IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A253/2012

DATE: 17 AUGUST 2012

In the matter between:

ESAU NUYS Appellant

and

THE STATE Respondent

J U D G M E N T

NYMAN, AJ

The appellant, Esau Nuys, was convicted on 15 July 2011 in the Oudtshoorn District Court of assault with the intention to do grievous bodily harm and sentenced to six months imprisonment or a fine of R600,00.

An application for leave to appeal against the conviction was refused and was subsequently granted on petition. The appellant was represented by an attorney.

Willem Kannemeyer, the complainant, testified that on Sunday 13 February 2011 at 7:30 pm he was cycling from his home. When he arrived at the *droë kamp* at the farm gate, he came

across the appellant. Mr Kannemeyer testified that he knew the appellant from the farm for about two years and he had also worked with the appellant. He therefore, knew the appellant and he knew his face. At the gate, Mr Kannemeyer stood with his legs astride across the bicycle while the appellant was sitting inside his motor vehicle. Mr Kannemeyer stepped down from his bicycle whereupon the appellant called him.

He thought that the appellant wanted to give him the keys of the gate. The appellant then hit Mr Kannemeyer with the door of the car and asked him when he was going to pay him. The car door caught Mr Kannemeyer on the right hand side of his lip causing his lip to bleed. Thereafter, Mr Kannemeyer turned around and went home because he wanted to stop the bleeding.

On his arrival at home Mr Kannemeyer found Dina Moos, his wife, who asked him who had hit him. In reply he stated that the appellant had hurt him with the door of his motor vehicle. Thereafter he was taken to the hospital by ambulance. He received three stitches and was booked off from work by the doctor for three days. Mr Kannemeyer testified that he owed the appellant money for groceries that he had bought from him on credit. He testified that he paid the appellant every month,

but he does not know how much he owes the appellant.

During his evidence-in-chief the prosecutor questioned Mr Kannemeyer concerning why the doctor's certificate contained in the J88 form recorded the incident as:

"Het met vuis geslaan deur 'n ander man."

Mr Kannemeyer replied that he did not know why the doctor made such an entry and he persisted with his evidence that the appellant had hurt him with the door of his car. Mr Kannemeyer testified that he did not go to school and he did not know what the doctor had written on the J88. He testified further that while he does drink alcohol, he had not consumed alcohol at the time of the incident.

Dina Moos testified that at about 07:30 pm on 13 February 2011 on her arrival at home, she found her husband lying on the bed in a pool of blood. The blood was gushing from his mouth. On enquiring from him who had hurt him, he replied that the appellant had hit him with the door of his motor vehicle. She then ran to the farm manager who called the ambulance whereupon the ambulance took her husband to the hospital. Ms Moos furthermore testified further that her husband had in a small *doppie*.

The appellant testified that on 13 February 2011 at 7:30 pm he picked up Isador Witbooi in his motor vehicle. They rode to the farm gate whereupon Isador Witbooi opened the gate. At that time, Brenton Witbooi entered the farm gate with his bicycle with a tankard of wine on his back.

The appellant then gave Isador Witbooi a lift to his home. Thereafter the appellant went to Shoprite and then to Rosebank to visit his brother. He returned home late that evening. The appellant denied that he had seen Mr Kannemeyer the day of the incident and he emphatically denied that he had assaulted Mr Kannemeyer.

Brenton Witbooi testified that on 13 February 2011 that evening, he sent Mr Kannemeyer to fetch alcohol for him. Thereafter he went looking for Mr Kannemeyer and found him at Johny Kotze's house being under the influence of alcohol. Mr Witbooi collected his wine.

Mr Kannemeyer told Mr Witbooi that he was going to continue drinking and Mr Witbooi left Mr Kannemeyer with a glass of wine in his hand. Thereafter at about 19:28, Mr Witbooi found the appellant at the gate where Mr Kannemeyer said that he had been assaulted. He saw the appellant giving Isador Witbooi, Mr Witbooi's cousin, a lift in his motor vehicle.

Isador Witbooi testified that on 13 February 2011 at 7:30 pm the appellant gave him a lift home. At that time he found Brenton Witbooi at the farm gate. He did not see Mr Kannemeyer.

In its evaluation of the evidence the trial court indicated that it was aware that Mr Kannemeyer was a single witness. However, it should be remembered that he is unsophisticated and did not go to school. It was the view of the trial court that Mr Kannemeyer was an unpretentious witness. Furthermore, his version was corroborated by his wife who can be categorised as the typical first report witness. She was a credible witness because she did not know that she was going to give evidence and was therefore unprepared.

The trial court did not find the appellant's evidence to be reliable. The appellant and his witnesses had placed the appellant at the scene of the incident but they did not place Mr Kannemeyer there. In the opinion of the trial court it was peculiar that the evidence of the appellant and his witnesses was precisely similar.

