

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal no: **AR 356/2020**

In the matter between:

VILVANATHAN MUDLAY

APPELLANT

and

THE STATE

RESPONDENT

Coram: Mossop J and Nicholson AJ

Heard: 7 June 2024

Delivered: 14 June 2024

ORDER

On appeal from: Verulam Magistrates' Court (sitting as the court of first instance):

The appeal against conviction and sentence is dismissed.

JUDGMENT

MOSSOP J (NICHOLSON AJ concurring):

[1] The appellant stood trial on two counts in the Verulam Magistrates' Court: a count of assault with intent to commit grievous bodily harm and a count of *crimen injuria*. He was acquitted on the count of *crimen injuria* and was only convicted of assault on the other count. He received a sentence of three months' imprisonment, wholly suspended for three years on certain conditions. He appeals against both his conviction and sentence with leave of the court *a quo*.

[2] At the commencement of the trial, the record reveals that the accused pleaded not guilty and declined to reveal the basis of his defence. His counsel, Mr Wolmarans, informed the court that:

'The accused will make no statement at this stage but it will become apparent what this matter is about during cross-examination.'

[3] The complainant in both counts was the appellant's wife. Their marriage was experiencing some difficulties. The complainant testified that on 16 May 2018, she happened to observe the appellant seated with another woman at a restaurant in a shopping mall. She concluded that he was being unfaithful to her and took umbrage at his apparent brazen conduct. A short while later, she went to the appellant's offices and confronted him over his conduct. She alleged that whilst in the boardroom at his office, he assaulted her by hitting and kicking her, all of which was denied by the appellant.

[4] After the incident in the boardroom, the appellant returned home at the end of his working day. The simmering discontent between the complainant and the appellant over the observed restaurant encounter continued to build in intensity. It finally erupted when the complainant again confronted the appellant about his conduct in the kitchen of the matrimonial home. This ultimately led to the appellant, *inter alia*, hitting the complainant on her left ear with his flat hand.

[5] Having done this, the appellant left the house, ostensibly to obtain some medication for the damage done to the complainant's ear by his blow. It is safe to

assume from this conduct that the appellant acknowledged that the complainant had suffered an injury because of his conduct. While he was away doing this, the injury became excessively painful to the complainant. She felt that she could not wait for the appellant's return with the medication and considered it necessary to forthwith seek specialist intervention. She accordingly telephoned him on his cellular telephone and requested him to immediately return home and to instead take her to the hospital. The appellant refused this request. Consequently, she left the home on her own before the appellant returned with the medication and drove herself to the trauma unit of a local hospital.

[6] At the hospital, the complainant was seen immediately by Dr Nicholas Raymond (Dr Raymond), who later testified at the trial. He diagnosed a traumatic tympanic membrane perforation to her left ear and a haematoma to her right shin. Given the alleged circumstances under which the injuries were sustained, the complainant was also seen by several experts who formed part of what was called 'the crisis team'. These included a psychologist, a psychiatrist, and an ear, nose and throat specialist. She was subsequently hospitalised for five days while she received treatment.

[7] When he testified at the trial, Dr Raymond confirmed his findings and stated that the injury to the complainant's eardrum would have required the infliction of 'significant force' to cause it. Dr Raymond's evidence was not seriously challenged by the defence. In fact, none of the facts just narrated appear to be in dispute.

[8] Only two witnesses were called by the State, the complainant and Dr Raymond. The statement made by counsel for the appellant that what the matter was about would emerge from cross-examination could only have been intended to refer to the cross-examination of the complainant, for Dr Raymond had no personal knowledge of the events that preceded the complainant's arrival at the hospital.

[9] The appellant's version was revealed to the complainant when she was cross-examined. He alleged that he had been at the restaurant with a client. When the complainant confronted him at home, he alleged that she had verbally abused him and had used coarse and unbecoming language about both his mother and sister.

She had then pushed him from behind and commenced hitting him repeatedly on the back of his head, all the while swearing at him, and continuing to use unbecoming language about his mother and sister. The following was then put to her:

‘He says that he could no longer take this abuse from you and he could no longer put up with you hitting him on the back of the head and he swung around with an open hand and struck out at you once. He is not even sure exactly where that blow landed.’

