

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A37/2007

In the appeal between:-

CHARLES SEAN MOFFETT

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI J *et* MILTON AJ

HEARD ON:

30 APRIL 2007

JUDGMENT BY:

MILTON AJ

DELIVERED ON:

17 MAY 2007

- [1] The appellant, a 44 year old man, was charged in the district court of Ficksburg with assault with intent to do grievous bodily harm, in that on the 18th May 2006 near Berlyn farm, district Ficksburg he unlawfully and intentionally assaulted the complainant, Petrus Mohapi, by pointing a firearm at him

and threatening to shoot him with intent to cause him grievous bodily harm.

The second charge, that the appellant on the same day and place pointed a firearm, a star pistol, at Petrus Mohapi without a lawful reason/permission.

- [2] The appellant pleaded not guilty to both the charges.
- [3] On the 11th October 2006 the appellant was found not guilty on count 1, but guilty on count 2 and sentenced to R2 000,00 (two thousand rand) or 6 (six) months imprisonment, half of which sentence is suspended for 4 (four) years on condition that the accused is not convicted of pointing of a firearm, committed during the period of suspension. The appellant was also declared unfit to possess a firearm in terms of section 103(3) of the Firearms Control Act, 60 of 2000.
- [4] Appellant is appealing against both his conviction and sentence.
- [5] The State called a single witness, the complainant, Mohapi Petrus Mohapi, employed on the farm as a labourer where the incident took place. He testified that while working the appellant approached him and asked him what he was

doing. The complainant said that he was busy removing the lawn after which the appellant told him that he was busy digging a hole. Without provocation the appellant insulted the complainant by saying his “buttocks was hard” (hardegat).

[6] Thereafter an altercation ensued both parties insulting each other. Appellant told him to stop working and leave but complainant was not sure he was authorised to do so. Appellant thereafter went to his caravan where he took out his gun.

[7] Appellant threatened to shoot the complainant who challenged him to do so. At this stage both parties were aggressive. The appellant thereafter stood one metre away from the complainant and pointed the firearm next to the complainant's legs and fired one shot next to his legs but he just swerved to the side quickly. The appellant was aiming to shoot at his leg.

[8] After the shot was fired he rushed back to where he was working, collected his tools to put them away. He had nothing in his hands when the shot went off. There were no eye witnesses and he is still employed on the farm.

[9] In cross-examination the complainant

9.1 denied that the appellant was making a joke about making the hole too deep;

9.2 admitted being angry and that he did not react to his name being called but later denied it again;

9.3 could not remember that the appellant said he wanted to leave the situation there since it was getting out of hand;

9.4 admitted that appellant first went to his car before he fetched the firearm in the caravan;

9.5 although he admitted that he was furious because his

services were terminated, he denied the appellant's version that he was aggressive and militant and that the situation was out of control;

9.6 denied having a spade and a rake in his hands when he followed the appellant to his vehicle.

[10] During cross-examination of the complainant

10.1 a statement by the defence witness was provisionally allowed for purposes of cross-examination and later admitted as evidence after the defence witness, Inspector Mtshabe, was called to verify the contents thereof.

10.2 In paragraph 4 of this statement the complainant avers that the appellant stood in front of him, placed the firearm against his head and three times said that he was going to shoot him (the complainant).

10.3 Complainant denies that the statement has been

correctly taken down although both he and the inspector were conversing in Sesotho, their mother language, and denies that the statement was read back to him.

[11] The appellant's version was that:

11.1 He was making a joke when he mentioned the hole that complainant was supposedly digging;

11.2 The complainant became aggressive and would not react to his name when he was trying to get his attention to explain what he meant;

11.3 He denies having fired the complainant when he said he must stay away from him. The complainant misinterpreted him.

11.4 He left and went to his vehicle to fetch welding rods but complainant followed him with garden implements and

insulted him by saying he is a “kortgat”.

11.5 Complainant shouted that he should fetch his firearm and he did so out of fear.

11.6 Appellant was fearful that the situation would become uncontrollable so he fetched his firearm and fired one round into the ground to calm the situation. He never pointed the firearm at the complainant.

Appellant’s version was unchallenged.

[12] 12.1 Inspector Mtshabe was called as a defence witness whose main purpose was to verify that he took the complainant’s statement on the same day the incident took place.

12.2 The inspector recorded the statement as the complainant narrated his version.

12.3 According to the complainant’s written statement the

appellant pointed the firearm at the complainant's head and threatened to shoot him three times whereafter he fired one shot next to his feet, not at his legs as indicated in his evidence in chief.

13. The presiding officer in the court *a quo* made the following statements:

13.1 that appellant should answer as to why he did not fire a shot when he was at the caravan;

13.2 that appellant did not prove that the matter was out of control;

13.3 that appellant gave evidence that complainant had a spade and a rake in his hands but tendered no evidence what he wanted to do with it;

13.4 accepts that complainant picked up the garden tools after the shots were fired;

13.5 rejects Inspector Mtshabe's evidence in total since he uses the words "if my memory serves me well" as being unreliable and he is therefore not sure of himself;

13.6 on the above grounds the preceding officer finds the appellant guilty on the second count.

ANALYSIS OF THE EVIDENCE

[14] Where there has been no misdirection of fact by the trial Judge or magistrate, the presumption is that the conclusion is correct and the Appeal Court will only reverse the judgment when it is convinced that it is incorrect.

[15] This may happen when the presiding officer of the court *a quo* may have misdirected himself or herself on the facts; where the reasons are either on the face value unsatisfactory or the record might show them such or show that some facts or probabilities are overlooked.

