62. The quotation in paragraph [53] above also gives the impression that the trial court placed much emphasis on the fact that the complainant refuted this suggestion and told the court that he could not have held the appellant in the manner explained. Nor could he have tried to trip him because he is crippled. A man who is seriously crippled, does not go around telling people that he will hit them. The appellant indicated that this was said to him by the complainant. A man who is so seriously crippled, would not be strong enough to have made it difficult for the appellant to take the camera from him. He will not be so courageous to go to the police and shouted in the manner as described by senior superintendant Molate.
63. In any event, the complainant was not using a walking stick. There was no suggestion that the appellant was aware that the complainant was limping. But, even most importantly, the extent of the complainant's disability was not

investigated to come to the conclusion that he was not capable of tripping another person in a fight or struggle.

64. The fact that the appellant did not raise tripping with Misses Bobejang during her cross-examination, in my view, could not have taken the matter any further, especially for a party that had the onus to prove beyond reasonable doubt the guilt of the appellant. Remember, at the time she gave evidence, self defence by tripping, was already put to the other witnesses. It was therefore, incumbent on the state to take up the defence with its witnesses. If it did not, when it was known to the prosecution, no adverse inference should have been drawn against the appellant.

65. It is also important to have a closer look at the evidence of Misses Bobejang. Her evidence in chief proceeded as follows:

"Your Worship, I did not see exactly as to whether he did of course manhandled each other or they did argue outside, but they were force fighting over the camera.

I saw the police officer slapping the gentlemen who was having the camera"

66. When asked as to whether the complainant retaliated, after he was slapped, Misses Bobejang responded as follows:

" No, the gentlemen did not retaliate, he only said that he does not want to fight with him."

67. During argument before us, it sounded like counsel for the respondent wished to rely on this statement in finding nothing wrong with the conclusion arrived at by the trial court. The real issue however, should have been whether the complainant was overpowering the appellant and whether the complainant attempted to trip the appellant. What was important was that the appellant could not take the camera from the complainant, and therefore, the suggestion that the complainant was overpowering the appellant, should not have been seen as farfetched. The fact that the complainant was heard saying, 'he did want to fight', did not mean he was not overpowering the appellant, and that he did not attempt to trip him. It could well be that the complainant said he did not 'want to fight', after he had felt the slapping.
68. It also did not look like Ms Bobejang had seen everything that happened before the slapping. For example, she did not see the spectacles falling off from the complainant's face. This was despite the fact that she was about seven meters away from the appellant and the complainant. Her cross examination went around like this:
- "Question: ... now you say you could not see properly this thing. That is why you could not even tell us whether it is the right of left cheek, is that correct?"*
- Answer: Yes, your worship.*
- Question: What was the problem? Why could you not see properly?"*

Answer: As I was on duty, Your worship, I was not actually (indistinct) those people your worship. Because I had to, concentrate on the customers as well your worship.

Question: So in fact you cannot give us a very accurate account of what really happened, because you were busy, with your cleaning, casually looking at this thing. is that so?

Answer: Yes your worship, because I only saw a certain part."

69. Now to say "It will be recalled that Misses Bobejang corroborated the complainant version. That when the accused slapped him twice, he was telling him that he was not fighting him", in my view, should not have been seen as refuting the suggestion that the complainant was overpowering the appellant and that the appellant was been tripped. It is clear that on the denial of tripping, the state could only have relied on the evidence of the complainant and not corroborated by the Misses Bobejang. Misses Bobejang obviously did not see that..
70. As I said earlier in this judgment, the fact that the appellant said he slapped the complainant once, whilst the state's evidence suggested twice, did not make any material difference. Remember, according to Miss Bobejang, the slapping was spontaneous. As she conceded, it was fast like 'blah, blah like that." I am therefore, not satisfied that the guilt of the appellant on the assault charge was proven beyond reasonable doubt. I do not find it necessary to deal with the

sentence imposed on the appellant, especially seen in the light of the order I intend to make.

71. Before I conclude, I want to say this. The complainant was not a good witness. I am not talking here about observations of the demeanor of the complainant in the witness box. But, rather the manner in which he expressed himself and answered questions, as it is clear from the record. Many times, he was requested to answer questions directly and not attempt to anticipate the essence of the questions. He was so warned not only by the defence, but, by the court as well. His response to the first few questions put under cross examination, in my view, displayed the attitude of an uncooperative witness. I do not find it necessary to go into the details.
72. The appellant on the other hand faced a fierce and hostile cross examination and in some instances, questions on issues which were not relevant or pertinent. I however, do not think that the appellant materially contradicted himself on relevant issues.
73. Consequently, I would make the following order:
 - 73.1 The appeal on all convictions and sentences on the three charges is hereby upheld.
 - 73.2 The convictions and sentences are hereby set aside and substituted by:
 - 73.3 'The accused is found not guilty and discharged on all the charges.'



