REPUBLIC OF SOUTH AFRICA.

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DATE 12 Nov 2013 SIGNATURE

NORTH GAUTENG HIGH COURT, PRETORIA

12/11/13

CASE NO: A645/12

In the matter between:

THOMAS APPOLUS Appellant

and

THE STATE Respondent

J U D G M E N T

Ismail J:

[1] The appellant was charged in the Bloemhof magistrates court on two counts, namely assault and the offence of resisting arrest. The allegations were that on the 13 September 2008 he assaulted constable William Montshiwagae ,that he resisted arrest and that he willfully interfered with the said constable and other members to wit by fighting, kicking and insulting them.

[2] The accused was initially represented during the trial. At some stage his legal representative did not appear and the appellant elected to conduct his own defense . He was appraised by the presiding magistrate regarding obtaining legal representation however he elected to conduct his own matter. It must be pointed out that the accused was a public prosecutor employed at the Molopo regional court.

[3] The accused was convicted on both counts and he was sentenced to:

"twelve months imprisonment, which is wholly suspended for a period of five years on condition that he was not convicted of both assault with intend(sic) to cause grievous bodily harm committed during the period of suspension and accused is not convicted of the offence resisting arrest committed during the period of suspension."

[4] A summary of the evidence presented in the court a quo follows hereunder.

Several policemen including constable Montsowagae, [the complainant], testified during the prosecution's case. His evidence in short was that he was contacted by radio regarding an incident which occurred at Social Services. They proceeded to Sussex Building, and outside in the parking area, they met a security guard in uniform. As the complainant approached the security guard in order to establish what had occurred he noticed a group of men standing nearby. One of the people, who he identified as the accused,

remarked " that they were stupid and that they were busy misusing the funds of the state". The complainant in turn remarked that if he wanted something the appellant he would ask him. He also told the appellant that he must stop interfering with his duties as he was there to speak to the security guard. Whilst attempting to speak to the security guard the appellant came between them. The complainant then realized that the appellant intended to fight. The appellant thereafter stretched his hand in order to assault him but warded off the blow and managed to avoid it.

A struggle ensued and the two of them fell to the ground. Other policemen came to the complainant's assistance in order to handcuff the appellant. Whilst on the ground he repeatedly kicked at the complainant. One of the policemen used pepper spray in order to subdue the appellant and he was

eventually handcuffed. They tried to place him in the police van and he resisted until he was placed into the back thereof by force.

The second witness, Mr Mogotla, also a police officer testified. His evidence was similar to that of the complainant and he related how the appellant insulted them by stating that they were useless and merely mis-using their taxes. He testified that the complainant spoke to one, Kagiso who told complainant how one of the persons from the group of appellant and his companions fought with him. Kagiso was the person who apparently telephoned the police to come the scene.

[5] The security guard who constable Montsowagae approached at the scene also gave evidence during the trial. He confirmed that there was a conversation relating to tenders. Although the context of the tender conversation differs from that which the appellant raised. According to the appellant the police officers stated that they had big heads as they had tenders in Bloemhof whereas they were from Vryburg, and were not residents of Bloemhof.

[6] The appellant testified and his version was that approximately 12 policemen arrived at the scene in at least five vehicles. He and his companions were at the scene in order to investigate a labour dispute and a security problem at the premises. They had received a report from an

investigator and they were there to investigate the report. When they arrived at the premises one of his associates approached Mr Kagiso and informed him that he had no right to be on the premises as he was not a recognized trade union representative.

His companion, Mr Moseke pushed Kagiso once in order for him to leave the premises and this set in motion the call which was made to the police. According to him the police were violent and aggressive (record p179). He stated that they started uttering derogatory words to the effect

" you shitty boys of the directors of the company from Vryburg... you are being made big headed by the monies that you enjoy from the tenders... you get in Bloemhof"

According to the appellant the police thereafter stated:

" we will show you that your tender is terminated and we will deal with you we are the police officers of Bloemhof".

Constable Montswagae thereafter approached him and commented that the appellant was stupid or a fool as he was wearing a pull over on top of a T-shirt. He was told that he was complaining and the word 'voetsek' was used. The appellant testified that in order to defend his reputation. He in turn also uttered the word voetsek to the policeman.

