

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: A21/2022

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

JAN DANIEL WOLMARANS

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The appellant appeared in the district magistrate court sitting in Lephalale on one count of malicious damage to property, and one count of assault common. He was found not guilty and discharged on the count of malicious damage to property, and convicted on the count of assault common. He was sentenced to a fine of R2000.00 or 3 months imprisonment of which R1000.00 or 1½ months imprisonment was suspended for 3 years on condition that the appellant is not convicted of assault common during the period of suspension. The appellant is appealing against both conviction and sentence with the leave of the court *a quo*.

[2] The facts of the case are briefly as follows. According to the State version, on 26th November 2016 Sebastian Rossouw (complainant) was in the company of Marushell Visser (second State witness) at the home of Fracois Kampher (first State witness). The complainant was taking care of the home of the first State witness who had gone on holidays. The complainant and the second State witness were engaging in a conversation when the appellant entered the outside area of the house on the upstairs where they were sitting.

[3] When the complainant saw the appellant he tried to put down his glass of wine on the stand. Whilst the complainant was in the process of putting down the glass of wine, the appellant pushed the complainant onto the couch he had been sitting on, hit the complainant with a fist, pulled the complainant to the ground and put his foot on his head telling the complainant that he will hit him until he was dead. The complainant requested the second State witness to open the gate so that the appellant could leave. Thereafter the appellant left the premises without saying anything.

[4] Doctor Makakase who had completed the complainant J88 has testified that he had examined the complainant on 26th November 2016. The complainant was complaining of pain on the scalp right side, both sides of the neck and right side of his face. His clinical finding was that the complainant was having a small bruise on the right side of his face. The cross-examination of the State witnesses by the appellant's counsel was more about the contradictions in their *viva voce* evidence and police statements, more especially the second State witness who seems to have deposed 3 contradictory police statements.

[5] According to the version of the appellant, on the date of the incident, he and the second State witness were in a love relationship. On that date the appellant who was in the company of his friend Kobus De Meyer have accompanied a female friend to Elephant Sports bar where she was employed. They were using Kobus bakkie, and Kobus was the driver. Whilst standing at the Sports Bar, the appellant was informed that the complainant had left with the second State witness and went to the first State witness's homestead.

[6] The appellant together with his friend drove to the first State witness's homestead. On arrival at the first State witness's homestead, appellant rang the doorbell and even called out without any response. They then manoeuvred the bakkie to the right next to the wall of the property. The appellant climbed onto the bulbar of the bakkie, thereafter climbed onto the wall of the property and squeezed himself through a space between the wall and the electric wires.

[7] On entering the premises, the appellant went upstairs of the house and found the complainant and the second State witness. The appellant entered the house, everything was normal, and in a calm voice told the complainant to stay out of his way. The complainant put down his glass of wine, and approached the appellant. The appellant and the complainant grabbed each other and a scuffle ensued. The appellant lowered the complainant to the floor in a controlled manner. Thereafter the appellant left the complainant on the floor and walked away. As the appellant was walking away, he requested the second State witness to open the gate for him so that he can leave. The appellant did not engage the second State witness any further.

[8] The appellant's appeal is directed against both conviction and sentence. It is trite that a court of appeal will not readily interfere with factual findings of the trial court unless it is clear from the record that the trial court had materially misdirected itself or erred to the extent that its findings were vitiated and fell to be set aside. The appeal court must also remain cognisant that the trial court has the advantage of having observed and heard the witnesses. (See *Mnyandu v Padayach*¹).

[9] In criminal proceedings it is trite that the State bears the onus to prove the guilt of the accused beyond reasonable doubt. The accused version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found credible evidence that the explanation given by the accused is false beyond reasonable doubt. The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. The appellant's conviction can therefore only be sustained after consideration of all the evidence and his version of

¹ 2017 (1) SA 151 (KZA) at para 28

events is found to be false beyond reasonable doubt. (See *Oosthuizen and Another v S²*).

[10] The appellant has been convicted of one count of assault common. In the *Oosthuizen* case above, it was held that Snyman Criminal Law 5th Edition page 455 defines the elements of the crime of assault as follows: (a) conduct which results in another person's bodily integrity being impaired or the inspiring of a belief in another person that such impairment will take place; (b) unlawfulness; and (c) intention. It was further stated that the crime of assault can be committed even though the physical injuries were slight. Physical injuries are not a requirement, the crime of assault can be committed even where there is no physical harm, but where there is a threat of immediate personal violence in circumstances that lead the person threatened reasonably believing that the other intends and has the power to immediately carry out the threat. (See *R v Gondo*³).

[11] The appellant had pleaded not guilty to both counts and elected to remain silent, and had further put the State to prove the allegations levelled against him. However, the appellant later during the trial placed himself on the scene by conceding that he was at the first State witness's homestead where he found the complainant and the second State witness. He had a scuffle with the complainant where he lowered the complainant to the ground in a controlled manner. A scuffle also amounts to a fight and for a fight to ensue there will have to be an aggressor.