M F LEGODI
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree,



RG TOLMAY
JUDGE OF THE NORTH GAUTENG HIGH COURT

IT IS SO ORDERED.

POTTERILL J

74. I have had an opportunity to read the judgment of my learned brother Legodi J. I unfortunately can not agree for the reasons set out below.
75. The appellant avers that the court *a quo* erred in finding that the State had proved the offences beyond a reasonable doubt. My brother finds the version of the appellant reasonably possibly true and therefore should be given the benefit of the doubt.
76. I start with the finding on count 3, [that the appellant drove inconsiderately] to give effect to the chronology of the events. The Magistrate was very alive to the fact that the complainant, Mr Wanyane, was a single witness. He applied the principles that attract the evaluation of a single witness and found the witness to have testified satisfactorily on all material aspects. The court *a quo* also found that the probabilities support the version of the complainant whereas there are improbabilities in the version of the appellant.

- 77 The version that the court *a quo* accepted was that the appellant was stationary at the intersection. The robot turned green, he had right of way and as he was slowly turning at about 20 kilometres per hour at point C on the map the appellant also entered Tom Street. He steered to the left of Tom Street rendering the appellant to pass him and drive in front of him. He rejected the version of the appellant that he never had to stop at the robot and while travelling to the intersection before he turned the appellant saw the white vehicle still approaching. The complainant's vehicle was however still 60 metres off. Just as he turned he heard a hoot and saw the white car behind him.
- 78 On appeal the credibility finding is not *per se* attacked, what are attacked are the probability findings of the Magistrate. My brother found that the complainant was not a good witness but then does not make a finding that the Magistrate erred in accepting the credibility of the complainant. He also finds that the appellant did not materially contradict himself. He also finds the Magistrate erred on the probabilities.
- 79 The magistrate did not err in accepting the version of the complainant. On the common cause facts both wanted to turn into Tom Street, both did so respectively when the robot was green for them. It was from the outset clear that the complainant's version was that the cutting in of the appellant occurred as "*I was entering in Tom Street.*"[P29 line 24]. In cross-examination he reaffirmed that it happened when he was at point C as marked on the sketch plan; "*What I know, I avoided the accident when I was at C.*"[P31 line 7]. The magistrate thus accepting the version of the appellant found that that is where the incident occurred. I have to disagree with my brother that on the evidence on the record there was any confusion as to where the complainant testified the collision occurred. The contention that the incident occurred next to the entrance of the garage is unfounded; nowhere on the record was there such

evidence. On P33 of the record the representative of the appellant conceded that there was no evidence that the complainant turned into the driveway of the garage to avoid a collision. It is common cause that the garage occupies the property from the corner of the intersection with its entrance only 15 metres further on. For the appellant thus to say he swerved to the garage and not the entrance to the garage to avoid a collision affirms that he swerved to his left where the garage is situated. This is in line with his evidence that the cutting in took place just after he turned into Tom Street in the vicinity of C on the plan and had to there swerve to the side of the garage to avoid a collision. The complainant's version is thus "*fairly simple and straightforward*." It is not complicated with the evidence that the appellant's car overtook the complainant's car because the appellant was the first to turn. The complainant answered that "*After I avoided this collision, it passed by.*" The complainant was busy turning when the appellant turned faster than he did, the complainant manoeuvred to the left and thus the appellant overtook his vehicle.

- 80 I regret to disagree with my Brother as to his findings on the leading questions of the prosecutor as set out in paragraphs 15, 16 and 17 of his judgment. It does however seem to be only criticism because my Brother then made findings on the "leading questions" Not one of the questions referred to are leading questions. It is a run of the mill question to ask whether steps had to be taken to avoid a collision and it is so because it does not suggest that he took steps or what steps he took. The surrounding circumstances are also to be taken note of whether to decide whether a question is a leading question or not. It is common cause that there was only one lane in Tom Street. The question whether "*the Mercedes Benz had to cross your lane in order to turn in the same street as you were turning into*" can only have one meaning i.e. with their being only one lane the Mercedes Benz was in the path of travel of the complainant as on his version he had right of way. In cross-examination of the complainant this aspect is cleared up as being exactly that what was meant. As set out in **S v Aitken And Another** 1988(4) SA 394 on p397 at F:

*“(T)he essential notion...of an improper (commonly called a leading) question is that of a **question which suggests the specific answer desired..**”*

The appellant had competent representation at the trial and him not objecting, which he often did, is further indicative of the fact that they are simply not leading questions. This is also not a ground of appeal. The answers to these questions were embroiled upon in cross-examination.

