REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: A 1068/2009

23/8/2012

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

23.8.2012
DATE

SIGNATURE

In the matter between:

CARL MARTIN FREDERICK EHRKE Appellant

and

THE STATE Respondent

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The Appellant stood trial on one account of assault and another of pointing a firearm. The Piet Retief magistrates court convicted the Appellant on count one (1) which was the assault charge and

acquitted him on count 2 the pointing of a firearm charge. The Appellant was sentenced to a fine of R3000-00 (Three Thousand Rand) or Six (6) months imprisonment half of which was suspended for a period of three (3) years on condition that the Appellant is not convicted of assault committed during the period of suspension. **The Appellant in terms of Section 103 of Act 60 of 2000** was not declared unfit to posses a firearm.

[2] The Appeliant was duly represented during the proceedings in the *court a quo.*

[3] On 8 October 2009, the Appellant, on petition, was granted leave to appeal against his conviction of assault. The appeal, is accordingly, directed against conviction only.

[4] The Appellant, when the appeal was argued,was represented by Ms M Barnard while Ms Z G Msholoio represented the Respondent.

[5] The matter was argued before myself and my Sister Molamu J. My sister, unfortunately, passed on before the judgment could be delivered or handed down. She, however, before passing, on had agreed with my views which form this judgment. This is therefore our judgment. The parties, too, are *ad idem* that I write this judgment.

THE APPELLANT'S PLEA

[6] The Appellant, in the *court a quo,* chose to give an extensive written plea explanation **in terms of Section 115 of the Criminal Procedure Act 51 of 1977. (the "CPA")**

[7] **THE CHARGES**

1. COUNT 1

The State in this count alleged that the Appellant on or about 12 October 2007 and at or near Mkhabela area, Piet Retief, in the district of Piet Retief, had unlawfully and intentionally assaulted Madwayi Jeremia Mkhonza by hitting him with a fist kicking him, strangling him and using a stone to assault him. Although the **Section 115** statement had been based on assault with intent to do Grievous Bodily Harm (GBH) the defence at the commencement of the trial was duly informed that the charge was, indeed, assault.

2. COUNT 2

The State in this count had alleged that the Appellant had contravened the provisions of **Section 120 (6) (a) read with Sections 1, 103, 120 (1) (a), Section 121 read with Schedule 4 and Sections 151 of the Firearms Control Act 60 of 2000** – pointing of a fire-arm, an antique firearm or airgun in that he, at the same place time and date, had unlawfully pointed a firearm

or an antique firearm or an airgun whether or not it was loaded or capable of being discharged, to wit a handgun of an unknown make and calibre at Madwayi Jeremia Mkhoza without good reason to do so.

[8] **THE APPELLANT'S PLEA**

The Appellant, in the *court a quo,* and **in terms of Section 115 of the Criminal Procedure Act 51 of 1977** chose to disclose the basis of his defence by proffering an extensive statement. The plea explanation disclosed that he, on the day in question, had caught the complainant and Mr Mabondwe Josiah Masondo ("Masondo") red handed while they were unlawfully removing his property from his farm. The Appellant and the complainant then got involved in a heated argument. The complainant's hands were lowered down towards his pockets and he immediately thought that the complainant had been reaching for his pockets to remove something therefrom. The Appellant got the impression that the complainant had wanted to take out a weapon which he would use to attack him with. He believed that his life and person had been in danger. He kicked (gestamp) the Complainant with his right foot and the Complainant, in the process of retreating, lost his balance and fell into a ditch or furrow. He got on top of the Complainant and tried to get his hands under control in order to search him and to disarm him. No weapon was found on the Complainant. He, after this,

realised that the Complainant possibly had not wanted to attack him after all. He, thereafter, stopped the truck which the Complainant and Masondo had been using on their way home and apologised to the Complainant for the incident. It is the Appellant's contention that that he defended himself when he attacked the Complainant.

[9] **THE STATE'S VERSION**

The State's version is that the Complainant who had been in the company of Masondo had been sent by Mr Andre Juan Rossouw ("Rossouw"), his employer at the time, to go and fetch the articles which Rossouw had purchased from the Appellant. The first load was taken on a Friday while the other loads were to be taken on the day in question. There is a difference in the evidence of Complainant and Masondo regarding the number of loads that were removed from the Appellant's farm. This, however, is neither here nor there. The Complainant testified that the Appellant found them loading the articles onto the truck. He accused them of stealing his articles and assaulted the Complainant. Masondo, according to evidence, appears only to have been touched when the Appellant tried to kick him while he was on top of the truck busy loading the stuff. The Complainant testified that when he fell to ground the Appellant kicked him. He went on assaulting him while he was on the ground until the Appellant's phone rang. He then managed to

