

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

**Case Nr: CA&R 75/08
Delivered: 13/02/09**

In the matter between:

ANDREW VAN SCHALKWYK

VERSUS

THE STATE

Coram: Majiedt J et Tlaletsi J

JUDGMENT ON APPEAL

Tlaletsi J:

[1] This is an appeal against the appellant's conviction on a charge of assault with intent to cause grievous bodily harm on 6 May 2008 by the district court at Kakamas. The appellant was subsequent to his conviction sentenced to three years imprisonment half of which was suspended for a period of five years. The appeal is with leave of the trial court.

- [2]** The allegations against the appellant were that on 9 June 2007 he stabbed Johannes Kotze ("the complainant") with a knife with intent to cause him grievous bodily harm and did thereby cause him certain injuries. The appellant, who was legally represented throughout his trial, pleaded not guilty to the charge. He also exercised his right to remain silent and tendered no plea explanation.
- [3]** The respondent's case may be summarized as hereunder. The complainant testified that he was on the night of the incident at the community hall where he together with other people had been dancing. In the process he consumed 7 bottles of 750ml of beer. He conceded that he was under the influence of alcohol. He mentioned that he could however understand what was going on around him. At about 22:15 he left the hall for home. He walked past a yard where there were people involved in an argument. He testified that the appellant was also involved in that argument. As the complainant was walking, the appellant left these premises and came to him. Appellant asked him for a cigarette. He told him that he did not have cigarette on him but had one at home. He testified that the appellant then pushed him. He thereafter took out a knife out of his right back pocket and stabbed him once on the left side of his neck. With same attack, he continued, the knife scratched him on his lip as he retreated. The complainant then ran into the motor vehicle that was parked nearby. He locked himself inside the motor vehicle together with the driver who was sitting behind the steering wheel. The driver could not see him as he was asleep having given in to the effects of alcohol.

- [4]** The complainant testified that as he was still inside the motor vehicle the second state witness, Mieta Heyn, arrived. She observed his condition and called other people for assistance. A certain Coetzee also came and knocked on the window. The complainant opened the door of the motor vehicle. He was taken to hospital for medical help.
- [5]** It was put to the complainant during cross-examination that the appellant's version would be that the complainant had been inside the motor vehicle and got out of the motor vehicle and aggressively threatened the appellant. The two stared at each other. The complainant then put his hand in his pocket as if he was taking something out. The appellant, goes the statement, thought that the complainant was taking a knife out of his pocket and the appellant quickly took his own knife out of his pocket and pushed the complainant backwards. He pushed him with his hands whilst holding his knife. He thereafter noticed that the complainant was bleeding on his neck. He believed that he could have stabbed him with a knife but did not know exactly how it happened. This version was denied by the complainant. The complainant explained that he could not do so as he was wearing tracksuit pants which had no pockets.
- [6]** Mieta Heyn testified that she is a friend to the complainant. She also knew the appellant very well as he is her boyfriend's cousin. She mentioned that at the time of the incident she was at one Elizabeth Van Rooy's house in Celliers. She saw the complainant walking past the yard towards a motor vehicle. The appellant who had been on the same premises with them walked to the complainant. She noticed that there was an exchange of words. She saw appellant push the complainant. She did not see

anything in the appellant's hands. She testified that the complainant had his back towards her and the appellant was facing towards her direction in front of the complainant. After pushing him the appellant returned to the yard. She noticed that the appellant was having an open knife (and its bag) in his hands. She immediately went to the motor vehicle. She found the complainant inside the motor vehicle full of blood on his chest. She also noticed that the owner of the motor vehicle was sleeping inside the motor vehicle. She called the complainant's relatives. The complainant was taken to hospital. What was to be the appellant's version was also put to her. She replied that she did not see the complainant threaten the appellant. She confirmed that they were both drunk. She also mentioned that the appellant was not involved in any argument on the premises. It was not disputed that there were high mast lights illuminating the entire area where the incident took place.

- [7]** At the close of the state case the appellant closed his case without tendering any evidence. The magistrate found the two state witness to be impressive, honest and reliable. He also found the only contradiction in the state case relating to whether the appellant was involved in an argument at Elizabeth Van Rooy's house to be immaterial. The Magistrate held that the state had proved its case beyond reasonable doubt.
- [8]** The grounds of appeal relied upon to challenge the conviction are that the magistrate erred by finding that the state had proved its case beyond a reasonable doubt and that the appellant's version is reasonably possibly true.

- [9] Mr Van Tonder, who appeared on behalf of the appellant before us, submitted that the complainant must have been strongly under the influence of alcohol after consuming the amount of liquor he admitted having consumed and that his evidence should therefore not be relied upon.
- [10] It is a trite principle of our law that an accused person has a right to be presumed innocent, to remain silent and not to testify during criminal proceedings against him or her. Failure to testify can not on its own be reason enough to find him or her guilty of the offence charged for. It remains the duty of the state to establish the guilt of the accused beyond a reasonable doubt. Where an accused person chooses to remain silent in the face of evidence calling for an answer, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. However, a failure to testify will not in the absence of credible implications against the accused remedy a deficiency in the state case. See: **S v Francis** 1991(1) SACR 198(A) at p203 H-I and **S v Boesak** 2001 (1) SACR 1(CC) at 11 D-F.
- [11] I find no fault with the acceptance by the magistrate that though the complainant admitted that he had consumed alcohol, he was not drunk to the extent that he could not realize what was happening. There was also no evidence to challenge the complainant's evidence that he was able to understand and appreciate what was happening around him. It was common cause that the appellant is the one who stabbed the complainant after pushing him. The pushing was also seen by Mieta Heyn. The complainant's evidence that he was wearing tracksuit pants and as such did not have pockets from which he could have

attempted to take out a knife remains the only credible evidence on record which was not even controverted.

[12] I am therefore of the view that the magistrate did not misdirect himself and correctly found that under the circumstances of this case the guilt of the appellant had been established beyond a reasonable doubt. The appeal therefore falls to be dismissed.

In the result I make the following order:

The appeal is dismissed and the conviction of the appellant is confirmed.

**L P TLALETSI
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

I concur

**S A MAJIEDT
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the State:	Mr Kgathwe
Instructed by:	Director of Public Prosecutions
For the Accused:	Mr Cloete
Instructed by:	Kimberley Justice Centre