- 81 On the facts that were common cause there need be no finding of whether the robot was red or green for the appellant and complainant because it is common cause that when they respectively turned the robot was green for both of them. [This is also not a ground of appeal]

The following facts are common cause:

- 81.1 That the intersection of Tom and Von Weilligh streets is robot controlled;
- 81.2 That both the complainant and appellant were travelling in Tom Street in opposite directions;
- 81.3 That the complainant wanted to turn left out of Tom street at the intersection and that the appellant wanted to turn right out of Tom street at the intersection for both of them to then proceed North [in the same direction] into Von Weilligh Street;
- 81.4 That after both these parties had respectively turned the appellant's vehicle was travelling in front of the complainant's vehicle;
- 81.5 That when the complainant turned the light was green for him and it was also green for the appellant when he turned. There is no suggestion that one of the parties turned while the light was red for them.

- 82 The only grounds of appeal thus to be addressed is whether the State proved that the appellant executed his turn when the complainant had the right of way to turn and thus acted inconsiderate. The Magistrate found that on the probabilities the appellant did execute his turn when the complainant had a right of way. The appellant argued that the measurements of the scene at the

inspection *in loco* render the complainant's version improbable. These arguments are based on the following common cause facts:

- 82.1 Tom Street is only wide enough for one vehicle to travel in the same direction, i.e. 4 paces from C-G and 6 paces from C-K.
- 82.2 On the left hand side of Tom Street there is a cement embankment higher than the road;
- 82.3 There is also a drain on the left side of the road.

It is thus argued that the complainant could not swerve to the left to avoid an accident with the appellant when the appellant cut into the road because he would have collided with the cement embankment. The road is also too narrow for the appellant to have cut the corner into oncoming traffic because on the appellant's version there were two vehicles stationary in Tom Street preventing him from crossing over into the oncoming lane.

The Magistrate found that there were no other vehicles in the intersection that could prevent the appellant from encroaching in the oncoming lane to execute his turn. His finding is based on the probability that the complainant was in a position to observe such vehicles and did not see same and persisted that there were no such vehicles. Furthermore the appellant on his version not having to stop at the intersection would not have had an opportunity to observe and reflect upon the Maroon Mercedes he so desired. He found that would be only possible if the complainant's version was true that the robot was red at the intersection. It was placed on record that C-K is 6 paces and K- G is 4 paces; the argument by the state that the lane in Tom Street wherein both the parties were entering is thus 10 paces wide is correct. There is nothing improbable in the version of the complainant that both vehicles could enter into that space with the complainant hugging the left. This would be so even if there were other vehicles at the intersection.

- 83 One however has to look at the evidence as a whole and if the version of the appellant is reasonably possibly true then the state did not prove its case

beyond reasonable doubt. The appellant testified that as he approached the intersection the traffic light was green for him. He saw a white car approaching but it was 60 paces away and therefore he turned to his right into Tom Street. At the inspection loco the 60 paces was reduced to 37 paces. He confirmed his statement that *"as soon as I turned I heard a car hooted behind me. When I looked in my rear view mirror I noticed that it was the same vehicle which was now driving behind me."* It is common cause that the appellant was driving a Mercedes Benz C200 Sports Package; pleading ignorance as to whether it is a fast vehicle is incorrigible. On his own version he turned without impeding the complainant yet *"as soon as he turned"* he heard a hoot. This is corroboration for the complainant's version that the complainant's vehicle was not 37 paces away. The Magistrate was correct in rejecting this version on the probabilities. He drove a sports vehicle and turned when the complainant had a right of way to do so; thus driving inconsiderately. The appellant is a director in the police and had a degree in law and is an admitted advocate; an educated man. He was evasive as to what speed he was travelling as he was turning. To expect a witness to pin point a speed is not reasonable, but not to commit him whether he was travelling lower or higher than 60 kilometres per hour is telling. It is telling that with his sports vehicle he was travelling fast as the complainant testified, *"dicing."* The complainant explained that he did not mention the speeding because he was never asked about the speed of the appellant's vehicle in examination in chief. This was not a new version. For the appellant to have cut in front of the complainant his speed would need to be higher than the complainant's due to the distances. The appellant was not prepared to give any evidence as to his speed. There is accordingly no evidence to the contrary of the complainant's as to the speed of the appellant. The version of the appellant on the totality of the evidence is so improbable as to be rejected as not being reasonably possibly true. On the appellant's version the complainant was 37 paces away from the intersection, had to negotiate a turn and yet was behind the appellant just after the appellant had turned into Tom Street.; this renders the state version probable and proven beyond a reasonable doubt.

