

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)



Case number: A863/2015

Date: 9/11/16

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

8/11/2016 Pretorius  
DATE SIGNATURE

In the matter between:

DAWID JOSEPH LEDWABA

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

PRETORIUS J.

(1) The appellant was convicted in the Regional Court, Gauteng in

Pretoria on 20 August 2015 on a charge of assault with the intent to cause grievous bodily harm and sentenced on 14 September 2015 to 36 months' imprisonment.

- (2) The appellant, who was accused 2 in the court *a quo*, was charged with two counts namely:

*"2.1.1 Housebreaking with the intent to assault and assault of one Nomvula Christina Mabuza; and*

*2.1.2 Assault with the intent to do grievous bodily harm to one Nomvula Christina Mabuza."*

- (3) The appellant pleaded not guilty to the charges and elected to remain silent. The appellant was legally represented throughout the trial in the court *a quo*. The appellant was acquitted on the first charge.

- (4) The appeal today is against both conviction and sentence. The appellant was granted bail pending the outcome of the appeal.

- (5) The first witness was Ms Nomvula Mabuza, the complainant in both charges. Her evidence was that on 2 November 2012 she was at her residence. She noticed five people running into her premises and attempted to lock the doors to keep them out. Her evidence was that these individuals assaulted her by choking her and hitting her with a hammer on the head. Unfortunately the complainant passed away

before her cross-examination was completed.

- (6) Her daughter, Ms Gontse Mabuza testified that she and the complainant were at home. According to her she was assaulted by accused 1 with a sjambok and the appellant allegedly hit her with a hammer on the head. When she and the complainant went to the police station, after the incident, they found the appellant already at the police station.
- (7) Ms Dudu Mabuza, the complainant's other daughter testified that she was present when the attack took place. She testified that she saw the appellant at her mother's house and he was in possession of a hammer. She could not indicate how and where her mother had been assaulted and by whom. She did not point the appellant out as the person who had assaulted the complainant.
- (8) The appellant's evidence was that he had arrived home on 2 November 2012 and found Ms Mabuza and her daughter, Gontse, at the gate to his maternal home. They were insulting his mother, who was sweeping the yard. According to the appellant Ms Nomvula Mabuza ran to her house and fetched an iron rod and a sjambok. He disarmed Ms Nomvula Mabuza by taking the iron rod from her, after which he disarmed her daughter by taking away the sjambok. He decided to retreat and not to escalate the incident and went to the

police station. He intended reporting that he had been assaulted, but the police was unwilling to assist him. His mother, Ms Aleta Ledwaba, confirmed his evidence in all material aspects. Both she and the appellant were subsequently arrested, although she was later on released.

- (9) Counsel for the State, in its heads of argument<sup>1</sup> stated:

*“Regarding the conviction, the submission is made that the evidence of **Nomvula Mabuza**, Gontse Mabuza and Dudu Mabuza is clear and satisfactory in all material respects. It is respectfully submitted that the magistrate did not misdirect himself with his evaluation of the whole evidence.”* (Court emphasis)

- (10) Even if regard is had to the cross-examination of the complainant, which had not been completed, it is clear that she had contradicted herself in material aspects. Her evidence was:

*“They came there running, I was sitting in the kitchen facing front. They came running. I went into the house.”*

And then again:

*“I saw that they were having some objects in their hands, and then I ran into the house and locked the house.”*

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<sup>1</sup> Paragraph 8 of Respondent's Heads of Argument

And again:

*"I was just sitting outside."*

(11) Her evidence of the assault was as follows:

*"I was hit by Joel with a hammer and then he also, Joel also choked me".*

And:

*"Dawid hit me with the hammer."*

And:

*"Now, how many hammer did you see on the particular day?*

*One.*

*One hammer? Yes and I took that hammer to the police station."*

(12) The right of an accused to challenge evidence is enshrined in section 35(3)(i) of the **Constitution**<sup>2</sup>, which provide that *"Every accused person has a right to a fair trial which includes the right... (i) to adduce and challenge evidence"*.

