IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION - PRETORIA

Case No.: A14/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES:NO

(3) REVISED.

DATE: **17/07/23**

SIGNATURE

In the matter between:

JIMMY MANASOE 1st Appellant

MAJOZI COLLY PHAKULA 2nd Appellant

and

THE STATE Respondent

J U D G M E N T

MNGQIBISA-THUSI J:

[1] On 13 December 2018 the appellants were convicted on a charge of assault in the Benoni District Court, Ekurhuleni South East. On the same day they were each sentenced to a fine of R6,000.00 or 90 days imprisonment and two thirds of the sentence was suspended for five years on condition that they are not convicted of assault or assault with intent to cause grievous bodily harm.

[2] The trial court granted leave to appeal against conviction and sentence. However, the appellants have abandoned their appeal against sentence.

[3] The conviction of the appellants relates to an incident which occurred on 1 September 2016 at Chief Luthuli Park, Ekurhuleni East, at the home of the complainant, Ms Magalatsa Paulina Nkadimeng. The appellants were charged with assault with intent to cause grievous bodily harm after .they allegedly sprayed the complaint with pepper spray in the face.

[4] The appellants are appealing against their conviction on the grounds that the court *a quo* erred in finding that the State had proven its case beyond a reasonable doubt by putting lesser weight on the version of the appellants.

[5] The State's case is that on the day in question, the appellants had pepper sprayed the complainant, causing her injury to her face.

[6] The complaint's evidence, in brief is as follows. On the relevant day she called the police to her house in order to assist her in a quarrel she had with her daughter who was refusing to go back to school in Limpopo. When her daughter refused, she called members of the SAPS to come and assist her in persuading the daughter to go to school. The two appellants are the officers who responded to her request and came to her home. She testified that the appellants asked her to give her daughter her clothes in order for her to go. When she refused as she believed that her daughter would not go to school, the officers told her that she does not have respect and second appellant suddenly sprayed her with pepper spray whilst the first appellant held her hands at the back. She further testified that the first appellant had closed the door. As a result of the assault on her eyes were injured and she had to consult a doctor who told her that her eyes were

damaged. Under cross examination the complainant denied that she wanted her daughter to undress the skirt she was wearing as she had bought it and that the reason for her quarrel with her daughter was over the child grant card the daughter was refusing to leave with her. However, the complainant did ultimately concede that she had demanded that her daughter take off her skirt if she wanted to leave.

[7] In brief, the appellants' evidence is that the complainant was pepper sprayed by the second appellant after she locked the door of the house when they tried to leave with the daughter and grandchild and put the house keys inside her breasts. It is common cause that the complainant's door only has one entrance door. As they were not prepared to manhandle her in order to retrieve the keys, their only option was to pepper spray her, which led to her giving the house keys to the first appellant. They both denied that the first appellant had taken the house keys from the door and thrown them outside as alleged by the complainant.

[8] In convicting the appellants for common assault the trial court, *inter alia*, said the following:

> "The complainant testified. I will not say that she was an honest witness, she kept a lot of things secret and what she said did not make sense, but what is common cause is that she was indeed sprayed in her eyes and in her face because she said, "my eyes, nose and mouth". (page 109,lines 15-17).
> and
> "The question is whether breaking the door open is less force than spraying someone. I think that is less force. So the Court comes to the conclusion that minimum force was not used. There were other alternatives that were available and the two accused standing before me have not used those alternative. There was no reason to pepper spray this woman in her face". (page 112, lines 6-12).

[9] On behalf of the appellants it was submitted that the court *a quo* erred in its finding that the State had proven its case beyond a reasonable doubt in that it relied on the evidence of a single witness (being the complaint) which the court itself had made a finding that the was not an honest witness. Further that the trial court erred in rejecting the appellants' defence of self-defence as the appellants' action was to protect not only their right to freedom of movement but also their right to dignity and respect.

[10] A court of appeal will not ordinarily depart from a trial court's findings of fact unless such findings unless they are plainly wrong. In *R v Dhlumayo and Another*[1], the court stated that the trial court's findings of fact and credibility are presumed to be correct because the trial court has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.

[11] It is common cause that the appellants were convicted on the basis of a single witness.

[12] It is trite that a court can base its finding on the evidence of a single witness as long as such evidence is substantially satisfactory in every material respect or if there is corroboration[2]. Section 208 of the Criminal Procedure Act ("the Act") provides that an accused person may be convicted on the single evidence of a competent witness. With regard to the consideration in a criminal trial of the evidence of a single witness, the Supreme Court of Appeal in *Y v S*[3] stated that:

> "[45] In criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt. Furthermore, the accused's version cannot be rejected solely on

[1] 1948 (2) SA 677(A) at 705. See also *S vs Francis* 1991 (1) SACR 198 (A) at 204 c-f.
[2] See *Mahlangu v S* 2011 (2) SACR 164 (SCA) at para [21].
[3] (537/2018) [2020] ZASCA 42 (21 April 2020).

the basis that it is improbable, but only once the trial court has found on credible evidence that the accused's explanation is false beyond a reasonable doubt. (See: *S v* 2000 (1) SACR 453 (SCA) at 455B.) The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. It is trite that in an appeal the accused's conviction can only be sustained after consideration of all the evidence and the accused's version of events.

