

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

Case No.: LA147/2004

In the appeal between:

M D BIERMAN

1st Applicant

B D BIERMAN 2nd Applicant

and

THE STATE

Respondent

CORAM:

H.M. MUSI, J *et* EBRAHIM, J

JUDGMENT:

EBRAHIM, J

HEARD ON:

28 SEPTEMBER 2007

DELIVERED ON:

30 NOVEMBER 2007

- [1] The two applicants were convicted on the 17th May 2004 in the District Court, sitting at Warden. The 1st applicant was convicted of the crime of assault and sentenced to pay a fine of R500,00 or undergo five months imprisonment. The 2nd applicant was convicted of the crime of assault with

intent to do grievous bodily harm and sentenced to pay a fine of R2000 or undergo 12 months imprisonment. Both applicants have since paid their respective fines. An application for leave to appeal against both their conviction and sentences was refused by the presiding magistrate.

- [2] The applicants thereafter approached this court by way of the petition procedure set out in section 309C of the Criminal Procedure Act No. 51 of 1977 as amended. On the 22nd of September 2004 this court denied the petition and the applicants thereafter lodged a formal application for leave to appeal against both the conviction and sentence in terms of section 21(4)(b) of the Supreme Court Act No. 59 of 1959 as amended. During argument, the applicants restricted their application to leave to appeal against the conviction only. The main ground of appeal in respect of the conviction is that the learned trial magistrate erred in making a finding that it was improbable that the complainant would fall off the bakkie without something having happened to cause him to fall. I quote from the

judgement of the court *a quo*:

“Dit is vir die hof moeilik om te glo dat die klaer bloot nadat beskuldigde 2 op die voertuig klim agteruitloop en net afval sonder dat daar enigiets gebeur.”

A further ground of appeal is that the court *a quo* erred in rejecting the version of the applicants as not being reasonably possibly true.

- [3] Mr. Nel, who appeared on behalf of the applicants in this application, embellished on these grounds in argument by emphasising the contradictions in the evidence of the complainant and that of his witness, Malinga, concerning the circumstances surrounding the fall. We were also reminded of the test to be applied in applications of this nature as set out in **REX v NGUBANE AND OTHERS** 1945 AD 185 namely, that the question to be asked is whether there is a reasonable prospect of success of the appeal were leave to be granted.

[4] Prior to answering this question it is necessary to set out the evidence in this matter briefly.

4.1 The complainant in this matter had started a fire on his farm which thereafter spread to the second applicant's farm which was adjacent to his. The complainant testified that whilst he was busy trying to temper the flames both the applicants arrived at his farm. Both swore at him and assaulted him and the 2nd applicant climbed up onto his bakkie on which he was standing near the rear opening of the bakkie, approached him and assaulted him with his fists in the left rib area. Thereafter the 2nd applicant pushed the complainant by pressing against his shoulder, causing him to fall off the bakkie. Whilst he was on the ground the 1st applicant grabbed him around the neck, forced him up against the rear flap of the bakkie and throttled him.

4.2 Malinga, his employee on the other hand, testified

that he saw both applicants approach the complainant. Both swore at and assaulted the complainant. The 2nd applicant climbed onto the bakkie. He took fright and ran away from the scene. At a distance of approximately 20 to 30 metres he stopped and continued to observe what was going on in the bakkie. He saw the 2nd applicant grab the complainant and throw him off the bakkie, after which the 1st applicant throttled him in the manner described by the complainant. According to Malinga the 1st applicant also struck the complainant in the ribs with his right hand.

- 4.3 In analysing these contradictions so as to decide upon the proper weight to be attached thereto, I have found that not much turns thereon in view of the fact that these were fast moving events which were being witnessed by Malinga from a distance of approximately 20 – 30 metres. Accordingly

discrepancies in his evidence and that of the complainant were bound to occur. What is of importance is that Malinga corroborates the complainant on the essential aspects of his evidence, namely that he did not fall off the bakkie as a result of losing his balance as the applicants testified, but as a result of being pushed off the bakkie, alternatively thrown off the bakkie, by the 2nd applicant.

- [5] It is trite law that the probabilities of a case are a useful guide in determining issues of credibility. It is therefore necessary to analyse the evidence of the complainant and his witness as well as the evidence of the applicants in the light of those probabilities.

5.1 Both the applicants denied assaulting the complainant at all but admitted that they were very angry with the complainant for having started a fire on his farm which had spread to the 2nd applicant's

farm and caused extensive damage. The 1st applicant admitted that aggressive words were used but could not remember the specific words used.

The 2nd applicant denied that any swearing took place saying that if in fact he had used the words “bliksem” and “moer”, he would have followed through by putting his threats into action. Both applicants denied assaulting the complainant but testified that the 2nd applicant climbed onto the complainant’s bakkie in order to check whether the fire extinguisher belonging to the complainant was in fact broken and that whilst the 2nd applicant was in the process of climbing up the vehicle the complainant retreated towards the rear opening of the vehicle, lost his balance and fell to the ground.

5.2 An analysis of the applicants’ evidence as well as the evidence of the complainant and his witness Malinga show the following common cause facts:

5.2.1 On their own admission the applicants were extremely angry and justifiably so, I may add,

that the complainant had failed to contain the fire he had started on his farm and which then spread to the 2nd applicant's farm.

5.2.2 In their angered state both applicants sought out the complainant.

5.2.3 The 1st applicant corroborated the evidence of both the complainant and Malinga that the 2nd applicant swore at the complainant.

5.2.4 The 2nd applicant climbed on to the complainant's bakkie on which the complainant was standing.

5.3 In these circumstances, it is difficult to believe that all that the 2nd applicant wanted was to examine the complainant's fire extinguisher. It is far more probable that the 2nd applicant climbed onto the bakkie for the express purpose of giving vent to his anger at the complainant for having caused him the financial loss which he must necessarily have suffered as a result of the fire spreading from the complainant's farm to his farm and causing damage. I find therefore that the probabilities of the case favour the version of the complainant and his witness

Malinga that both applicants assaulted the complainant in the manner described by him I find therefore that the complainant did not fall off the bakkie but was pushed off the bakkie by the 2nd applicant and thereafter throttled by the 1st applicant. Such a version seems to me to be more capable of honest belief and in line with the proven facts of the case.

- [8] The application for leave to appeal against the conviction is thus wholly without merit and no reasonable prospect exists that another court may come to a different conclusion on the totality of the evidence. The application is accordingly dismissed.

S. EBRAHIM, J

I concur.

H. M. MUSI, J

On behalf of appellants: Mr. L. Strating
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of respondent:
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

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