IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R159/2018

DATE HEARD: 13/03/2019

DATE DELIVERED: 02/04/2019

In the matter between

ANDILE LUNGISA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The appellant was convicted in the Magistrate's Court, Port Elizabeth, of assault with intent to do grievous bodily harm. He was sentenced to three years' imprisonment, one year of which was suspended for five years on condition he was not convicted of assault with intent to do grievous bodily harm or assault, committed during the period of suspension. This appeal is against conviction and sentence, leave having been granted on petition to this court.

[2] It is common cause that on 27 October 2016 the appellant struck the complainant, Mr Rano Kayser (Kayser), on the head with a glass jug which contained water. The incident occurred in the council chambers of the Nelson Mandela Bay Municipality (NMBM), during a council meeting. The appellant was the leader of the African National Congress (the ANC) caucus in the council and Kayser was a Democratic Alliance (DA) councillor.

[3] Certain background facts are common cause. One of the items on the agenda concerned an ANC councillor, Councillor Sabani. He had been ordered by the Speaker to leave the chamber because a matter concerning his conduct at another meeting was to be discussed. Sabani refused to leave the chamber and efforts by security personnel to remove him were obstructed by some councillors. The City Manager was also prevented from approaching Sabani. A motion concerning Sabani's conduct at a previous meeting was passed. These events relating to Sabani were met with displeasure by ANC councillors and chaos erupted in the chamber. The appellant and another ANC councillor, Councillor Feni, moved towards the Speaker's table which is on a raised podium. Kayser and another DA councillor, Mr Johnny Arends, also moved towards the Speaker's table. The assault on Kayser occurred in the vicinity of the Speaker's table. The glass jug shattered when it came into contact with Kayser's left temple. The injuries suffered by Kayser were recorded in a J88 form which was admitted as an exhibit. They were as follows:

> "3cm "C" shaped laceration left temple 1 cm deep through muscle; arteriole's transected and bleeding profusely; underlying haematoma; multiple linear abrasions 5 – 10cm long left side of neck' deep 4cm long abrasion upper chest; small flap of loose skin upper outer pinna."

[4] Several State witnesses testified, including Mr Ronaldo Gouws, who filmed portions of the events of that day on his cellphone. This video footage was admitted in evidence and was referred to by several of the witnesses while they testified.

[5] Gouws testified that he is a DA councillor in the NMBM. After Sabani refused to leave the chamber and chaos erupted, Gouws noticed pieces of paper being thrown around by the ANC councillors. The Speaker stood and asked for order, to no avail. Gouws decided to record the events on his cellphone so that there would be evidence of the events. Gouws stopped recording now and then because the ANC councillors shouted and pointed at him and he wanted to avoid a confrontation.

[6] The appellant approached the Speaker, which is not allowed according to council rules. The appellant was holding a water jug which he had taken from the area where he had been seated. Kayser approached the appellant in order to prevent whatever was going to happen because he had seen the appellant picking up the jug. This was Gouws' opinion based on the video. Kayser was trying to take the jug away from the appellant, as was another DA councillor. The appellant struck Kayser on his head with the jug. Kayser had not threatened or assaulted the appellant nor was he in possession of a weapon of any kind. The appellant was not in any danger from Kayser or anyone else. It was put to Gouws in cross-examination that the reason the appellant struck Kayser was that four people who looked intimidating came towards him before he picked up the jug. It was further put to Gouws that the appellant took the jug when he saw Kayser approaching him in a very aggressive manner. Gouws disagreed with both propositions, saying that the appellant already had the jug in his hand. Kayser fell down and some councillors assisted by wrapping his wound which was bleeding profusely. The appellant ran out of the chamber. As the chaos subsided, an ANC councillor threw a glass or jug towards the Speaker and a shot was fired by a security guard in order to restore order.

