

SOUTH AFRICA / JUDGMENT

Choshi and Another v S (A07/2020)

[2021] ZALMPPHC 49 (30 August 2021)

[2021] ZALMPPHC 49**COURT**

Limpopo High Court, Polokwane

BEFORE

Kganyago, Muller

CASE / FILE NUMBER

A07/2020

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
CASE
NO: A07/2020

REPORTABLE:

YES/NO
OF
INTEREST TO OTHER JUDGES: YES/NO
REVISED
In

the matter between:

DOCKRY
CHOSHI
FIRST
APPELLANT
CABRY
CHOSHI
SECOND
APPELLANT
And
THE
STATE
RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The two appellants appeared before magistrate M Komape at Seshego magistrate court on two counts of assault with intent to do grievous bodily harm, and one count of contravention of section 6 read with section 17 of Act 116 of 1998 (Domestic Violence Act). Both appellants have pleaded not guilty to all the three counts that they were facing. Both appellants appeared in person. Both appellants were found guilty of two counts of assault GBH, whilst the first appellant was found not guilty and discharged on the count of contravention of a protection order. The second appellant was found guilty of the count of contravention of a protection order. The appellants are appealing against conviction only. The appeal is with the leave of the court a quo.
- [2] The first witness to testify for the State was Margaret Teffo (first complainant). She testified that she knows the appellants, and that they are both brothers. That their father married her sister Josephine Choshi (second complainant in count 2 and 3) after their mother passed away. On 11th June 2017 she was with second complainant in her bedroom at about 20h00, and when she looked through the camera she saw people fighting outside the house. When they went outside to go and check, they found that it was the first appellant and McDonald who were fighting. McDonald is the second complaint's child. The complainants told them to stop fighting as they were children from the same parents, but they did not listen to them and continued fighting.
- [3] She went back to the house, and as she was going back into the house, the first appellant phoned his brother (second appellant). The second appellant arrived been in possession of something which looked like an iron rod or plank. Both appellants went to the second complainant room where they found the first and the second complainants. On arrival in the room, the first appellant went to the first complainant, whilst the second appellant went to the second complainant. The first appellant started hitting first complainant with fists. She could not see what the second appellant was doing to the second complainant as she was been assaulted by the first appellant who also pushed her outside the house. When the first appellant was pushing her outside the house, the second appellant came and hit her with the object he was having and she fell down. Whilst on the ground, the second appellant hit her on the side of her head with that object. When she got up, she saw their uncle Elias Choshi who told the appellants to kill them.
- [4] Police were called, and when the police arrived, they told complainants to go to the hospital. She does not remember how the fight stopped, as by the time the police arrived the fight had stopped, and they were already running to the hospital. She was swollen on the side of her head and chest as a result of the assault. The first complainant further testified that the first appellant was staying with the second complainant and McDonald, whilst the second appellant was having his own homestead. Both appellants cross examined the first

complainant.

