

SOUTH AFRICA / JUDGMENT

Celliers v S (A36/2021) [2021] ZAGPPHC 846 (8 December 2021)

[2021] ZAGPPHC 846

COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa, C.K Matshise

CASE / FILE NUMBER

A36/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

number: A36/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

08/12/21

In

the matter between:

HENDRICK

PETRUS

CELLIERS

Appellant

And

THE

STATE

Respondent

JUDGMENT

Baqwa J

Introduction

- [1] The appellant was arraigned before the Magistrate Court for the district of Tshwane East, held at Bronkhorstpruit on two counts of assault with intent to inflict grievous bodily harm.
- [2] The appellant pleaded not guilty but was found guilty and sentenced to one year imprisonment or a fine of R10 000.00 of which half was conditionally suspended for five years.
- [3] Leave to appeal against the convictions and sentence was granted by the trial court.
- [4] The state evidence was tendered through the evidence of the two complainants Richard Charles Lynch ("Lynch") and Johannes David van der Merwe ("van der Merwe") aged 65 and 75years respectively. The appellant is 70 years old.

Charges

- [5] The first count was assault with intent to do grievous bodily harm "in that upon or about 28 October 2018 and at or near Kleinfontein in the District/Regional Division of Tshwane East the accused did unlawfully and intentionally assault Richard Charles Lynch by grabbing him and/or throwing him towards the fence with intent to do the said person grievous bodily harm".
- [6] Count 2 was assault with intent to do grievous bodily harm "in that upon or about 28 October 2018 and at or near Kleinfontein in the District/ Regional Division of Tshwane East the accused did unlawfully and intentionally assault Johannes David van der Merwe by hitting him with an unknown object with intent to do the said person grievous bodily harm".
- [7] The State also relied on two Medico Legal Reports on Forms J88 marked Exhibit"A" and Exhibit "C".
- [8] The appellant testified in his own defence and he called two witnesses, namely, Mrs Hettie Kuhn ("Kuhn") and Mr Wikus Kremer ("Kremer") Affidavits deposed to by the complaints to the police by both complainants were utilised during cross examination and handed in as exhibits "B" and "D" respectively.

Background

- [9] On Sunday28 October 2018 at or about 12h30 van der Merwe was at home preparing lunch when he invited Lynch to join him for lunch. Lynch obliged and joined him.

- [10] When lunch was about to be served van der Merwe heard the sounding of a hooter at the gate of his house. Upon investigating he discovered that it was the appellant hooting because Lynch was blocking his driveway. According to van der Merwe the appellant was angry and threatening to deflate the vehicle's tyre. Van der Merwe undertook to go and call Lynch to move his vehicle.

The Assault

- [11] Van der Merwe testified that as he fumed around to go back to the house he felt a blow at his back which caused him to fall flat on his stomach. He felt pain and he noticed Lynch coming outside and at that time saw the appellant grab Lynch by the throat, shake him and drop him on the ground. He asked appellant to leave Lynch alone and he stopped. However appellant grabbed Lynch again by his belt and shirt collar and threw him on the ground the second time. Van der Merwe again asked the appellant to leave Lynch and the appellant complied. The appellant proceeded to his vehicle and drove off.
- [12] Van der Merwe sustained injuries on his hip and was later that day admitted to hospital. He denied that he was intoxicated and that he needed a hip replacement operation just before the incident.
- [13] Lynch testified that when van der Merwe was taking too long to return he came out of the house and found him lying on the ground on his stomach. The appellant was still in the vicinity and when he asked what had happened, the appellant grabbed him by his throat and threw him against the wire fence. He again grabbed him by his belt and collar and threw him against the fence for the second time where he sustained cuts on his face and arms. He also denied that he was intoxicated or that he attacked the appellant.
- [14] The appellant also testified and denied assaulting the complainants. He stated that on the day in question he reversed his vehicle and found that there was a vehicle blocking his driveway. After hooting for 10 minutes without any reaction van der Merwe came out of his house intoxicated and unsteady on his feet. He was aggressive and using insulting language. He chastised him (the appellant) for making a noise with the hooter. Van der Merwe approached the appellant and grabbed him by his shoulder and the appellant pushed him on his chest. Van der Merwe fell on his back due to his drunken state. Lynch also approached in a drunken state and insulted him for making noise. Lynch also approached him aggressively and tried to touch him. The appellant pushed him off causing him to fall. The appellant then got into his Pajero, drove over some garden rocks and left the scene.
- [15] The appellant called two witnesses. The first was Kuhn who testified that she was aware that van der Merwe needed a hip replacement operation two years prior to the incident.
- [16] The second witness was Kremer who was part of the security personnel in the residential complex. Kremer responded to a complaint by the appellant about his driveway being blocked. He observed that both Lynch and van der Merwe were drunk. They informed him that appellant had assaulted them and left.