[7] The Speaker, Mr Jonathan Lawack, testified that his chief responsibility is to maintain order in council and to protect the quorum of the House while it is in session. After the chaos erupted, the appellant and Feni approached the Speaker's seat. This was strange conduct because the sanctity of the Speaker's seat has never been disputed. Only the City Manager and the director in the Speaker's office are allowed into that space. Lawack said it was clear from Feni's and the appellant's approach that they intended to intimidate him. Feni grabbed his arm and the director in the Speaker's office, Mr Nxolwana, came between them and protected Lawack. As far as Lawack could recall, the appellant was holding a glass jug of water, which according to Lawack he must have picked up on his way to the Speaker's seat. Later in his testimony he said that he was not sure when the appellant picked up the jug and he only became aware that the appellant was holding a jug when the appellant broke it on Kayser's head. A number of DA councillors, including one Arends, came forward because, according to Lawack, they saw that he was in danger. Kayser approached the appellant, intending to protect Lawack. The appellant struck Kayser on the side of his head with the jug. Kayser fell and bled profusely. Lawack agreed that in hindsight it would have been better to have adjourned the meeting when it became chaotic.

[8] It was put to Lawack in cross-examination that the appellant had wanted to get his attention. Lawack said that to do that in council you raise your hand. He said that the appellant should have calmed down his members and brought to his attention that he wanted to speak to him. Lawack denied that the appellant tried to do that on numerous occasions and that he had failed to recognise the appellant. It

was further put to Lawack that the appellant saw Kayser approaching him and perceived him as approaching him in order to attack him. Lawack said that the situation was volatile and that when the appellant and Feni approached him he was of the opinion that he was "under siege".

[9] Kayser testified that on 27 October 2016 he participated in the council meeting. During the chaos, Kayser noticed the appellant and Feni in conversation and then they walked up to the Speaker's seat. Kayser was in the first row of councillors opposite the Speaker's seat. He saw Feni grab the Speaker's arm and thought that the Speaker was in danger. He saw the appellant standing at the corner of the secretary's desk next to a jug of water and reaching out to the jug. Kayser walked up the steps towards the appellant and Feni, but was stopped on the second step of three leading up to the speaker's podium. His objective was to ask them to go back to their seats so that the meeting could continue. He repeated that this was his intention when it was put to him in cross-examination that the appellant perceived his approach to be very hostile and because there were others who approached him, he defended himself because he felt that they were going to attack him. Kayser asked the appellant and Feni to return to their seats. He said that if his memory served him well, the appellant had the water jug in his hand and he, Kayser, was trying to take it from him. During cross-examination Kayser said that when Feni grabbed the speaker's arm he saw the appellant taking the jug. Further on during cross-examination he said he could not recall if, when he approached the appellant, the jug was already in his hand or still on the table, but he knew that before he approached the Speaker's table the appellant was "busy" with the water jug.

[10] The appellant lifted the jug and Kayser tried to protect himself and tried to take the jug from the appellant, but the appellant hit him over the head with the jug. Kayser fell and when he regained consciousness he was being assisted by fellow councillors. He was later treated by ambulance personnel and transferred to hospital. He received stitches to his head and pieces of glass were removed from his chest and neck. All these injuries were inflicted at the same time. He was given pain medication and discharged from hospital that evening.

[11] Mr Johnny Arends testified that he is a councillor in the NMBM and attended the council meeting on 27 October 2016. During the chaos the appellant and Feni came forward and Arends and Kayser also moved forward. The appellant was holding a jug which he had brought with him when he moved forward and Arends put his arms around the appellant in order to prevent him using the jug. Arends also grabbed the appellant by the shoulder in order to calm him down. Arends later corrected his evidence and said that the appellant had taken the jug when he was already at the front, not far from where the incident occurred. In his police statement he said that he moved forward to assist with the negotiation and saw the appellant take one of the water jugs.