REX v DHLUMAYO AND ANOTHER 1948 (2) SA 677 (A)

and

S v FRANCIS 1991 (1) SACR 198 (A) at 204D

[16] The presiding officer correctly found the appellant not guilty on the first count although there are no reasons given in her judgment.

[17] The State must prove beyond reasonable doubt that the appellant intentionally and unlawfully pointed a firearm, a star pistol, at the complainant without any lawful reasons or permission.

[18] It is common cause

18.1 that an altercation took place between the complainant and the appellant;

18.2 that the complainant on his own evidence was furious and became boisterous;

18.3 that the appellant used his firearm to defuse the volatile situation and one shot was fired;

[19] The appellant is not required to convince the court that his version is true. If his version is reasonably and possibly true,

so as to cast doubt in the court's mind, then he must be acquitted. *Vide* **REX v DIFFORD** 1937 AD 370 on 373.

[20] 20.1 I am not convinced that the appellant acted at all correctly on this particular day and find myself asking several questions regarding his actions. There is no doubt that the appellant instigated the unfortunate situation by making a sarcastic remark to the complainant. Appellant tried in evidence to downplay his remark, but in the context, that he uttered it, it was specifically meant. This is deduced from the appellant's explanation he gave as to why he commented thus, namely, that the complainant had been busy on the same spot for some time and the inference is that he was dilly-dalling.

20.2 Appellant made this remark well knowing (on his own evidence) that the two of them had had problems previously.

20.3 There was no suggestion in his evidence that he was threatened by the complainant physically, but it is accepted that the complainant was becoming increasingly worked up and was not sure if he would pull a knife on him or do something that would endanger him.

20.4 Since the appellant had the opportunity to move away from the complainant to his vehicle, on his own version, why did he not walk away from the situation totally or get in his car and drive away? The over hasty use of a firearm in whatever way is to be frowned upon.

20.5 It is highly improbable that the complainant, who was unarmed, would or should shout “go fetch your firearm, go fetch your firearm”.

[21] The above, however, does not detract from the fact that the State must still prove beyond reasonable doubt that the appellant pointed the firearm at the complainant. The

appellant denies that he pointed the firearm at the complainant but only fired a shot into the ground there where he was standing as a supposed warning shot and to defuse the volatile situation.

[22] The State relied on the evidence of a single witness and although a single witness' evidence should be evaluated with caution, a court can convict an accused if the evidence of the single witness is satisfactory, reliable, clear, not bias and is not contradictory on the material elements making him/her a credible witness.

In **S v SAULS AND OTHERS** 1981 (3) SA 172 (A) on 180F the following was said regarding the valuation of a single witness:

“The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP in 1932 may be a guide to a right decision but it does not mean

‘that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded’
(Per SCHREINER JA in *R v Nhlapo* (AD 10 November 1952) quoted in

R v Bellingham 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

[23] Credibility is a wide concept and does not rely on the honesty, bias or motives of a witness alone, but also on memory and the ability to observe and to express such observations.

See Kriegler/Kruger: Hiemstra – **Suid-Afrikaanse Strafbroses** (6th Edition) on page 530.

[24] The complainant made a statement to Inspector Mtshabe on the same day the incident occurred. The facts were fresh in his memory. In this he avers that the appellant came and stood in front of him and pointed it “op my kop en gesig drie (3) keer gesê hy gaan my skiet”. Mnr Moffett het dan een (1) keer op die grond langs my geskiet.” This is in direct conflict to his evidence in court where his evidence was that the appellant stood about one metre from the complainant with the gun in his hand just like one would hold any item and the firearm was pointing next to his legs. When the shot went

off, he swerved out the way.

[25] The complainant also contradicted himself whether he was angry or not and avers in cross-examination that he was humble at all times towards the appellant. This he did, I assume, to give the court the impression that he was not the aggressor.

[26] 26.1 The complainant's evidence regarding the ability to swerve away from a gunshot at one metre distance is highly improbable if not impossible.

26.2 I also find it highly improbable that the complainant would keep an even humble attitude when both parties sketched a tense situation.

26.3 Further I find it highly improbable that the complainant would challenge the appellant, who has a firearm and he is unarmed, to shout "shoot me, shoot me" unless done, to provoke the situation further.

[27] 27.1 With reference to the above I therefore cannot find that the complainant, as a single witness, was a satisfactory witness regarding all the material aspects required to

convict the appellant.

27.2 The State had to prove beyond reasonable doubt that the appellant pointed the firearm at him. Point means to aim direct or align. From the complainant's contradictory evidence it is not clear where the firearm was pointed at, head, legs or feet. The appellant denies that he aimed at the complainant. The prosecutor in the court *a quo* was also not convinced that the State had proved a case beyond reasonable doubt and said the following:

"... but on these facts your worship I would not be honourable to my profession to ask for a conviction in this matter".

[28] I find therefore that the magistrate erred by not taking into account the contradictions in the complainant's evidence which evidence was, for purposes of a conviction, beyond reasonable doubt, unreliable and unsatisfactory.

[29] Accordingly I make the following order:

29.1 The appeal succeeds. The conviction and sentence are set aside.

29.2 The order made in terms of section 103(4) of the Firearms Control Act, 60 of 2000 is also set aside.

29.3 The order in question is substituted with the following:

The appellant is not declared unfit to possess a firearm.

D. MILTON, AJ

I concur.

M.H. RAMPAL, J

On behalf of the appellant:

Adv. P.C.F. van Rooyen SC
Instructed by:
Du Toit Louw Botha Inc.
BLOEMFONTEIN

On behalf of the respondent:

Adv. R. Hoffman

Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

/sp