[12] The appellant was informed that the complainant had left with his girlfriend who was the second State witness. The appellant went to where the complainant was, rang the doorbell and shouted but there was no response. The appellant had risk to be electrocuted by squeezing himself between the wall and the electric wires for him to be able to gain access into the premises in which the complainant and the second State witness were. That in itself is an indication that it was not a friendly visit, and the appellant should have been furious to take such a risk of him being electrocuted just for him to gain access to the premises.

² [2019] ZASCA 182; 2020 (1) SACR 561 (SCA) (2 December 2019)

³ 1970 (2) SA 306 (R)

[13] The complainant had consulted a medical doctor after the alleged assault. The J88 completed by the doctor who had examined the complainant had recorded that the complainant had a small bruise on the right side of his face, and further that the complainant was complaining of pains on the right side of the scalp, both sides of the neck and right side of the face. The conclusion of the medical doctor was that the complainant had sustained multiple soft tissue pain and a small bruise on the face possibly injured by a blunt object. Since the appellant does not dispute that he had a scuffle with the complainant, the only conclusion is that the complainant had sustained these injuries during the scuffle. For the complainant to sustain these minor injuries shows that the complainant was not put on the ground in a control manner as testified by the appellant. If the appellant and the complainant were engaged in a scuffle, there will be no time for either party to be gentle with each other.

[14] The appellant during the trial did not offer any defence to his actions, but has concentrated more on the contradictions between the State witnesses' *viva voce* evidence and their written police statements. The second State witness in her first police statement has stated that she saw the appellant and complainant grabbing each other, but did not see if they hit each other or not. In second police statement, the second State witness has stated that she saw the appellant grabbing the complainant and assaulting him. The State witness's second police statement is in line with her *viva voce* evidence in court.

[15] In *S v Bruiners and Another*⁴ it was held that in order to discredit a State witness on the basis of his affidavit, it was still necessary that there had to be a material deviation by the witness from his affidavit, before any negative inference could be drawn. The purpose of an affidavit was to obtain the details of an offence, so that it could be decided whether a prosecution should be instituted against the accused. It was not the purpose of such an affidavit to anticipate the witness's evidence in court, and it was absurd to expect of a witness to furnish precisely the same account in his statement as he would in his evidence in open court.

⁴ 1998 (2) SACR 432 (SE)

[16] In both police statements, the second State witness had seen that the appellant and respondent had grabbed each other. This version supports the version of the complainant. The appellant himself had testified that he had a scuffle with the complainant. There is evidence that after the scuffle and/or grabbing, the complainant had consulted a medical doctor who had found that the complainant had sustained some minor bruises and was also complaining of the pains. The scuffle and/or grabbing was between the appellant and the complainant, and there was no third person involved in which case it could have been said that there was a possibility that second State witness might have not seen properly as to who was grabbing who.

[17] The manner in which the appellant had gained access to the house where the complainant and second State witness were in, suggest that the appellant came furious and ready to deal with the complainant as the complainant had left with his girlfriend without his knowledge and consent, and when he rings the doorbell and even shout for them to open for him, there was no response. In my view, the contradictions in the second State witness's police statement and *viva voce* evidence are of a minor nature and not material. The evidence of this case taken in its totality and holistically, shows that the appellant was aggressor on the date in question. Even if the evidence of the second State witness is excluded, the version of the complainant and that of the appellant still shows the appellant as the aggressor.

[18] In my view, the court *a quo* has correctly assessed the evidence presented before it in its totality and holistically. The totality of the evidence presented exclude any doubt about the guilt of the appellant. It therefore follows that the appeal against conviction must fail.

[19] Turning to sentence, it is trite that sentencing is the prerogative of the trial court, and should not lightly be interfered with. An appeal in which the interference with sentence will be justified is when it is found that the trial court has misdirected itself in some respect or if the sentence imposed was so disturbingly disproportionate that no reasonable court would have imposed it. The test is not whether the trial

court was wrong, but whether it exercised its discretion properly. (See *S v Romer*⁵). Before this court counsel for the appellant had correctly abandoned the appellant's appeal on sentence, and this court will not take this issue any further. By abandoning the appeal on sentence, the appellant is conceding that there is nothing to fault the court *a quo* on sentence.

[20] Accordingly, the following order is made:

20.1 The appeal against both conviction and sentence is dismissed.

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

I AGREE

MORGAN AJ
ACTING JUDGE OF THE HIGH OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the appellant	: Adv MM De Jager
Instructed by	: Van Velden-Duffy Inc
Counsel for the respondent	: Adv P Van Der Kooi
Instructed by	: Office of DPP Polokwane
Date heard	: 13th September 2024
Electronically circulated on	: 17th September 2024

⁵ 2011 (2) SACR 153 (SCA) at paras 22 and 23