- [5] The State's second witness to testify was McDonald Choshi. He testified that he knows the two appellants and he and the appellants are brothers but with different mothers. That on 11th June 2017 at about 20h00 he was coming from the shops and going home. He entered the house through the kitchen and found the first appellant standing on a chair changing an electric bulb. As he was about to pass the first appellant, the first appellant hit him with an electric bulb on his head and a fight ensued. As they were fighting, the first and second complaints came and asked them why they were fighting. They continued fighting until they stopped the fight on their own. When they stopped fighting, he was bleeding on his forehead, and he went to his room to stop the bleeding.
- [6] When he was in his bedroom, the first appellant phoned the second appellant. When he got out of his room, he found the two appellants in the second complainant's room. On entering the second complainant's room he saw the second appellant holding something black in colour, but could not tell what that thing was. He saw the two appellants assaulting both the complaints. However, he just peeped and saw the two appellants assaulting the complaints and he went outside to go and seek for help. He saw the second appellant having something like a stick hitting both complainants whilst the first appellant was pushing the two complaints out of the house. When he came back to the house, the two appellants pushed all of them out of the yard.
- [7] When they were out of the yard, community members arrived at the house. When the community members arrived, the second appellant was still busy assaulting the first complainant until she fell down. By then the first appellant was pushing them out of the yard. After the first appellant had succeeded to push them out of the yard, he closed the gate. Outside the yard as it was dark, he could not see the appellants assaulting anyone. After the first appellant had closed the gate, both appellants went out of the yard and left.
- [8] Under cross examination by the second appellant when it was put to the witness that the first complainant testified that the second appellant did not assault her, the witness stated that he just observed and ran outside. The witness further stated that he saw the second appellant assaulting both complainants.
- [9] Josephine Choshi was the third witness to testify for the State. She testified that on 11th June 2017 she was in her bedroom with the first complainant. As she was in her bedroom, she checked the cameras and saw a chair been thrown out of the house. She requested the first complainant that they go and check what was happening. When the two complainants arrive in the kitchen, they found McDonald fighting with the first appellant. The two complainants tried to stop them, but they continued fighting, and she phoned the police. The first appellant phoned the second appellant telling him that people were assaulting him.
- [10] The second appellant arrived in possession of a black object which looked like a stick. On arrival the first appellant grabbed the second appellant and told him not to assault them as they were going to curse or bewitch the wounds where he might have assaulted them. The

second appellant asked the first appellant as to why he had phoned him and that he will assault him. The first appellant let the second appellant go, and the second appellant followed the second complainant to her bedroom. On entering the room, the second appellant hit the second complainant with that stick on her forehead, left arm and lower abdomen. Thereafter the second appellant pushed them out of the house, and that the first appellant did not participate in pushing them out of the house, even though the first appellant had attempted to assault the first complainant with fists.

- [11] The second complainant further testified that on 25th June 2015, she was granted a protection order by Seshego Magistrate against the second appellant. The second complainant further

testified that the protection order was later made final and that the second appellant was present when it was made final. The second complainant was cross examined by both appellants. Thereafter the State proceeded to close its case.

- [12] The first appellant took the witness stand and testified under oath. He testified that on 11th June 2017 at about 20h00 he was busy replacing an electric bulb when McDonald arrived. The first appellant had climbed on a chair in order to replace the electric bulb. On arrival McDonald asked the first appellant whether his mother (first appellant) had left a chair before she passed on. Thereafter McDonald pulled that chair which the first appellant had climbed, and the first appellant fell on the ground. McDonald picked up a brick and hit the first appellant with it at the back of his head. Whilst on the ground the first appellant heard the first and second complainants saying this dog wanted to be taught a lesson.
- [13] The first appellant stood up and he was bleeding from his nose. McDonald picked up a coffee table and hit him at the back with it. The first appellant tried to phone the second appellant but could not succeed. As the first appellant was bleeding profusely, he went to his bedroom. Whilst in the bedroom he phoned the second appellant to come and fetch him as he was injured. On arrival of the second appellant, the first complainant went outside the house and screamed for help saying people were killing them. The second appellant then locked all the doors of the house and all of them went out of the house. The first appellant was taken to hospital. When the first appellant returned from hospital, he found some community members inside the yard.
- [14] Under cross examination by the State, the first appellant stated that the second appellant had told the two complainant and McDonald to go outside, whilst he (first appellant) pushed the complainant and McDonald out of the house. The first appellant denied that the second appellant had pushed the two complainant together with McDonald out of the house. The first appellant also denied that he had assaulted the first complainant.
- [15] The second appellant took the witness stand and testified under oath. He testified that the first appellant is his younger brother. That the second complainant is his aunt. On 11th June 2017 at about 20h00 he was at his homestead when he was phoned by the first appellant informing him that they have injured him at home. The second appellant together with his

wife drove to the homestead where the first appellant was. On arrival at the said homestead he found the first appellant in a pool of blood and his clothes were torn. The first appellant told him that he was attacked by the two complainants and McDonald.