move for a distance to a place where the Appellant again assaulted him. A stone or a brick was also used to hit his hands which, at the time, were outstretched. A white man in the company of another man arrived and it was only then that the assault stopped. The Appellant ordered them to offload the bricks, corrugated iron and sawmill equipment that they had loaded onto the truck. They did and then drove to Rossouw who, at the time, was having a party. He explained to Rossouw that the Appellant had assaulted him and Rossouw suggested that the Complainant be taken to a doctor. Masondo took him to Dr Sibeko who examined him and completed the J88. The State called the Complainant, Masondo, Dr Sibeko and Rossouw in support of its case while the Appellant called Dr J V Z Kotze as his witness.

[10] Ms Barnard submitted that :

1. *The court a quo,* faced with two mutually destructive versions ought to have considered the credibility of the witnesses and the probabilities of their evidence.

2. There are serious and material contradictions, inconsistencies, and improbabilities in the State's version which rendered the version weak.

3. Masondo's and the Complainant's versions were so different that they could not be reconciled with each other.

4. Rossouw's version was in no way helpful to the State.

5. Dr Sibeko's evidence, seen in the light of the J88 which he completed in respect of the Complainant, was vague. The incomplete J88 and the evidence, according to him, did not support the Complainant's version of the assault.

6. The Appellant's version, in the light of Rossouw's and Dr Kotze's evidence, is reasonably possible and supports his version that he acted in putative self – defence.

7. A distinction should be drawn between unlawfulness and putative self-defence which relates to culpability and that in the process of doing so it will become evident that the Appellant had acted in self-defence.

8. The court a quo had erred when it found that the Sate's version had been credible, reliable and correct while the version had consisted of different versions relating to the incident. The witnesses, according to Ms Barnard, had not been good and reliable as, according to her, they contradicted themselves and each other in material respects.

[11] Ms Msholoio submitted on the other hand that:

1. The Appellant's conduct did not constitute private defence but a clear attack on the complainant.

2. the differences in the evidence of the Complainant and Masondo related only to the sequence of events and that they were in no way material. The submission appears to be correct as it will later be shown.

3. the *court a quo* had to do with a moving scene where people could make honest mistakes as to the sequence of events. This submission is again correct.

[12] **PRINCIPLES**

PRIVATE DEFENCE

" *The use of force which would ordinarily be criminal is justified if it is necessary to repel an unlawful invasion of person, property or other legal interest. Since the right to use force in these circumstances not only goes beyond the defence of life and limb but also extends to the protection of a third party, the term 'self-defence' is too narrow and private defence' is preferred."*

(South African Criminal Law and Procedure, Vol 1- General Principles: Burchell and Hunt Second Edition P 322.)

The requirements of private defence are that:

1. there must be an unlawful attack
2. upon a legal interest
3. the attack must have commenced or must be imminent

The defence must be:

1. directed against the attacker
2. necessary to avert the attack.
3. one where reasonable means are used to avert the attack. However, in **Exparte Minister of Justice: In re S v Van Wyk 1967 (1) SA 488 (A) Steyn CJ,** as he then was, disapproved of the test of proportional retribution as the yard stick.

[13] The questions that the court need to answer are:

1. whether the Appellant acted in self - defence real or putative.
2. whether the contradictions or inconsistencies in the State's case are such as to vitiate the conviction
3. whether the evidence that the State tendered is enough to sustain a conviction of assault.

[14] It is the defence's contention that the value of the evidence that the State tendered is such that the Appellant was, at the close of the State's prosecution or case, entitled to a discharge **in terms of Section 174 of the Criminal Procedure Act 51 of**

1977. The court is, on that basis, asked to set aside the Appellant's conviction.

[15] It is, on behalf of the Appellant, further submitted that in the event that the court finds that the State has established *a prima facie* case, then and that event, the court should enquire whether the Appellant's version is not reasonably possible and whether the Appellant did not act in self - defence. It is, on behalf of the Appellant, further argued that the court a quo ought to have inquired if the Appellant's conduct had been lawful or unlawful. This, the *court a quo*, appears to have done.

[16] It was further submitted that the court a quo had never indicated that the Appellant's version had not been reasonably possibly true and that the court had, therefore, erred when it found that the Appellant had not acted in putative self - defence.

[17] **COMMON CAUSE FACTS**

These are that:

1. the Appellant is the owner of the farm Driehoek which is approximately 26 kilometres from Piet Retief.

2. The Appellant, during September 2007, sold sawmill equipment to Rossouw and the Els brothers

3. The purchasers' employees started removing the equipment in October 2007.

4. On 12 October 2007 the Complainant and Masondo went to the Appellants' farm to remove the articles that Rossouw had purchased.