Grounds of Appeal

- [17] The appellant contends that the court a quo erred in finding the witnesses for the state to be credible and reliable and in preferring their evidence to that of the appellant.
- [18] The appellant further contends that the court a quo ought to have rejected the versions presented by the State due to the material contradictions, discrepancies, inconsistencies and improbabilities therein and that it ought to have found the appellant's version reasonably possibly true and acquitted the appellant.
- [19] The appellant also contends that no credible evidence demonstrating an intent to injure or cause grievous bodily harm was presented by the State.

The Law

- [20] It is trite that the credibility of factual witnesses, their reliability and probabilities are critical elements in the process of weighing by a court which version of two mutually destructive versions to prefer.
- [21] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie and Others*[1] the following was said:

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[22] In R v De Villiers[2] Davis AJA made the following remarks:

"The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. The court must carefully weigh the accumulative effect of them together and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to the inference of guilt as the only inference which can be drawn."

[23] On the question of whether the crimes were allegedly committed by the appellant were committed with intent, Snyman CR in his work, Criminal Law, sixth edition, p 453 he states as follows:

"All the requirements for an assault as set out above apply to this crime, but in addition there must be an intent to do grievous bodily harm. Whatever grievous bodily harm is in fact inflicted on Y is immaterial in determining liability (though it is usually of great importance for the purpose of sentence.) It is simply the intention to do grievous bodily harm that is in question. Whether X in fact had an intention to do grievous bodily harm is a factual question. Important factors which may indicate that X had such an intention are for example; The nature of the weapon or instrument used, the way in which it was used, the degree of violence, the part of the body aimed at, the persistence of the attack and the nature of the injuries inflicted if any."

[24] In S v Mbelu[3] Miller J said: "Now where the court is confronted with the problem whether it should draw the inference that an assault was accompanied by this particular intent it usually has to rely on four main factors which provide the index to the accused's state of mind: I am not suggesting that those four factors are exhaustive; I do suggest that in the large majority of cases these are the factors which provide a guide to the accused's state of mind. They are, first, the nature of the weapon or instrument used; secondly, the degree of the force used by the accused in wielding that instrument or weapon,· thirdly, the situation on the body where the assault was directed and fourthly, the injuries actually sustained by the victim of the assault" See also S v Mdau[4].

[25] The matter is further elucidated in S v Dipholo[5], where the Court summarised the situation as follows: "On a charge of assault with intent to do grievous bodily harm, the question arises whether the state has proved beyond reasonable doubt that the accused had the required intent (to do grievous bodily harm). That is a question of fact which must be decided on the basis, inter alia, of the following factors: (a) the nature of the weapon used and in what manner it was used;(c) the part of the body aimed at; and (d) also the nature of the injury, if any, which was sustained."

Analysis

[26] Regarding the contradictions and discrepancies in the State evidence it cannot be denied that the record of evidence is bristling with instances where such contradictions exist. It cannot be said however that all of them were material discrepancies. It cannot be argued for example that the fact that Van der Merwe and Lynch contradicted each other regarding the

type of beer they consumed on the day in question is of any material relevance. The common cause fact is that they had consumed alcohol and the only material difference between their evidence and that of the appellant was the probable amount of alcohol that had been consumed. According to the appellant and his witness, Kremmer, the complainants were highly intoxicated on the day whilst this was denied by them.