- 84 It is also with regret that I can not agree with my Brother on the finding on count 2; *crimen iniuria*. It is common cause that at the next stop sign in Tom Street the complainant moved to the right of the appellant's vehicle rendering him to encroach in the oncoming lane. There is no evidence that there was oncoming traffic or traffic that he did in fact impede. When the window of the appellant's vehicle was open the complainant said to the appellant in the **appellant's** own words "*His first words were hey you, how do you drive why do you drive in front of me.*" [P277 lines 16 and 17 and p203 line11]. The complainant then testified that the appellant then uttered the words "*Polo ya gago*" which translated means "*your penis.*" He testified that he found the words to be hurtful especially coming from a police officer and that after the police-officer had cut in front of him. It is common cause that they travelled from that stop to the next stop sign and the appellant testified that he then told the complainant that he is causing himself a heart attack. The appellant testified that the complainant retorted that because the appellant is a police-man he thinks the complainant is afraid of him but he will hit the appellant. The appellant at that second stop sign turned to his left. The complainant turned to the right but executed a u- turn to follow the appellant.
- 86 The Magistrate confirmed his finding that he found the complainant to be a truthful and honest witness who did not exaggerate the Appellant's roll in the commission of the crimes. On behalf of the appellant it was submitted that the State did not prove all the elements of *crimen iniuria* although this was not expanded on. It was also submitted that the complainant did not muster the test for a single witness and it was improbable that a police officer would insult the complainant in full uniform under circumstances where he could be easily identified. It was also not probable that the complainant would have been in a position to hear the uttered words.

- 87 The appellant was found guilty for uttering the words "Pola ya gago" and not for the words "fuck off." To be found guilty of *crimen iniuria* there has to be serious infringement of one's dignity. The test is subjective and the complainant testified that subjectively he was hurt and affronted. The words complained of must however also objectively have offended a reasonable person. It is not a ground of appeal that the words uttered would not have seriously infringed a reasonable person's dignity and I need not address this any further. I do however disagree with my Brother if his finding is that "Fuck off" is more serious than "Your Penis." In society today "Fuck off" is a swear word generally used and in law classified as "vulgar abuse" which can only constitute *crimen iniuria* if **very serious**. [See **S v S** 1964(3) 319 TPD] Referring to one's private parts however does not constitute vulgar abuse, refers to an intimate part of a man's body and need only be **serious** to constitute *crimen iniuria*.
- 88 It is common cause that the appellant was confronted at the next stop street because of the appellant's driving and specifically of his driving in front of the complainant. The appellant understood that this is what the complainant is confronting him with, although appellant did not see anything wrong with his driving because he testified he gave the complainant enough time to turn in after him. It is not a probability that the complainant would not have heard the words because the vehicles were far apart with both cars engines running. This argument renders the appellant's version that he could hear the complainant talking and threatening him also improbable. It is not a probability on the facts that a policeman would not insult a person when one can be identified; *crimen iniuria* can only be committed fact to face. The appellant is legally trained, a fact from which an inference can be drawn, and would know that often complainants and prosecutors will not pursue a criminal trial for *crimen iniuria* as it always is a "he say, she say situation." On the facts that are common cause the appellant as a police officer did in a public place

struggle with and slap the complainant. It is thus not improbable that he in public being identified would attack the *dignitas* of the complainant. The appellant in his statement also wrote that the complainant had told him in the Steers that "*And he was also accusing me of insulting him or calling him with his private parts.*" [P291 lines 16-17] This was not a new story it was already alluded to at the Steers.