- [16] As the second appellant was not in good speaking terms with the second complainant, he told the first complainant that every time she was at that homestead, something happens to the first appellant. The second appellant told the first complainant to leave that homestead and go to her homestead. The second appellant thinks that what he told the first complainant had bothered the second complainant and McDonald as it was already late and there was no transport to take the first complainant to her homestead. The second appellant then took the first appellant to the headman's kraal because they have already reported their problems to the headman.
- [17] On arrival at the headman's kraal, the headman saw that the first appellant was injured, and the headman told him (second appellant) to take the first appellant to hospital and that they will call the police. The second appellant took the first appellant to hospital where he was treated. From hospital the appellants went the police station to open a criminal case. The second appellant further stated that when the two complainants saw that the appellants had opened a criminal case against them, they too opened a counter charge against the appellants.
- [18] The second appellant was cross examined and he conceded that the second complainant was married to his late father. However, the second appellant denied that the house that the second complainant was staying in was hers, but that the house belonged to his (second appellant) late mother. The second appellant conceded that the second complainant had obtained a protection order against him. The second appellant also conceded that one of the conditions of the protection order was that he was not supposed to enter the second complainant's homestead. The second appellant disputed that he had assaulted the second complainant. That concluded the evidence of both appellants and they closed their case.
- [19] Both appellants appeal is directed against conviction only. It is trite that a court of appeal will not readily interfere with the 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 court of appeal must also remain cognisant that the trial court has the advantage of having observed and heard witnesses. (See *Mnyandu v Padayachi*[1]).
- [20] It is trite that the State bears the onus of establishing the guilt of the accused beyond reasonable doubt. An accused is entitled to be acquitted if there is a reasonable possibility that he might be innocent. (See *S v van Aswagen*[2]). The question which this court must determine is whether the State has discharged its onus on all the counts which the appellants have been convicted of.

- [21] The State has called three witnesses to testify against the two appellants. According to the first complainant, she was assaulted by the first appellant who hit her with fists, and also pushed her out of the house where she fell. As she was on the ground, the second appellant came and hit her with an object. The second State witness testified that he saw the appellants assaulting the two complainants, further that the second appellant was assaulting both complainants with a stick, and thereafter both appellants pushed both complainants out of the house. However, when asked during his evidence in chief to give the details of the alleged assault, the second State witness testified that he had just peeped into the room and saw the two appellants assaulting both complaints and he turned back and went outside to go and seek for help. Even during cross examination when asked about the details of the alleged assault, the second State witness stated he just observed the second appellant assaulting both complainants, and thereafter he ran out of the house.
- [22] The second complainant testified that she was assaulted by the second appellant who hit her on the forehead, left arm and lower abdomen with a stick. The second complainant further testified she was pushed out of the house by the second appellant and that the first appellant did not participate in pushing her out of the house, although the first appellant did attempt to assault the first complainant with fists.
- [23] Regarding the first appellant, there are material contradictions in whether he had assaulted the two complainants. The second complainant had testified that the first appellant had attempted to assault the first complainant with fists and that he did not participate in pushing her out of the house. The second State witness could not give a clear picture of what role the first appellant played in assaulting the complainants as his testimony is to the effect that when he peeped into the room where he observed the two appellants assaulting the two complainants and thereafter he ran out of the house to go and seek for help. However, during cross examination what the second State witness emphasised was that he saw the second appellant assaulting both complainants.
- [23] Even the State when it addressed the court on merits of the case, it was non-committal about whether the first appellant should be convicted or not. What the State submitted was that with regard to the first appellant, the court may take a decision, and that it was difficult for the State to ask for a conviction against the first appellant. When the court *a quo* asked the State whether chasing or pushing someone out of the house does not amount to assault and the State replied that the first appellant had stated that when he was incriminating himself.
- [24] It remains the duty of the State to prove the guilt of an accused beyond reasonable doubt and there is no duty on the accused to convince the court of the truthfulness of any explanation which he gives. (See *S v V*[3]). It is clear that the State did not have faith in its case against the first appellant and the court *quo* convicted the first appellant on his self-incriminating evidence after he took the witness stand. The question is whether at the time the State closed its case, did the State prove its case against the first appellant beyond reasonable doubt. If not, the first appellant is entitled to an acquittal, and not to convict him on the basis of self-incriminating evidence which was adduced when the first appellant took