- [27] What I found significant however was the discrepancies regarding the injuries allegedly suffered by the complainants where these were not supported by medical evidence. Van der Merwe testified that he had suffered scrapes on his hand but none were recorded by Dr Mahlangu who examined him at 20h25 on 28 October about six hours after the incident and completed exhibit UA". Further, van der Merwe testified that he had felt an enormous blow to his lower back. He had no idea what hit him. Whilst it could be inferred that it must be the appellant who struck him, there was no evidence that the appellant

was in possession of a weapon with which to cause van der Merwe grievous bodily harm. Such evidence was not forthcoming from both

complainants. Significantly however, van der Merwe had informed the police that the appellant had assaulted him on his upper back with an unknown object in exhibit "B". This was however contrary to what he conveyed to Dr Mahlangu that he was pushed by an assailant during a verbal altercation. He failed to mention to the doctor that he was struck with an unknown object or about feeling a blow on his back in exhibit "A". No injury was recorded on either his upper or lower back. These are material contradictions in van der Merwe's version to the doctor, to the police and his testimony in court.

- [28] In his testimony in court van der Merwe testified under cross examination as follows: "I was moved forward. I do not know from what, I do not know where, I do not know how and my, not my hip but my actual leg was broken as you can see on the x rays." However, no x rays were presented by the State and no expert evidence was called to corroborate the nature and severity or possible cause of van der Merwe's alleged injuries.

- [29] Lynch testified that he had sustained bleeding cuts, abrasions and scratches to his right elbow, left arm and right hand side of his face but not serious enough to require stitches. He however mentioned nothing about injuries to his face when he made the statement to the police in exhibit "D"

- [30] Van der Merwe testified that Lynch had blood "flecks" or spots on his arms, face and head. To the police he said Lynch "was bleeding from his head and neck. He was having an open wound." Yet, Or Westerman who examined Lynch on 31 October 2018 made no findings of any injuries. His notes reflect "keel seer & geswel" regarding the throat and "stukkend & vel af" at the right elbow. There were no cuts, abrasions or scratches to his face. There was no sign of any wound to Lynch's head observed by the doctor in exhibit "C". Lynch conceded under cross-examination that if he sustained serious wounds, scratches

or abrasions during the incident he would have mentioned those to the doctor.

- [31] Evidently, the versions presented by Lynch and van der Merwe regarding injuries suffered by them were materially different and were not supported by medico-legal evidence relied upon by the State.
- [32] It is common cause that Lynch did not exit the house at the same time as van der Merwe when they heard the car hooter which attracted their attention. Lynch testified that he had no idea why the appellant had assaulted him and that they did not speak to each other. He only learnt at a later stage from van der Merwe why the appellant assaulted him. Yet, in his statement to the police he said "... and he threw me against the fence and he walk to his bakkie and I asked him why he was assaulting me, he said my vehicle was blocking his driveway and he could not go out, that was his reason for assaulting me." Exhibit 'D'.
- [33] The self-contradictions by Lynch and the contradictions between Lynch and Van der Merwe did not end there. Lynch testified that the appellant assaulted him by grabbing him around the neck shaking him and throwing him against the fence then by grabbing him by his clothing (his trousers and collar) and throwing him against the fence again.
- [34] According to Van der Merwe the appellant grabbed him by the throat, shook him and dropped him to the ground, picked him up by the belt and collar and throwing him on the ground again. Van der Merwe denied emphatically in his evidence that Lynch was thrown against the fence and stated that he was thrown down only once.
- [35] It is difficult to establish which version of the complainants to accept as they contradicted not only one another but themselves by presenting different versions prior to and during their testimony before the court a quo.
- [36] Lynch also testified that when he went outside the house he found Van der Merwe lying on his elbows and knees next to the bakkie. He saw no other person than Van der Merwe as the appellant had already walked to his bakkie and driven away. Shortly thereafter upon re-examination by the prosecutor, he changed course and stated that the appellant was standing near Van der Merwe doing nothing.
- [37] To the police, Lynch in exhibit D said that when he went outside: "I found Johan lying on the street and the person who assaulted him was bending over him." Not only are Lynch's versions in court, in examination in chief and under cross-examination contradictory, but they are also inconsistent with his statement to the police in exhibit "D".