Furthermore, while both Isador and Brenton Witbooi had testified that similar circumstances had been present previously, neither of them could explain why they had

remembered the incident of 13 February. It was the trial court's opinion that the reason why they remembered the incident was because they had consulted together with the appellant's counsel and therefore had the opportunity to modify their evidence. For these reasons the trial court concluded that the State had proven its case beyond a reasonable doubt and therefore convicted the appellant.

The following grounds of appeal against the conviction were submitted on behalf of the appellant:

1. The badgering examination of the witnesses by the trial court rendered the trial unfair.

2. The evidence of the complainant as a single witness does not meet the required standard, it was clearly from the evidence that he lied regarding the state of his sobriety.

3. The reports made in the J88 to the effect that the complainant was under the influence of alcohol and that the complainant had reported that another man had hit him with the fist, contradicted the complainant's evidence.

4. The appellant's evidence was reasonably true in that it

was evident that he habitually transported Gelderbloem to Oudtshoorn and that he did in fact meet Witbooi.

5. The complainant's wife had testified that she found the complainant at home at 7:30 pm, blood covered. On the complainant's version he arrived home at 7:30 pm and then left again, therefore the incident could not have happened earlier than 7:30 pm.

6. The trial court misdirected itself by not reversing the J88 and by relying on the *viva voce* evidence.

In my consideration of the grounds of appeal, I must have regard to the settled principle that a Court's powers to interfere on appeal with the findings of fact of a trial court are limited. In order to succeed on appeal, I have to be persuaded that the trial court committed a misdirection or that the trial court was wrong in accepting the complainant's evidence.

A reasonable doubt will not justify interference with the evidence of the trial court. It is only in exceptional circumstances that I can interfere with a trial court's evaluation of the oral testimony. Given that the trial court has the advantage of: "seeing, hearing and appraising a witness," as decided in S v Francis 1991 SACR 118 (A) at 204c–f.

At the outset, I wish to state that I do not have the power to consider the first ground of appeal because in my viewpoint it constitutes a ground of review and not appeal given that it pertains to the procedures of the trial court.

I am satisified that the trial court did not commit a misdirection or was wrong in accepting the evidence of the complainant and his wife and in rejecting the evidence of the appellant and his witnesses.

Ms Moos testified that she found her husband at home at about 7:30 pm. I therefore do not find any contradictions pertaining to the time fo the incident. It is not in dispute that the complainant suffered an injury and that he was examined in hospital as verified in the J88.

The point in issue is whether or not the appellant had assaulted the complainant. It is my view that even thought there is a contradiction in the evidence between the complainant and his wife regarding the complainant's state of sobriety, such a contradiction does not vitiate the complainant's overall credibility. It shows that the complainant and his wife did not attempt to concoct their testimony.

In my opinion there are no grounds for disturbing the finding of the trial court in upholding the evidence of the complainant. I therefore find no merit in the second and fifth grounds of appeal.

Turning to the third and sixth grounds of appeal. The record shows that the trial court did consider the J88 form, but rejected the version therein to the extent that it contradicted the evidence of the complainant.

In S v Veldhuizen 1982(3) SA 413 (A) at 416G the court held that the affidavit received in terms of section 212 constitutes *prima facie* evidence and in the absence of other credible evidence such *prima facie* evidence should be accepted by the judicial officer.

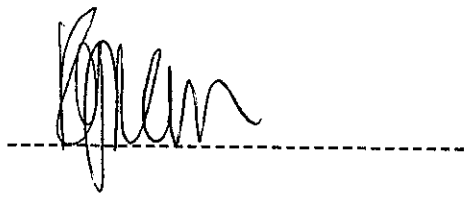
In my opinion the trial court accepted the evidence of the complainant as credible evidence and therefore rejected the *prima facie* evidence in the J88 form that contradicted the appellant's version of the incident.

In my opinion the trial court correctly rejected the evidence of the appellant and his witnesses because not only were their versions similar, but they also failed to give an explanation why they remembered the details concerning the incident when

they had conducted similar activities in the past. I can find no reason to disagree with the trial court's reasoning that the only reasonable explanation is that they had the opportunity to concoct their version at the consultation with the appellant's counsel.

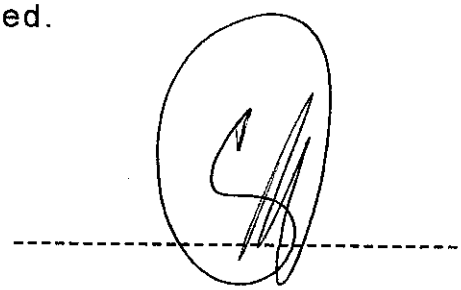
In R v Vlok 1954(1) 203 (SWA) 206G-H the Court held that in the instance where two statements are similar an inference can be drawn that these statements were drafted at the same time and that such statements should be approached with caution.

I therefore do not find the appellant's evidence is reasonably true as contended in the fourth ground of appeal. In the result I propose that **THE APPEAL BE DISMISSED AND THE CONVICTION CONFIRMED**.



NYMAN, AJ

I agree and it is accordingly so ordered.



YEKISO, J

/RV