the witness stand. In fact the appellant should have been found not guilty and discharged in terms of section 174 of the Criminal Procedure Act[4] (CPA) in order to avoid self incrimination. The appellants were unrepresented, and it was the duty of the court quo to assist them in presenting their defence, and that will include in assisting an unrepresented accused to apply for a discharge in terms of section 174 of the CPA where the accused has no case to answer. The court a quo in this case had failed to assist the unrepresented first appellant in applying for discharge in terms of section 174 of the CPA, but waited for the first appellant to self incriminate himself.

- [25] In *Machete v S*[5] it was held that if the prosecution has no faith in its case it will be an unusual outcome for the court to say that the evidence nonetheless suffices to discharge that onus. The court held further that the function of the prosecution is not to obtain conviction at all costs, but to present the prosecution case fairly, which includes making concessions whenever it is appropriate to do so. There were material contradictions in the case against the first appellant, and there was no basis for the court a quo to have ignored those contradictions. This court is alive to the fact that the mere contradictions in the State case is not a ground to discharge an accused person in terms of section 174 of the CPA. However, the test is whether with the evidence presented at the close of the State case, will a reasonable court convict an accused at the end of the case based on that evidence. In the case at hand, the evidence presented at the close of the State case against the first appellant was of such a poor quality that no reasonable court would have convicted the first appellant at the end of the case, unless he self incriminate himself, like it happened in this case. In my view, the court a quo misdirected itself in convicting the first appellant on both counts of assault GBH despite the material contradictions in the State case.
- [26] Turning to the second appellant, all the three State witnesses have implicated him. The first appellant is the second appellant's younger brother. He was called to the scene by the first appellant, and when he was called the first appellant told him that he was been assaulted by the people in the house. On arrival at the scene he found that the first appellant was injured and his clothes were bloodied, which confirmed that indeed he was assaulted. The second appellant was not in good terms with the second complainant whom the first appellant had implicated as one of the people who had assaulted him. The second complainant had a protection order against the second appellant, of which one of the conditions of that protection order was to prevent him from entering the second complainant homestead.
- [27] The second appellant defied the protection order and entered the second complainants homestead. The second appellant does not believe that the said house belonged to the second complainant, but in his view it still belonged to his late mother. That gives a picture of the animosity that prevails between the second appellant and the second complainant. Therefore in view the second appellant did not go to the second complainant homestead for a friendly visit. Since the second appellant did not regard the second complainant as the rightful owner of the house, when he found his younger brother injured and with bloodied clothes as result of the alleged assault by his enemies, in my view, he decided to retaliate

and revenge for his younger brother by assaulting and chasing the complainants and McDonald out of the house.

[28] In my view, having assessed the evidence on record in its totality, with regard to the second appellant, he was correctly convicted on all the counts. The appeal with regard to the second appellant stand to fail.

[29] In the result I make the following order:

29.1 The appeal against the first appellant is upheld on both counts.

29.2 The appeal against the second appellant is dismissed on all the counts.

29.3 The order of the court a quo with regard to the first appellant is set aside and substituted with the following:

“Accused 1 is found not guilty and discharged on all the counts”

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I AGREE

MULLER J

APPEARANCES: Counsel for the appellants Adv KP Mokwena Instructed by DS Sello Attorneys
Counsel for the respondent Adv P Magoda Instructed by Office of DPP Limpopo Polokwane Date
heard 30th July 2021 Date delivered 30th August 2021

[1] 2017 (1) SA 151 (KZP) at para 28

[2] 2001 ZASCA 61 (17 May 2001)

[3] 2000 (1) SACR 453 (SCA) at 455b

[4] 51 of 1977

[5] 2017 ZASCA 70 (31 May 2017)

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