[7] Thereafter constable Mampo told him that he could not speak to a police officer like that and grabbed him with his pull over, whilst Montswagae and Mokhobo grabbed him by his arms. He described how he was thrown to the ground and kicked whilst lying down. He testified

how he was placed into the police van.

[8] This in brief is the backdrop of the evidence which was presented during the trial. It must not be construed that what appears above is the evidence in totality. It is merely a summary to understand the conclusions which this court would arrive at.

[9] There were two conflicting versions of events presented to the trial court. It is trite that where there are two mutually destructive versions the court must looks at the *onus* bearing party and ask itself whether it has proved its case beyond reasonable doubt. See *S v Saban and 'n Andere* 1992 (1) SACR 199 (A)

The following were common cause facts:

(a) the police were called to the scene by way of a radio message transmitted to them;
(b) they were told to contact a security guard at the premises
(c) Mr Kagiso phoned the police to come to the scene;
(d) Words were exchanged at the scene regarding tenders and some -thing ignited the situation which resulted in the appellants arrest.

(e) The appellant was the only person arrested that evening.
(f) The policemen did not know the appellant prior to that night.
(g) None of the appellants companions were called to testify at the trial

[10] The trial court evaluated the evidence in its totality and arrived at the decision it did. The thrust of the appellant's argument seems to revolve around the issue of the contradictions in the state's case and the fact that the court drew an adverse inference in the failure of the appellant not to call witnesses. The appellant's notice of appeal appears at pages 455- 504 of the record. It sets out the various differences in what the three witnesses who testified on behalf of the prosecution stated regarding the incident, such as the blow which he struck constable Montsowagae. In this regard Montsowagae stated that he warded off the attack whereas constable Mokgotla gave a different version. Furthermore the latter also varied his evidence on that score.

[11] It has been stated in many decisions that contradictions per se are not in themselves sufficient to render a witness' evidence unacceptable. One must look at the nature and seriousness of the contradiction and ask oneself whether the contradiction is a material contradiction which affects the credibility of the witness' evidence. In this regard the court in *S v Mkohle* 1991 (1) SACR 95 (A) where Nestadt JA held:

'that contradictions per se do not lead to the rejection of the witnesses evidence; they simply may be indicative of an error. Not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation, taking into effect the nature of the contradictions; their number and importance, and their bearing on other parts of the witnesses evidence."

See also : *S v Oosthuizen* 1982 (3) SA 571 (T) at 576 B-C and 576 G-H; In *S v Bruiners en Andere* 1998 (2) SACR 432(SE) at 439 c-e reference is made to *S v Safatsa and Others* 1988 (1) SA 868 (A) where Botha JA at 890F in determining the differences in the evidence of witnesses stated:

" The trial court considered the alleged conflict fully and carefully as appears from the judgment of the trial Judge, and found that it did not exist. In my view the reasoning of the trial court is unassailable. The fallacy in the argument of the accused is that it presupposes that either or both of the witnesses must be untruthful or unreliable simply because their observations did not coincide. Such an approach to the evidence is unsound"

[12] On the totally of the evidence the witness, Lintikele Meholoana, the security guard is an independent witness who does not have to further the interest the police officers or that of the accused. He confirmed that there was talk of tenders at the premises notwithstanding a denial by the officers. Mr Mehooana did not see the appellant striking Montsowagae. He testified however, that he heard the latter telling the other police officers at the scene of the blow. Furthermore, he also corroborated the complainant's version that the appellant came in between them when constable Montsowagae wanted to speak to him.

[13] The fact that there are differences in the evidence of the various witnesses is to be expected, considering that there were several people at

the scene. On the police version there were at least 11 people, namely 5-6 policemen;

four people consisting of the appellant's group; Mr Meholoana and Mr Kagiso.

On the appellant's version there were at least 6 more policemen. This was not a static scene as people were moving around and for that reason one can expect people to see certain things whilst others may not as their attention may have been focused elsewhere.

[14] Having reads through this lengthy record and having seen the differences in the evidence of witnesses on certain aspects I am nevertheless satisfied that the trial court appraised the evidence properly and on sound legal precepts. The magistrate evaluated the evidence and gave reasons for his findings where he accepted it and did exactly the same where he rejected the evidence. I cannot find any misdirection in his evaluation of the law nor in his evaluation of the facts presented to him.

