

SOUTH AFRICA / JUDGMENT

Malherbe v S (A921/14) [2016] ZAGPPHC 107 (2 March 2016)

[2016] ZAGPPHC 107**COURT**

North Gauteng High Court, Pretoria

BEFORE

Motepe, Jansen

CASE / FILE NUMBER

A921/14

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REPUBLIC
OF SOUTH AFRICA
OFFICE
OF THE CHIEF JUSTICE
(GAUTENG
DIVISION. PRETORIA)
APPEAL
CASE NO: A921/14

DATE: 02 MARCH 2016
In

the matter between: DEON
AART
MALHERBE.....Appellant
And
THE
STATE.....Respo
ndent

JUDGMENT**MOTEPE AJ:**

[1] This is an appeal against the conviction of the appellant on a count of common assault and a sentence of a fine of R3000.00 or three

months imprisonment.

[2] On petition, leave to appeal against both the conviction and the sentence was granted on 12 November 2014.

[3] The facts in this appeal are largely common cause. The appellant and the complainant were married to each other but were separated at the time of the incident. They have two minor children; daughters aged 4 and 6 at the time of the incident. They were staying

with the appellant at the time, pursuant to an order of the High Court. The complainant had visitation rights in respect of the minor children and was entitled to take them away for certain weekends.

[4] On a certain occasion the complainant was returning the minor children to the appellant after one such weekend.

[5] The complainant parked her motor vehicle in the garage. After the children went into the house, she started packing some of the items from the house into her car. It appears to have upset the appellant that she was taking items from the house without informing

him. He then wished her to take more than what she had intended to taking. He physically took some of the items and packed them in her car, including a sewing machine. The complaint locked her car so that the appellant would not be able to load more items into the car. She, however, left the passenger window open. The appellant collected a number of her books and loaded them on the driver's seat.

[6] It would appear that some of the books were on the garage floor. This agitated the complainant who had a strong love for her books. The appellant denied that some of her books were on the garage floor.

[7] The appellant went back into the house to fetch more of her books. He testified that he collected a stack of these books. He had

to balance the stack of books with his chin. According to him, the complainant came from the garage and confronted him complaining about the way he allegedly was mistreating her books. She advanced towards him causing the books to fall. The complainant denies having charged into the appellant. She testified that she was upset about the manner in which he treated her books. She threatened to have him charged with malicious damage to property if he continued. According to her, they stood approximately 1 metre apart at that stage.

[8] It is what happened subsequently which is in contention. The complainant testified that the appellant then walked into her and caused her to fly through the air for approximately 1 to 2 metres and to fall on her arm breaking her wrist in the process.

[9] The appellant testified that as the complainant was advancing aggressively towards him, getting close to his face, challenging him,

he “took her by the upper arms” and “just pushed her away from (him) with pressure.”[1]

[10] Later in his evidence in chief, on a question from his counsel, the appellant answered as follows:

“And you say, if I understand you correctly that she basically walked backwards on her own. Is it not possible that she moved back as a result of your pushing her back? - I did not use force to push her back. I merely just stayed back.”

COURT: I did not get the answer?—I did not force her back. I just moved her out of my personal space basically”

[11] In cross-examination, when it was put to him that he grabbed both her arms, his answer was “I did not grab her, I just merely pushed her away from me”.

[12] In paragraph 4.7 of his heads of arguments, Mr Van Twisk, on behalf of the appellant, contended that after the complainant caused the books to fall down, the appellant merely took her “by her biceps to stop her advancing. He contends that according to the appellant, the complainant then back paddled, tripped and fell down”. The evidence of the appellant referred above tells a different story.

[13] It is trite that a Court of Appeal would be hesitant to interfere with the factual findings and evaluation of the evidence by the Trial Court.[2] It will only interfere where the Trial Court has materially misdirected itself insofar as its factual and credibility findings are concerned.

[14] In casu, there are no material misdirections or exceptional circumstances that warrant interference of the Appeal Court on conviction. If anything, the evidence of the appellant confirms that he pushed the complainant with force to move her away from his personal space.

[15] I agree with Mr Wilsenach for the respondent that the evidence points to a direct intention on the part of the appellant, namely to push the complainant in order to protect his personal space and from stopping her from coming too close and to challenge him.

[16] It is not the appellant's case that he pushed the complainant in self-defence. In any event, there is no suggestion, even on his own version, that the complainant was attacking him. If all that he wanted was to keep her at bay, a mere outstretching of the arm without a push or applying pressure would have been sufficient to keep her from his personal space.

[17] In the premises, I find that there are no grounds for interfering with the conviction. With regard to the sentence, I cannot find that the sentence imposed is disturbingly inappropriate.

[18] I therefore propose the following order:

“The appeal is dismissed with costs”

Motepe JA

(Acting Judge of the High Court)

I agree and it is so ordered.

Jansen J

(Judge pf the High Court)

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Attorneys for the respondent: The Director of Public Prosecutions

[1] Record, page 134, lines 20 to 25 and page 135, lines 20 to 25

[2] See *R v Dhlumayo and Another* 1948 (2) SA 677 (A); see also *S v Francis* 1991 (1) SACR 198 (A) at 198j-199a; *S v Hadebe & Others* 1997 (2) SACR 641 (SCA) at 645E-F; *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139H-140A

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Prepared on 10 October 2026 · Esheria