[10] The appellant’s professed uncertainty regarding his own conduct and which part of the complainant’s body he admitted striking was not of a permanent duration. When he testified in his own defence, he agreed with the following leading propositions put to him by Mr Wolmarans:

‘So do I understand you correctly she was pushing and hitting you from behind? --- Yes.

You turned and you swung your hand around and it hit her on the ear? --- Yes.’

[11] The appellant went on to agree that when he struck the complainant on her left ear, the blow was of sufficient force to knock her off her feet and to the floor. This would seem to accord with the evidence of Dr Raymond concerning the degree of force that would have been necessary to cause the injury to the complainant’s ear. The appellant also indicated under cross-examination by the prosecutor that he had also pushed the complainant.

[12] Given these admissions by the appellant, it is uncertain what his defence was. Was it that he had been provoked by the complainant? Or had he acted in private defence? Or had he merely lost his temper? We sought some clarity on this from Mr Wolmarans. He indicated that the defence relied upon was private defence. There is nothing in the record of proceedings that indicates that this was, in fact, the defence relied upon. Indeed, there is also nothing in the appellant’s heads of argument that indicates this nor were there any submissions that the magistrate had erred in rejecting that specific defence.

[13] To successfully establish the defence of private defence, the party relying upon it must establish that the defence was directed against the attacker, that the defensive act was essential in order to protect the interest threatened, that there was a reasonable relationship between the attack and the defensive act, and that the attacked person must be aware that he is acting in private defence.¹

[14] But for the first requirement, it seems to me that none of the other essential requirements were met. The second requirement dictates that the performance of the defensive act must be the only way in which the party raising the defence can avert the threat he faces. Accepting the appellant's version that the complainant was physically attacking him, there were several alternatives available to him to avoid what was occurring: he could have turned and faced the complainant and admonished her to stop what she was doing; alternatively, he could have grabbed her hands or arms and physically stopped her from striking him. After all, he was not being set upon by a person physically stronger than himself nor did he ever state that he felt his wellbeing was in danger.

[15] The appellant suffered no injuries arising out of the complainant's conduct. In my view, his response was out of proportion to what he was allegedly being subjected to. The third requirement was thus not met. It would not be unfair to state that our society is generally a violent one and that people seem to resort to violence far too quickly when faced with taxing circumstances. Martin Luther stated that nothing good ever comes from violence. He was correct.

[16] As regards the final requirement, the appellant's version that he could no longer take the complainant's alleged swearing and her striking the back of his head appears to be the high-water mark of his defence. I am not sure that in advancing this version the appellant himself appreciated that he was acting in private defence. That explanation appears to reveal not a reliance upon private defence but merely an exasperation with the alleged conduct of the complainant. There is no suggestion

¹ See S V Hoor *Snyman's Criminal Law* 7 ed (2020) at 88-93.

of an anticipation of a physical injury that would entitle him to respond with superior force.

[17] In assessing the appellant's version, I have cautioned myself about adopting an armchair critic's view of what occurred. I was not there, and I did not experience what the appellant experienced. But I nonetheless adhere to the view that his conduct was not justified in the circumstances. Society requires that there must be some degree of proportion between the attack and the response.² Where excessive force is applied to a relatively trivial threat, it is not justified and it is, thus, unlawful.

[18] That there was some provocation in this matter appears entirely likely. The complainant would not let the topic of the appellant's alleged infidelity rest and raised it both at his office and later at the matrimonial home. It appears that she was determined to obtain a confession from him, and she appears to have acted with a degree of dogged persistence.

[19] But even if there was a degree of provocation, since the decision in *S v Eadie*,³ the position is that provocation is not a complete defence to a criminal charge. In *Eadie*, the Supreme Court of Appeal brought an end to the defence of non-pathological incapacity based upon provocation. Thus, provocation can no longer result in an acquittal, but may be viewed as a mitigatory feature. As Navsa JA stated in that matter:

'The deceased's aggressive and provocative behaviour did not entitle the appellant to behave as he did. It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism. It is by its very nature a state that will be rarely encountered.'⁴

[20] It seems to me that the appellant simply lost his temper based upon the complainant's alleged conduct. If he simply lost his temper and lashed out at the

² *S v Steyn* [2009] ZASCA 152; 2010 (1) SACR 411 (SCA) para 19.

