



**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

Date: 19/11/2007
Case No: A242/2007

UNREPORTABLE

In the matter between:

JOHANNES HENDRIK VAN DEN BERG

Appellant

And

THE STATE

Respondent

LEDWABA. J

JUDGMENT

- [1] The appellant, Johannes Van Hendrik Van den Berg, was convicted on 23 November 2005 on a charge of assault. The allegations in the charge sheet was that on 13th May 2005 at Lephalale in Ellisras, he threatened to shoot and/or pointed a finger at her and or threatened that he will make sure that she pulls hard as he is pulling hard whilst the accused had the capacity to actualise the threat. He was sentenced to ninety (90) days imprisonment or R 1000, 00 fine.
- [2] He was legally represented at the court *a quo*. His application for leave to appeal at the court *a quo* was refused. He filed a petition and leave to appeal against conviction and sentence was granted by this court.

- [3] His conviction arose from an incident which occurred at Lephalale Municipal offices. The complainant testified that on 3rd May 2005 at about 15h00 she left their office building with Mr. Sehlo Kgageng (Kgageng) and they walked to the parking area. They met the appellant going into the building. Complainant moved into her car, when she bade Kgageng good-bye, she saw appellant running towards her in an aggressive mood and he was shaking. When he reached her car, he opened the driver's door and asked her as to who was the acting manager. Her response was that Maria Coegit was an acting manager that afternoon. Appellant further enquired about the record of the proceedings of his disciplinary hearing. She told him that she was instructed by the Municipal manager not to give him the said documents. He became more aggressive and started swearing at her by, *inter alia*, saying she was a '*nonsense and an idiot*'. He leaned on the door of the vehicle and said further that he would shoot her. He thereafter banged the door of her vehicle when he closed it, left and went to the offices.
- [4] Complainant said she was frightened by appellant's utterances and aggressive mood. She further said she did not expect him to act in the aforesaid manner. She also believed that appellant could carry out his threats because there was animosity between them since she was appointed as a manager of corporate services; a position that was applied for by both appellant and the complainant.
- [5] She said as a result of the appellant's conduct and utterances which threatened her, she then decided to phone Mr. Simon Thabane, the manager of protection services. After Thabane went to her, she explained to him what transpired between her and the appellant.
- [6] Kgageng testified that after he had left complainant's vehicle, at a distance of about twenty metres; he saw appellant opening the door of complainant's vehicle and banged it when he closed it. He could not

hear the conversation between appellant and complainant when appellant was next to complainant's vehicle. He confirmed that he was present when complainant phoned Thabane. She looked like a person who was crying.

[7] He further confirmed complainant's version that appellant came to her vehicle for the second time and opened the passenger door. He further said, when Thabane came to the scene he comforted complainant and spoke to the appellant.

[8] Thabane testified and confirmed that complainant phoned him and summoned him to quickly come to the parking area. Complainant informed him that appellant confronted him, demanded documents from her in an aggressive manner and opened the passenger door of her vehicle. The aforesaid summary is the evidence of the state witnesses.

[9] In perusing the record carefully, it is clear that when the appellant approached the complainant for the second time the complainant went out of her car, approached appellant and Thabane intervened and attempted to diffuse a volatile situation between them. Thabane said that in the altercation; appellant said the Municipal manager and complainant stopped his salary. Their conduct caused his family to suffer and he would also cause complainant to suffer. Appellant further said if he is reported to the police, nothing will happen. He also referred to the complainant as an idiot.

[10] Appellant testified that on the day in question he went to complainant at the parking area, Thabane was present, and asked her if she was the acting manager. Her response was that she only acted until 15h00 and Mrs Coegit took over. He thanked complainant and went to the offices. After receiving information that Mrs Coegit was not in the office and complainant was acting manager, he ran back to the complainant's vehicle at the parking area.

- [11] Complainant was about to move out of the parking area. He opened the passenger door and asked her why she was lying about the fact that she was not the acting manager at that moment. He said he was angered by complainant's response when she said he would only receive the documents Monday when he told her that he needed the documents. He told her that she would suffer and complainant retorted and said he is an old man and he must F*** off. He said complainant was very aggressive when she spoke to him and that he even had to intervene. He then decided to ignore complainant and he left. He denied that he told complainant that he would shoot her and that she is an idiot. During cross-examination he said complainant is paranoid and further said he did tell complainant that he was going to "*donder*" (assault) her.
- [12] Before I deal with the merits of the case, I need to comment on the issue raised by appellant's counsel that complainant should be regarded as a racist because she raised an objection when her case was presided over by a white magistrate. It should be noted that when the prosecutor in the court a *quo* addressed the court before the trial started he/she mentioned that there may be other aspects of the case that are racially orientated; but the prosecutor would deal with matters that had the same racial connotations.
- [13] I disagree with appellant's counsel's submission that because complainant objected to two magistrates, (who happened to be white), handling her case, the complainant clearly stated that she did not want the matter to be handled by a magistrate or public prosecutor residing at Ellisras because appellant said if a case is made against him the police and magistrate would do nothing to him. Complainant gave reasons as to why she held such a perception and it was for the court to decide whether such perception was justified or not.