The Judgment of the Court a quo

- [38] Notably, the judgment of the court a quo makes no reference whatsoever to the many contradictions and inconsistencies which are quite apparent from the record. Considering the irreconcilable versions presented by the State and the defence the court a quo would have had to employ the technique referred to in the Stellenbosch Winery case (supra) to resolve the factual dispute. The court quo ought to have explicitly weighed the witness' candour and demeanour in the witness box, their bias, latent or blatant, the internal and external contradictions, the probabilities and improbabilities, the calibre and cogency of

their performance compared to that of other witnesses testifying about the same incident. The court a quo ought to have commented about the quality, integrity and independence of their recall of the incident before coming to the final step, namely, determining whether the party burdened with the onus of proof had succeeded in discharging it.

- [39] The court a quo seems to have merely paid lip service to the above without actually demonstrating how it had come to its conclusion. I can do no better than quote directly from the judgment:

"Now on your side you deny. You said you only pushed them because they were drunk, trying to attack you but now when I come to look at the evidence in totality, when I say one must look at the credibility of the witnesses and their reliability and the probabilities of what could have happened on that date when you want to pass a judgment. I find that the two witnesses are elderly people. I see no reason why they can come to this court and tell lies of what happened on that date. To me the finding of this court they are credible witnesses and they are also reliable and the probabilities as we would look in totality of the whole issue, the probabilities is that what they said happened is most probably true."

- [40] Throughout the judgment the court a quo seems to emphasise that the complainants were elderly people who could not tell lies without considering that the appellant and the complainants belong to the same age group, the appellant being seventy years old. If age was to be a consideration, it could have equally favoured the appellant.
- [41] Evidently, the contradictions, inconsistencies and discrepancies played no part in the decision of the court a quo. If they did, that is not clear from the judgment. In my view this was a misdirection on the part of the court a quo. The fact that the evidence of the appellant and his witnesses was consistent and not found wanting even under cross-examination seemed to count for nothing in the eyes of the court a quo. Yet, if properly considered, this could have been a clear indicator that the appellant's version was reasonably possibly true.
- [42] Further, the court a quo seems to have misdirected itself in another respect. The court failed to consider the requirements by *Snyman* (supra) and in the *Mbelu* and *Dipholo* decisions (supra). The requirements are with regard to the appellant's state of mind at the time and to recap, they are: firstly, the nature of the weapon or instrument used, secondly, the degree of force used by the accused in wielding that instrument or weapon, thirdly, the situation on the body where the assault was directed and fourthly, the injuries actually sustained by the victim of the assault.
- [43] The record shows that the appellant was not in possession of any instrument or weapon. The first, second and third requirements are therefore not met. It would only be if they were satisfied that a conviction on a charge of assault with intent to do grievous bodily harm could be justified. In my view the material contradictions would preclude even a conviction on the crime of common assault. Absent a conviction, the fourth requirement which would be more relevant to sentence would not apply.

[44] Given the conflicting versions and the nature of the crime, the court a quo ought to have considered the said requirements in order to conclude that the State had discharged the onus upon it.

[45] In light of the above I find that the court a quo misdirected itself and that it ought to have come to a different conclusion. I find that the State failed to prove their case beyond reasonable doubt.

[46] In the circumstances, I propose that the following order be made:

ORDER:

53.1 The appeal against conviction and sentence is upheld.

53.2 The conviction and sentence are set aside.

SELBY BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree.

C.K MATSHISE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

For the Appellant:

Adv J.J Greeff

Instructed by:

Johann Scheepers Incorporated

For the Respondent: Adv M.J Makgwatha

Instructed by:

NDPP

[1] 2003(1) SA 11 SCA at par [5]

[2] 1944 AD 493 at 508-9

[3] PH.H.176

[4] 2001(1) SACR 625 (W)

[5] 1983 (4) SA 757 (T) at 760

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