…

[48] The applicant was convicted on the evidence of a single witness, which in order to be sufficient to convict, must be clear and satisfactory in every material respect. (See: *S v Sauls* 1981 4 All SA 182 (A).) It is trite that a court will not rely on such evidence where the witness has made a previous inconsistent statement, where the witness has not had a sufficient opportunity for observation and where there are material contradictions in the evidence of the witness. In *Sauls* it was held that there is no rule of thumb, test or formula to apply when it comes to the consideration of the credibility of a single witness. Rather, a court should consider the merits and demerits of the evidence, then decide whether it is satisfied that the truth has been told despite the shortcomings in the evidence".

[13] It is not in dispute that first appellant did spray the complainant with pepper spray. What the trial court had to decide was whether the pepper spraying of the complainant was in self-defence after the complainant had allegedly locked the entrance door to her home, preventing the appellants and her daughter from leaving the house.

[14] With regard to contradictions in a witness' evidence in *S v Mkhothle* 1990 (1) SACR 95 (A) the court stated that "contradictions per se do not lead to the rejection of a witness' evidence. They may simply be

indicative of an error. Not every error made by a witness affects credibility. In each case the trier of fact has to make an evaluation, taking into account such matters as the nature of contradictions, their number and importance and their bearing on other parts of the witness' evidence."

[15] It is trite that the burden of proof lies with the State to prove the guilt of an accused person beyond a reasonable doubt. In determining the guilt or innocence of an accused the court has to weigh all the evidence before it. No onus rests on the accused to prove his or her innocence. Furthermore, it is true that if a trial court finds the version of an accused person to be reasonably possibly true, the accused person is entitled to an acquittal.

[16] It is common cause that on the relevant day the complainant had called the appellants to come and assist her in resolving a dispute she was having with her daughter. It is also common cause that after some argument between the complainant and the appellants regarding the complainant's demand that her daughter take off the skirt she was wearing, the door of the house was locked, culminating in the second appellant using a pepper spray on the complainant. It is in dispute as to who between the appellants and the complainant locked the door and the event which led to the second appellant using the pepper spray on the complaint.

[17] The complainant's version is that the second appellant suddenly used the pepper spray after she refused to allow her daughter to leave and that it was the first appellant who locked the door and threw the key outside. On the other hand it is the appellants' version that after pleading with the complainant to give them the keys to the door and warning her several times that if she refused pepper spray will be used, it was only at that stage that a decision was made, not to retrieve the keys from the complainant's breast but to use pepper spray. It is further the appellants' version that it was the complainant who had

locked them inside the house preventing them from leaving and putting the keys in her breast.

[18] The trial court was faced with conflicting and mutually destructive versions as to the events which occurred in the complainant's house after the appellants were called to resolve the dispute between the complainant and the appellants. The approach which should be followed when faced with mutually destructive versions is set out in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others* 2003 (1) SA 11 (SCA).

[19] The trial court having made credibility findings against the complaint, it was incumbent on it to exercise caution in dealing with her evidence, particularly as she was a single witness to the events that led to the alleged assault on her. The trial court having accepted that the appellants' evidence that before the pepper spray was used, the appellants' had warned the complainant several times of use in the event she refused to give them the keys to the locked door, I am of the view that the appellants found themselves in an emergency situation in that they and the daughter were unable to leave the complainant's house due to her conduct.

[20] The trial court further opined that since the officers were stronger than the complainant, they could have used minimum force to make the complainant hand over the keys to the door. In this regard the trial court failed to take cognisance of the fact that according to the appellants the keys were placed inside the complainant's breast. As the trial court correctly commended the appellants for not retrieving the keys from the complainant's breast, it cannot be disputed that under the circumstances, the use of the pepper spray can be considered to have been minimum force as the alternative, being ghastly to contemplate, retrieving the keys from the complainant's breast. I am therefore of the view that the officers acted reasonably under the circumstances in order to gain their freedom and that of the

complainant's daughter from the locked house. Further, it is incomprehensible how, when the trial court made credibility findings against the complainant as being an honest person, it could have accepted her evidence, with contradictions and rejected the appellants' evidence.

[21] Under the circumstances I am of the view that the trial court erred in not treating the evidence of the complainant with caution and in rejecting the appellants' evidence as to the events leading to the pepper spray being used. I am satisfied that the appeal should be upheld in that the State had not proven the guilt of the accused, under the circumstances beyond a reasonable doubt.

[22] In the result the following order is made:

'The appellants' appeal against conviction is upheld'.

NP MNGQIBISA-THUSI
Judge of the High Court

I agree:

B MNYOVU
Acting Judge of the High Court

Appearances

For Appellants: Mr P T Mthombeni (instructed by: P T Mthombeni Attorneys)
For Respondent: Adv M J Makgwatha (instructed by the DPP, Pretoria)