5. The Appellant found the Complainant and Masondo having loaded the equipment, corrugated irons and bricks.

6. The loaded stuff was off loaded.

7. Masondo being the driver of the truck and the Complainant then proceeded to Rossouw 's place.

8. Rossouw who observed the Complainant as having been injured suggested that the complainant be seen by a doctor.

9. The Complainant was examined by Dr Mandla Ayisi Moses Sibeko ("Dr Sibeko")

10. The Complainant, at the instance of the defence, was also seen by Dr Johannes Van Zyl Kotze.

11. Dr Sibeko observed that the Complainant had pre-existing diseases - *Gout arthritis* which was also observed by Dr Kotze.

[18] **APPROACH OF THE APPEAL COURTS IN DEALING WITH MATTERS ON APPEAL**

1. The appeal court is reluctant to upset the findings of the trial court. This is because the trial court has advantages which the appeal court does not have in seeing and hearing the witnesses and being in the atmosphere of the trial. The trial court has the advantage of obserserving the demeanour, appearances and the personality of the witnesses.

2. In the absence of misdirection on fact by the trial court the presumption is that the trial court 's conclusion is correct and the appeal court will only reverse the conclusion when it is convinced that such conclusion is wrong. (**See R v Dhlumayo and Another 1948 (2) SA 677 (A).**

3. **In Koopman v S ALL SA (1) 2005 (2005) 1 ALL SA 539 (SCA) at 539**: Headnote: the following is said

" In the absence of demonstrable and material misdirection by the trial court it findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong"

(See also S v Mkohle 1990 (1) SACR 95 (A) at 100e-f and S v Ntsele 1998 (2) SACR 178 (HHA) at 179)

[19] Reverting to the facts of the case the Appellant in his plea explanation contended that he and the Complainant were involved in a heated argument. The Appellant failed to explain what was said in the heated argument except to say that he wanted to know why they were loading his stuff onto the truck and that the Complainant had informed him that he had been sent by Rossouw to fetch the articles from his farm. There is nothing to show that the Complainant could have lost his temper. There was nothing which could have led to that conclusion as the Complainant clearly pointed out that they had been sent there by Rossouw. Even if the Appellant accused them of stealing his articles, nothing from the version of the Appellant, warranted " a heated argument." The Complainant, according to the Appellant's version, had every reason to be on his farm. Indeed, nothing demonstrated that the Complainant was angry or could have, been, angry. In any case, nothing on the version of the Appellant, warranted that. This, the Appellant failed to show in his evidence. There was, therefore, no reason for the Complainant to move his hands downwards towards his pockets. It is highly improbable that the Complainant would have behaved like that in the circumstances of this case. Indeed the Complainant and Masondo denied that the Complainant had lowered his hands to

his pockets as if he was to take out a weapon or something with which he could have attacked the Appellant. The Complainant, according to the Appellant, had no weapon in his pocket. This makes it perfectly clear that the Complainant could not have behaved as the Appellant contended. There was no reason for him to do that. The Appellant, as Ms Msholo correctly submitted, simply attacked the Complainant who had done nothing to justify the conduct of the Appellant.

[20] Ms Barnard submitted that the Complainant and Masondo contradicted each other and that their evidence was full of inconsistencies and improbabilities to an extent that the *court a quo* ought to have discharged the Appellant **in terms of Section 174 of the Criminal Procedure Act 57 of 1977.** This, in the light of the evidence that State tendered cannot be correct. **In S v Mkhohle (supra)** the court at 95 said:

"contradictions *per se do not lead to rejection of witness' evidence – not every error made by witness affects his credibility - Trier of facts has to make an evaluation, taking into account the contradictions, their number and importance and bearing on other parts of his evidence."*

It is also significant to note that at the end of everything when the merits and demerits of evidence have been considered, regard having been had to the shortcomings or defects or

contradictions in the evidence, the question has to be asked whether the truth has been told.

[21] Ms Barnard submitted that the value of the State case was drastically reduced by the contradictions and inconsistencies in the evidence of the Complainant and Masondo. Ms Mshololo on the other hand submitted that the contradictions were immaterial and only had something to do with the sequence of events. The scene, according to her, had been moving and allowed room for honest mistakes as to the sequence of events. The submission indeed has merit. The question at the end of the day is whether the Complainant was assaulted. Notwithstanding the defects and shortcomings in the evidence of the Complainant and Masondo, it is clear that the truth has been told. The evidence of the Complainant in the main is corroborated by that of Masondo.