[14] The main issues raised in the appellant's heads of argument may be summarised as follows:

14.1 Did the appellant utter the words said by the complainant?

14.2 If the court finds that he did utter the said words, did he have the intention to assault complainant by making the alleged threats?

14.3 The complainant was not an honest and reliable witness. Her evidence should be treated with caution.

14.4 The appellant's version was reasonably possibly true and, he should have been found not guilty and discharged.

[15] It is trite law that the state must prove beyond reasonable doubt that that appellant inspired a belief to the complainant that force would immediately be applied to her. The evidence must prove that there was a threat of immediate personal violence in circumstances that led complainant to believe that the appellant intended and could carry out the threat.

[16] It is clear from the evidence of the complainant and appellant that when complainant was at the parking area, appellant approached her twice. Regarding the first occasion there are two versions as to what transpired between the appellant and the complainant when the appellant approached the complainant.

[17] The complainant's evidence is to a certain degree corroborated by Kgageng when he testified that after parting with complainant at the parking area he saw appellant banging the door of the complainant's vehicle. His version should be accepted because it was not challenged. In *5 v Gentle 2005 (1) SACR 420 at 430j-431a*:

"It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, on the issues in dispute (cf Rv W 1949 (3) SA 772 (A) at A 778 - 9). If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable".

Appellant's version that he spoke to complainant, normally without any confrontation and that when he left he said *"thank-you"*, in my view, should be rejected.

- [18] Another important aspect to be considered is that appellant in his evidence said on the first occasion when he spoke to complainant Thabane was standing on the side. This negates complainant's evidence that she phoned Thabane when appellant confronted her.

- [19] Thabane's testimony is that after he was phoned by complainant, he went to her and he saw appellant approaching the parking area on the second occasion. His version as to what transpired between appellant and complainant was not challenged. Appellant's counsel, in my view, correctly submitted that Thabane is a credible and objective witness.

- [20] In scrutinizing the evidence in totality it cannot be said that complainant is not telling the truth about the first occasion and can it further be said that she only phoned Thabane when there was no threatening situation at all?

- [21] It is common cause that on the second occasion the complainant and the appellant confronted each other. In my view, on the second occasion the complainant did not think that there was any imminent attack on her because of her conduct when Thabane was present. The

- magistrate, in my view, correctly remarked on page 225 lines 18-22
- [26] I am satisfied that the magistrate correctly convicted the appellant and page 226 lines 1-7 the when he said the following:
- On the evidence that was led by the state. Regarding sentence, no submission was made that the magistrate misdirected himself in sentencing the appellant to ninety (90) days imprisonment or R1000, 00 fine. There is no justification to interfere with the sentence.*
- [28] *Therefore make the following order:*
- The appeal against conviction and sentence is dismissed.**
- daardie oorsig nie en daardie aspek so os deur die tweede en die derde staatsgetuie daardoor getuig is, aanvaar die hof dat dit is nie waar dat sy nie gesig tot gesig met die beskuldigde gestaan het nie."*

- [22] Appellant's counsel submitted that because the i and that the complainant did not tell the truth concerning acts of the evidence as to what happened on the s sion between her and the appellant, her evidence should be disregarded in toto. I disagree. There is nothing which warrants the evidence should be disregarded in toto. **JUDGE OF THE HIGH COURT**

I agree,

- [23] The appellant's version regarding what happened when he met complainant, in the light of the evidence led, cannot be credible and acceptable. **JUDGE OF THE HIGH COURT**

- [24] The court should be satisfied that the conduct of the appellant according to the evidence led, constituted assault.

- [25] I am mindful of the fact that some of the allegations in complainant's evidence are not mentioned in the charge sheet. However, when one looks at the utterances and the aggressiveness of the appellant it can be said that he had the intention to inculcate fear into complainant. In my view, the appellant was aware of what he was doing. The complainant said she was seeing one side of the appellant for the first time and she was threatened that is why she phoned Thabane.