[15] The trial court at paginated page 341[lines 24/5] of the record said: " it would be expected from him to call somebody to have corroborated his evidence". Whilst it is so that no *onus* rests on the appellant to convince the court of the truth of his version he had witnesses available. The matter had been postponed for that reason. He decided to close his case without calling them. I am aware that an explanation was tendered why they were

not at court at the time, however the appellant could have sought a postponement in order to secure their evidence at a later date. This begs the question that if the witnesses had testified and corroborated his version sufficient doubt may have been created to secure an acquittal.

[16] In evaluating the evidence one must consider whether the police concocted a story to arrest the appellant for no reason. The police were called to the scene by Kagiso who was confronted by the appellant's colleague. On the appellant's own version he raised the issue about wastage of tax payer's money in the light of the number of police who attended the scene. Both the security guard and constable Montsowagae testified that it was the appellant who came between them. If the police intended to falsely implicate the accused the easiest thing for them to have done was to say that the appellant threw a punch at the complainant and hit him on the jaw. However the evidence of various witnesses on this aspect is not identical. This clearly indicates that the evidence was not manufactured or conspired between the policemen. Furthermore the security guard who did not actually see the appellant hit out at Montsowagae, testified that at the scene he heard them saying that the appellant had hit a policeman.

[17] The appellant in his latest heads of arguments dated 24 October 2013 raised a Constitutional point. The point being that the respondent in its heads of argument changed the sequence of the charges. During the trial the charge of assault was count 1 and the offence of resisting arrest was count 2. The respondent changed the order of the two counts in its heads of argument.

The appellant submitted before us that he was thereby prejudiced by the changing of sequence of the charges, in the respondent's heads of argument. Mr Fourie , on behalf of the respondent, referred to pages 4 and 5 of the record where the charges were as stipulated. When the appellant pleaded in the court a quo the charges were count 1assault and count 2 resisting arrest.

[18] I agree with the appellant's submission that the right to a fair trial as guaranteed by the Constitution does not only extend to the trial proceedings but also to the appeal proceedings. The all important question which needs to be answered is how was the appellant prejudiced as a result of the charges having been changed. The respondent's heads of arguments are not matters of evidence, but rather as the name suggest arguments regarding the trial. Furthermore, if count 2 was dependent upon the state succeeding in securing a conviction if it had proven count 1 it might be a different matter.

It is trite that it is not every irregularity which renders a trial unfair. Such an irregularity would have to prejudice a party in order to render a trial unfair. See *S May* 2005 (2) SACR 33 (SCA) at para [7] and *S v CT* 2012 (2) SACR 517 (GNP).

[19] The appellant also raised the issue that the magistrate drew an adverse inference from his failure in calling witnesses to testify. The issue of drawing an adverse inference was raised in the matter of *S v Texiera* 1980 (3) SA 755 (A). If a party has several witnesses which would testify on an aspect and it merely calls one or two witnesses to testify without calling the other witnesses, does this mean that an adverse inference should be drawn to the effect the witnesses who were not called would have testified to the contrary. Clearly not. The situation in this matter was that the appellant who was represented asked that the matter be postponed in order to call witnesses. When the matter resumed the appellant's attorney no longer appeared on his behalf.

[20] At that stage he informed the court that the witnesses could not attend court as their employer deployed them to duties elsewhere and that they were not available. The appellant closed his case. He could have requested a postponement to secure those witnesses at a later date, however he closed his case without calling them or at the least seeking a postponement.

Under these circumstances the magistrate was at the least entitled to take this aspect into account.

[21] It must also be mentioned that there was no notice of appeal which was filed in this appeal. Instead there were heads of arguments which were filed and these appear at pages .... of the record. In the course of the appeal we had to plough through the heads of argument and determine what the real reasons for the appeal on conviction were. This aspect was raised with the appellant during argument before us and he was invited to address us on any aspect(s) which we may not have covered.

[22] The appeal was only in respect of conviction and neither the appellant nor Mr Fourie , on behalf of the respondent, addressed us on sentence.

[23] I am satisfied that the conviction in the court a quo was appropriate and for that reason I would dismiss the appeal in respect of conviction.

M H E Ismail

Judge of the High Court

I agree

M Masipa

Judge of the High Court

Appearances:

For the Appellant:	In person
For the Respondent:	Adv Fourie, The Director of Public Prosecutions Pretoria.
Date of Hearing:	1 November 2013
Date of judgment :	11 November 2013.