

SOUTH AFRICA / JUDGMENT

Nndwammbi v S (A17/2022) [2023] ZALMPTHC 3 (15 March 2023)

[2023] ZALMPTHC 3

COURT

Limpopo High Court, Thohoyandou

BEFORE

Kganyago, AML Phatudi

CASE / FILE NUMBER

A17/2022

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO LOCAL
DIVISION, THOHOYANDOU
CASE
NO: A17/2022
In

the matter between:

MASHUDU
MICHAEL NNDWAMMBI
APPELLANT
And
THE
STATE
RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The appellant together with Tambudzani Nndwambi (accused 2) appeared in the Thohoyandou magistrate court on 2nd March 2012 on one count of assault. Accused 2 was found not guilty and discharged whilst the appellant was found guilty as charged and sentenced to a fine of R5 000.00 or 2 years imprisonment wholly suspended for a period of 5 years. Ten years later the appellant petitioned this court together with a condonation

application for late filing of the application for leave to appeal. The appellant is appealing against both conviction and sentence, and the appeal is with the leave of this court.

- [2] The background facts are as follows. The complainant testified that on 24th January 2012 at around 7h30 in the morning she was posted to work next to Jet Mart parking area to monitor vehicles in the parking area, and make sure that drivers pay money for parking before they left. The appellant and accused 2 parked their vehicle and left. When the appellant and accused 2 came back, the complainant informed them that they must pay R2.00 for parking. The appellant gave the complainant a R100.00 note, and the complainant told the appellant who was the driver of the vehicle that she was going to the

nearby shop to get some change. Whilst the complainant was in the shop, she was surprised when the appellant came to her and hit her on her face with fists. The complainant fell to the ground as result of the assault. When she tried to stand up accused 2 pushed her, and she fell to the ground for the second time. She was swollen on her face as a result of the assault.

- [3] The complainant was cross-examined and she denied that she ran away after the appellant had given her a R100.00 note. The complainant stated that she had told the appellant that she was going to the Indian shop to look for a change. The complainant admitted that in the Indian shop she had a struggle with the appellant when the appellant wanted to take the R100.00 note from her. She denied that she had pushed the appellant and accused 2. She admitted that she had fell to the ground when the appellant took the money from her hand. The complainant denied that she told the appellant that she had gone into the shop to look for a change after the struggle, but that she told him at the parking area.
- [4] The appellant testified under oath and stated that on the day in question he had parked his vehicle where the complainant was working, and that when he arrived at that parking area the complainant was not there. On that date the appellant was in the company of his mother (accused 2) and younger brother. After parking the vehicle, they went into Jet Mart Store. When the appellant came back from Jet Mart Store, he found the complainant. The complainant told the appellant to pay her R2.00 for parking. The appellant gave the complainant a R100.00 note, and asked the complainant whether she was having change and she said yes.
- [5] After the appellant had given the complainant a R100.00 note, he was surprised when he saw the complainant walking away. The appellant asked the complainant where she was going and the complainant started running away. The appellant started chasing the complainant as he did not know where the complainant was going. The appellant caught the complainant as she was heading towards the Indian shop. The appellant struggled with the complainant to get his money back. Because the complainant had bent down, it was easy for the appellant to take the R100.00 note from the complainant. As the appellant was taking the money, the appellant fell to the ground.

- [6] At that stage accused 2 arrived and the appellant gave accused 2 the car keys. The complainant started pushing accused 2 at the door of the shop telling her that she will not get out of the Indian shop before they pay her the parking money. When this struggle between appellant, complainant and accused 2 was taking place, the owner of the shop was present and he did nothing. After the appellant had taken the R100.00 note from the complainant, the complainant told the appellant that she went to the Indian shop to seek for a change. The appellant did not pay the complainant her R2.00 as the complainant had told them to leave, and thereafter the complainant ran towards Russels shop. The appellant denied that he had assaulted the complainant. The appellant stated that the swelling on the complainant's forehead might have been caused by the struggle which he had with the complainant when he wanted to take the R100.00 note from her, or when she fell, but he had not seen any swelling on the complainant's forehead.
- [7] The appellant was cross examined and he stated that at first when he gave the complainant money, the complainant did not tell him that she was not having a change, and that he only knew when he caught the complainant in the Indian shop that she had went there to get a change. The appellant conceded that he had caught up the complainant inside the Indian shop. The appellant further stated that when he found the complainant inside the Indian shop, he grabbed the complainant by the hand and fought to take the R100.00 note out of her hand. The appellant stated that as he was pulling the complainant and the money towards him, and that resulted in the complainant felling backwards.
- [8] Accused 2 has testified under oath and stated that she is the appellant's mother. On the day in question she was in the company of the appellant. When they came out of Jet Mart Store they went to their car in the parking area, where a person responsible for the parking arrived. When that person arrived, she told them that they were supposed to pay her R2.00. The appellant who was the driver asked that person whether she was having a change for R100.00, and she said yes. The appellant gave that person a R100.00 note. On receipt of the R100.00 note, that person immediately went into a certain Indian shop or café. The appellant got out of the vehicle and asked that person where she was going, and that person did not answer him, but she started running. The appellant ran after that person, whilst she remained seated in the car.
- [9] Accused 2 saw that the appellant was not coming back, and she alighted from the vehicle and followed them. She found the appellant and the complainant inside the shop. On arrival in the shop the appellant gave her the R100.00 note and the car keys. After receiving the money and the car keys she decided to get out of the shop. As accused 2 was about to exit the shop, the complainant came and blocked her way, and told her that she will not get out of the shop. The appellant talked to the complainant to make way for accused 2, and the complainant complied. That is when accused 2 exited the shop and went to the car. Accused 2 stated that inside the shop she did not touch or say anything towards the complainant. That when she was walking towards the car, the complainant told them to go with the money and that it was the last time for them not to pay. Accused 2 further stated that there was an