- 89 I agree with the Magistrate that the appellant was not a credible witness. It is put to the complainant in cross-examination by appellant's legal representative that the appellant told the complainant to fuck off. The appellant then in cross-examination denied that he said fuck off to the complainant, this despite the statement written by himself wherein he confirmed that told the complainant to fuck off. This is not the testimony of a credible witness. I can not agree with my Brother who now accepts that the appellant did in fact utter those words, but not "your penis."
- 90 From paragraphs 41 and 42 of my Brother's judgment it is apparent that he accepted the version of the appellant as being reasonably possibly true and seemingly rejected the complainant's version based on the personality of the complainant. The finding is that the complainant was supposed to be deterred from any further conduct against the appellant because by then he knew the appellant was a police official. I do not know on what evidence or law this is based as it is clear that nobody is above the law, in fact one would especially expect a police official to adhere to the laws of the country albeit it road traffic laws and the dignity of a fellow human being. My Brother accordingly accepted that the complainant did say that he would hit the appellant. In paragraph 37 my Brother goes so far as to find based on the personality of the complainant that although the complainant was still a distance from the robot the complainant would have expected the appellant to wait for him. He finds the complainant to be angry and persistent. I agree that the complainant was persistent in calling the police official to order. He was angry and hurt that a

police official cut in front of him and then infringed his dignity. The anger at the police station is even more so justified, it is common cause that he was slapped so hard by a police man in public that his gum bled and his spectacles broke. The persistent nature of the complainant is not justification for the appellant's conduct and he is not on trial. The complainant's nature on the day was combative, but did not render his version improbable.

- 91 It is common cause that the appellant did assault the complainant by slapping him. The appellant however submitted that this was done in self-defence. It is also common cause that the slapping took place while the appellant and complainant were struggling over the camera. The appellant wanted to take the camera from the complainant because he did not want his photo to be developed. The appellant accordingly in his heads submitted that the appellant had the right to protect his personality rights. This is so because as a police-man he did not know what the photograph could be used for, perhaps a hit list and there are many police killings. The appellant averred the Magistrate erred in finding *"Any person would have been concerned at the fact of the photos being taken without their consent"*, yet finding him guilty of assault. The appellant also relied on putative self-defence in the alternative.
- 92 The Magistrate found the appellant guilty of assault because he rejected the version of the appellant that he was going to be tripped by the complainant, thus being overpowered and therefore slapping him was unjustified. He rejected this version because the complainant is a cripple and if he uses one leg to trip then he has no other effective leg to stand on and not fall himself. He also relied on the evidence of Mister Molebatsi and Ms Bobejang that the complainant at that stage uttered that he is not fighting the appellant and accordingly there was no apprehension of danger and therefore could not raise the issue of self-defence.

- 93 My Brother accepts the version of the appellant that he was being tripped, consequently overpowered and therefore had the right to act in self-defence. I regret that I can not agree with this finding. I can not find that the magistrate erred in accepting the version of the complainant. The appellant averred he acted in self defence because he realized the complainant would trip him and then he would be overpowered. If he was not going to be tripped he would accordingly not be overpowered and then there is no self-defence. It is common cause that the complainant is big of posture, bigger than the appellant. It is also common cause that the complainant is a cripple and the chairman of the disabled people in Ekageng. The undisputed fact that the complainant is a cripple renders the inference the Magistrate drew that a cripple with one bad leg would not trip probable. In fact it not only an inference, it accorded with what the complainant testified to when confronted with the tripping as follows:

"Your Worship, I do not know when he said he was trying to [inaudible] me because I have got only one [leg] that can be strong enough to balance. What I am saying to this court, he slapped me twice." [P84 lines 15-18] and *"At no stage did I trip the accused."*[P84 line 23]

The findings of my Brother in paragraphs 62 and 63 effectively find that the appellant is not a cripple because he was not using a walking stick and that no cripple will threaten a person or have courage to go to a police station and shout. I can not reconcile myself with such findings in general and especially not on the common cause facts of this case. The appellant's representative accepts the fact that he is a cripple: *'Ja. Whether you have one leg which is not proper or not is besides the point...'*[P84 line 20] He did so as it was common cause.

- 95 The appellant did not address us on the supplementary heads and I accordingly do not address these arguments.

95 The appellant and the respondent were not afforded an opportunity to
address us on the sentences but I can not find that the Magistrate erred in that
the sentences induce a sense of shock.

100 I accordingly find that the appeal against the convictions and sentences are to
be dismissed.

JUDGE OF THE NORTH GAUTENG HIGH COURT

A handwritten signature in dark ink, appearing to read 'J. POTTERILL', is written over the printed name. The signature is stylized with a large, sweeping loop at the end.