³ *S v Eadie* 2002 (1) SACR 663 (SCA).

⁴ *Ibid* para 70.

complainant in rage, then it is well to bear in mind what was said in *S v Kok*,⁵ namely:

‘Loss of temper, that is to say a failure to control one's emotional reactions, is not to be confused with a loss of cognitive control (see *S v Henry* 1999 (1) SACR 13 (SCA) at 20*d - f*).’

[21] The law is crafted so that it applies to all those who are subject to it, and it treats all as equals. It cannot be selectively applied to afford those who do not control their tempers a defence against allegations of criminal conduct at the expense of those who habitually control their tempers. The message must be clearly transmitted that consciously giving in to anger and responding with violence will not be tolerated, nor will the striking of women.

[22] In argument at the trial and, indeed, before us, it was suggested by Mr Wolmarans that the complainant had not been a satisfactory witness and that her version of events should be rejected. Certain criticisms were made about her evidence. The record reveals that her precise recollection of the events and the sequence of the blows that she received were imprecise. She alleged that she was kicked and punched but Dr Raymond saw no signs of injuries that could have been anticipated to manifest themselves if that had occurred. Some of the criticism of her evidence accordingly finds traction, but I am not satisfied that all the criticisms levelled at her materially affected her credibility. Her injuries, which were objectively verified by Dr Raymond, provided support for her evidence. However, assuming that Mr Wolmarans is correct in offering such criticisms, the alleged weaknesses in the complainant's evidence do not, in my view, assist the appellant. This is because, on his own version, the appellant admitted landing a blow on the complainant's ear and pushing her and did not dispute that the complainant suffered the injury to her ear that Dr Raymond described. The only inference to be drawn is that the blow the appellant admitted landing on the complainant caused that injury.

⁵ *S v Kok* 2001 (2) SACR 106 (SCA) para 22.

[23] In response to the proposition that the appellant was guilty on his own version of assault, Mr Wolmarans submitted that the appellant ought not to have been placed on his defence by the court a quo and ought then and there to have been discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977. An application in terms of this section was brought by the appellant at trial but was refused by the magistrate. In my view, the magistrate was correct to do so. There was evidence before him from the complainant that she was struck on her left ear by the appellant and Dr Raymond confirmed physical damage to that ear. Because a positive act coupled either with negligence or with intent which causes physical harm to another is considered in our law to be prima facie unlawful,⁶ the appellant's application for a discharge was correctly refused.

[24] The appellant did not establish a legally justifiable explanation for his conduct. In both pushing the complainant, which he admitted doing, and hitting her on the left ear, which he also admitted doing, he committed an assault, as:

'Assault consists in any unlawful and intentional act or omission:

(a) which results in another person's bodily integrity being directly or indirectly impaired, or

(b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place.'⁷

Slapping, pushing, and kicking another person would unequivocally constitute an impairment of the bodily integrity of the person who was the recipient of that conduct.

[25] Accordingly, it seems to me that this appeal does not have a future. The grounds upon which an appeal court can interfere in the decision of a lower court are limited in the absence of any misdirection.⁸ Even if the magistrate incorrectly

⁶ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12.

⁷ *Cingo and another v SQ Risk Security Services* [2024] ZAECHMHC 9 para 33, quoting the definition of assault provided in *S v Hooroer Snyman's Criminal Law* 7 ed (2020) at 395.

⁸ *S v Francis* 1991 (1) SACR 198 (A) at 198j-199a in the headnote; *Mathuthu and others v S* [2024] ZASCA 50 para 14.

accepted all the evidence of the complainant, about which I make no finding, on his own version, the appellant was guilty of assault. He was correctly convicted.

[26] The sentence that the appellant received, in my view, is a sensible one given the fact that at the time of the trial, the complainant and the appellant had apparently settled their differences and had reconciled. We were informed from the bar during argument that the reconciliation ultimately failed, and the complainant and appellant are now divorced. The sentence appears to acknowledge the circumstances under which the appellant acted and the provocation to which he was exposed. I am accordingly satisfied that the magistrate did not err in sentencing him as he did.

[27] I would therefore propose that the appeal against conviction and sentence be dismissed.

MOSSOP J

I agree.

NICHOLSON AJ

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