indication that the complainant was going to the police station.

- [10] Accused 2 was cross examined and she stated that when she arrived inside the shop, nothing was happening, and the appellant just gave her money. Further that the complainant was standing inside the shop next to the door. She denied that on the day in question she had pushed the complainant.
- [11] The court called Ms Patel as the witness for the court. She testified that on 24th January 2012 she was in the shop busy assisting her customers and did not see the fight or assault in the parking area near her shop. Further that in her shop many people come to seek for change and does not even remember their faces. She also stated that she did not see anyone been assaulted on the day in question because she was busy with customers.
- [12] The witness was cross examined and she stated that on the day in question she was inside the counter and not outside busy assisting her customers. She stated that when you are inside the counter you are unable to see what is happening in the shop, as the customers will be standing and obscuring her. She denied having seen the complainant on the day in question.
- [13] The appellant's appeal is directed against both conviction and sentence. However, during the hearing of the appeal, the appellant has withdrawn his appeal against sentence. 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 events is found to be false beyond reasonable doubt. (See *Oosthuizen and Another v S*[1]).
- [14] It is also 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 court of appeal must also remain cognisant that the trial court has the advantage of having observed and heard the witnesses. (See *Mnyandu v Padayachi*[2]).
- [15] The appellant was facing one count of assault. In *Oosthuizen and Another v S* above, it was stated 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. 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]).

[16] The evidence of the complainant is that of a single witness and must therefore be credible, trustworthy and satisfactory. Even though the evidence of the complainant is that of a single witness, her evidence was credible, trustworthy and satisfactory. To some extent it is been corroborated by the evidence of the appellant himself. The appellant himself has testified that he had chased the complainant and when he found her in the shop, he fought with her for the R100.00 note. In terms of The New Shorter Oxford English Dictionary, fight means “a hostile encounter between opposing forces”. Since the appellant is admitting to having a hostile encounter with the complainant, the only defence he might raise is that of self-defence, but he did not do so.

[17] Had the appellant raised self-defence as his defence to his actions, for him to succeed with that, he had to show that (a) he was acting in response to an uncompleted unlawful attack on an interest deserving of legal protection, and the response must be directed at the attacker; (ii) the defensive act was necessary to protect the interest in question; (iii) there was a reasonable relationship between the attack and the defensive act; (iv) and that the appellant was aware of the fact that he was acting in private defence. (See *S v TS*[4]).

[18] The appellant in chasing the complainant wanted to get back his change of R98-00 which is deserving legal protection. However, when the appellant found the complainant in the Indian shop, and after the complainant had told him that she was there to seek for a change, the fight which the appellant was involved in with the complainant was no longer a defensive act that was necessary to protect his interest. It was clear that the complainant was going to give the appellant his change. Therefore, there was no reasonable relationship between the attack and the defensive act. Further the appellant was not aware that he was acting in private defence. Even if the appellant had raised self-defence as his defence, he would not have succeeded with that.

[19] In my view, the court a quo has approached this matter holistically and dealt with the evidence in its totality. The totality of the evidence presented exclude any doubt about the guilt of the appellant. It therefore follows that the appeal of the appellant against his conviction must fail. The appellant has withdrawn his appeal against sentence, and this court will not take that issue any further.

[20] In the result the following order

20.1 The appellant's appeal on conviction is dismissed.

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

I AGREE

AML PHATUDI J

JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

Counsel for the appellant : Mr VP Muthevhuli Instructed by : Kern Dekker and Muthevhuli

Counsel for the respondent : Adv A Madzuta Instructed by : DPP Thohoyandou Date heard : 3rd February 2023 Date delivered : 15th March 2023

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

[2] 2017

(1) SA 151 (KZP) at para 28

[3] 1970

(2) SA 306 (R)

[4] 2015

(1) SACR 489 (WCC) at para 29

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