[22] Rossouw, too, corroborates the evidence of Masondo and the Complainant. He saw the Complainant after the incident. According to him, the complainant looked injured. The complaint was that the Appellant had assaulted him. The Complainant kept according to him, kept on complaining about the injuries walking in a funny way and crying a lot. He ion his owm, could hardly stand up properly and that led Rossouw to assume that the Complainant had been in deep pain.

Rossouw conceded that he possibly had not properly given the description of the articles that the Complainant and Masondo had to fetch. He further conceded that he should have made sure that what had been purchased was correctly identified.

[23] Dr Sibeko's evidence, although severely criticised by Ms Barnard, remained helpful. The J88 form was incomplete in certain respects. This, however, did not render his evidence and the J88 useless. He, indeed, examined the Complainant on the day of the incident and observed fresh injuries. He was honest enough to disclose that the Complainant had pre-existing disease in the form of "gout arthritis". Some of the injuries that he observed had been on top of those pre-existing conditions. According to him, the Complainant's upper lip was swollen. The inner side thereof had a small laceration. Dr Kotze, answering a question by the court, admitted that if there had been some swelling on top of the abnormalities those would have disappeared by the time he examined the Complaint. It will be remembered that he examined the Complainant almost a year after the incident. Although the J88 that Dr Sibeko completed is, indeed, incomplete that in no way means that the J88 should be disregarded. This is so because there are aspects on which the two doctors agree. Dr Sibeko made the necessary concessions where he made mistake and gave acceptable and understandable explanations for that. The criticism that Dr Kotze

levelled at the J88 that Dr Sibeko completed is in some respects understandable while in other not. He is, indeed, not entirely right when he says that the J88 does not support the version of the Complainant on the aspect of the assault. The J88, in my view , does support the evidence that the Complainant was, indeed, injured on the day of the incident. His evidence that he was assaulted is supported by Masondo while Rossouw confirms that the Complainant appeared injured, in deep pain, and always complaining and literally crying.

[24] Dr Kotze complained about the J88 which, according to him, was not readable, understandable and did not give a good summary of the Complainant's injuries. With its problems as shown above, the J88, in my view, remains helpful. Dr Sibeko examined the Complainan: on the day of the incident. He has shown the injuries which he observed which, in my view, support the evidence of the Complainant. Dr Kotze, when cross examined by the State Prosecutor, was unable to answer questions directly. He would in certain instances give unsatisfactory answers. He, for instance, could not give a satisfactory answer when asked if he could deny or confirm what Dr Sibeko observed during his examination of the Complainant. The question whether he could confirm or deny that he had examined the Complainant almost a year after the

incident remained unanswered. He also could not deny that the Complainant had suffered bodily injuries.

[25] The question which the court must also ask itself is whether one can find fault with the *court a quo*'s findings of fact. The court's findings of fact are as shown above, presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. I have given proper consideration to the matter and have found no demonstrable and material misdirection by the *court a quo*.

[26] Evidence clearly demonstrates that the *court a quo* gave proper consideration to the matter too. The Appellant failed to bring out detailed account of the heated argument that is said to have preceeded the kicking of the Complainant by the Appellant. The Appellant, on his own version, admitted kicking the Complainant but added that that occurred when he thought that the Complainant was reaching for his pockets to produce a weapon which could have been used to attack him, Evidence has demonstrated that the Complainant never lowered his hands towards his pockets. This at any rate, was denied by both the Complainant and Masondo. The Complainant never attacked the Appellant. There was no need for the Appellant to defend himself. The Appellant merely attacked the Complainant because, as he put it, the Complainant and Masondo were stealing his

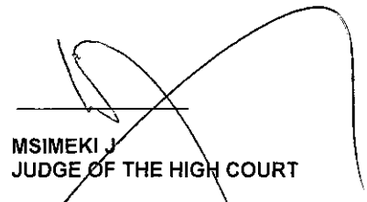
articles *inter alia* his corrugated iron and his bricks. He obviously, was angry. The *court a quo* asked the Appellant why he could not involve the police or Rossouw instead of handling the matter in the manner that he did. His response thereto was never satisfactory. Indeed, it was not necessary for the Appellant to have behaved in the manner that he did.

[27] It is, in the light the evidence, not correct that the *court a quo* ought to have discharged the Appellant at the end of the State's case. Evidence, at the time, was overwhelming and called for a response from the Appellant.

[28] The overwhelming evidence, indeed, proved the guilt of the Appellant beyond reasonable doubt. The Appellant's version was not and is not reasonably possibly true and was, in my view, correctly rejected by the *court a quo* . The appeal against conviction, my view, should fail.

[29] I, in the result, make the following order:

The appeal against conviction is dismissed.



MSIMEKI J
JUDGE OF THE HIGH COURT

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Date heard:	19 April 2011
Date of judgment:	