(13) In the **South African Law of Evidence, Zeffert, Paizes and Skeen (Lexis Nexis, Butterworths, Cape Town 2003)**, it was set out that the

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<sup>2</sup> Act 108 of 1996

English Rule set out in **Browne v Dunn**<sup>3</sup> that “a party who calls a witness is entitled to assume that a witness’ testimony has been accepted as correct if it has not been challenged” has been consistently accepted as correct in our courts.

- (14) In **President of the Republic of South Africa and Others v South African Rugby Football Union and Others**<sup>4</sup> the court dealt with the cross-examination of a witness as follows:

*“The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. **This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.**”* (Court emphasis)

- (15) The State’s counsel conceded, after argument, that the evidence of Ms Nomvula Mabuza, the complainant, should be disregarded, as she passed away before her cross-examination had been completed.

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<sup>3</sup> (1894) 6 The Reports 67

<sup>4</sup> 2000(1) SA 1 CC at paragraph 63

- (16) The State relies on the evidence of her two daughters, Mss Dudu Mabuza and Gontse Mabuza to confirm the conviction of assault on the victim. The relevant passages the State relies on are the following by Ms Gontse Mabuza:

*"Yes after Kgamoitso and Dawid entered your house then asking for Gontas and Nomvula? --- They started assaulting us.*

*How did they assault you, what did they say? They said Gontse and Dawid [?] and they started to assault you. [Indistinct] conversation [indistinct]. --- They said they wanted Nomvula and Gontse, they further pushed the bedroom door which opened and they started to assault us.*

*Yes? --- They assaulted us, when they were done they left."*

[Record page 37 lines 4 to 10]

And by Ms Dudu Mabuza:

*"How did they assault them, do you still remember? --- At the time when I was, after I was man handled, then I jumped the wall. Then I was able to see through the bedroom window because my, I saw my mom running to the bedroom, then I could see when they were assaulted through the window and the doors were damaged.*

*But just to whether how they were assaulted, with what, you never saw or you saw? --- At the time when they were man*

*handling me outside, I saw the weapons."*

[Record page 64 lines 5 to 12]

That is the only evidence on record regarding the assault. It is clear these two witnesses did not explain at all how and by whom their mother, the complainant, was assaulted.

- (17) The State conceded that the J88 pertaining to the victim was never proved in court, as the victim could not identify it due to not being able to see properly.

- (18) **In S v Van Der Meyden**<sup>5</sup> Nugent J held:

*"Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."*

This was confirmed by the Supreme Court of Appeal in **S v Van Aswegen**<sup>6</sup>.

- (19) **In S v Chabalala**<sup>7</sup> Heher AJA held:

*"...to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his*

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<sup>5</sup> 1999(2) SA 79 (W) at p82

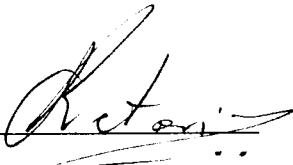
<sup>6</sup> 2001(1) SACR 97 (SCA)

<sup>7</sup> 2003(1) SACR 134 (SCA) at paragraph 15

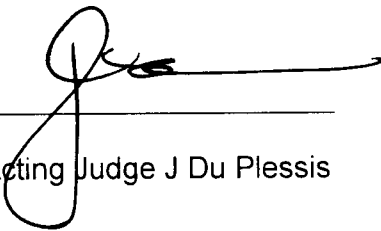


*innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."* (Court emphasis)

- (20) The State had not proved the case beyond a reasonable doubt that the appellant had hit the complainant, Ms Nomvula Mabuza with a hammer, steel pipe and sjambok. There is no evidence by the State as to who, why and how the victim was hit. There is no evidence as to her injuries as the J88 was provisionally accepted, but the medical doctor was not called to give evidence and to finalize the aspect of the J88.
- (21) In these circumstances this court has to find that the State had not proved its case beyond a reasonable doubt and the appellant is entitled to be acquitted.
- (22) The following order is made:
1. The appeal is upheld;
  2. The conviction and sentence of the appellant is set aside.

  
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Judge C Pretorius

I agree.

  
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Acting Judge J Du Plessis

Case number : A863/2015

Matter heard on : 31 October 2016

For the Appellant : Adv Gerber

Instructed by : BJ Kruger Attorneys

For the Respondent : Adv Maoke

Instructed by : Director of Public Prosecutions

Date of Judgment :