[12] Arends said that he did not assault the appellant. It was put to him in cross-examination that the appellant perceived his and Kayser's approach as an act of aggression and that is why he reacted as he did. Arends said that neither he nor Kayser had an aggressive attitude. Arends released his hold of the appellant because he was speaking to him, trying to calm him down. The appellant was very upset about the motion which had been passed. The appellant calmed down and

Arends turned to return to his seat. Kayser also spoke to the appellant to calm him down. Kayser did not assault the appellant. Before he moved away Arends saw that the appellant had lifted up the jug. The appellant struck Kayser with the jug. Thereafter objects were thrown in the chamber. According to Arends nobody attempted to assault or did assault the appellant.

[13] The City Manager, Mr Johan Mettler, testified that he was requested by the Speaker to remove Sabani from the chamber. Sabani refused to leave and Mettler asked security personnel to assist. At this time there was a commotion because a large number of councillors objected to the removal of Sabani. As Mettler made his way to the Speaker's chair, glass jugs were thrown from one side of the chamber. As the chaos subsided, Mettler became aware that Kayser had been injured.

[14] Captain Nontombi Sita of the South African Police Service testified that on 27 October 2016 she was on duty in the Community Service Centre at Humewood police station. The appellant came into the Centre and complained that he had been assaulted, mentioning attempted murder. He said that they were in a meeting and a shot had been fired. There had been a disagreement at the meeting and a fight ensued between two groups. Kayser had hit the appellant with a fist but missed because the appellant had ducked the blow. Sita took a written statement from the appellant. This statement was admitted as an exhibit. It was taken at 22h25. In the statement the appellant said that ANC councillors were arguing with DA councillors and that security personnel tried to remove Sabani from the chamber. The ANC councillors blocked the security guards and chaos erupted. The appellant and Feni approached the Speaker to restore calm and while they were speaking to the

Speaker DA councillors charged towards them, one of whom was Kayser. Kayser punched him with a clenched fist. He ducked and Kayser missed. At that time gunshots were fired and the appellant ran towards the door. He felt fists beating him on his back and people were swearing at him. The people behind him were all DA councillors. The councillor with false teeth (later identified as Arends) dived trying to take him down but he jumped over him. While he was trying to get out of the door he felt a blunt object hitting him several times on his left shoulder and on his back. He did not see the people who were assaulting him but Kayser was one of them because he was the one who punched at him with a clenched fist earlier. On his return to the ANC offices he noticed cuts on his fingers. He did not know how he sustained those cuts.

[15] Sita noted in writing that the appellant complained of a painful left shoulder and spinal cord, and that there were no visible injuries other than the cuts on the fingers of the left hand.

[16] The cellphone footage taken by Gouws depicted three stages: the first where the chaos erupted, showing councillors getting to their feet and singing, some clapping, some shouting, and one or possibly two councillors banging on a table. It also shows the appellant and Feni talking on the side of the chamber. The second stage shows Arends going towards the appellant, holding him by the shoulder and around his body. The appellant turns towards Arends and the jug is visible in his possession. At this stage Kayser is not in contact with the appellant. Arends turns away and Kayser comes closer to the appellant, apparently attempting to take the jug from him. The appellant strikes Kayser with the jug which shatters as it makes

contact with Kayser's temple and Kayser falls. The appellant runs away and a person strikes him on the back with a flagpole. A little later another jug flies through the air. The third stage related to an alleged attack on the chief whip in council by the appellant's former co-accused who was discharged at the close of the State case.

[17] That was the evidence for the State.

[18] The appellant testified that at that time he and Kayser were on good terms and Kayser used to give him sweets and chocolates at council meetings. On 27 October 2016, after the Speaker ruled that Sabani should vacate the chamber there was chaos. As leader of the ANC in council the appellant had a responsibility to address the people so they could quieten down. There was unhappiness because the motion had been passed, and, because it was not according to the rules, he had the responsibility of approaching the adviser to the Speaker, Mr Nxolwana, so that he could tell the Speaker to adjourn the meeting. He was not upset that the motion had been passed but he wanted to point out the correct procedure. If there is a problem with a councillor the conduct of that councillor should first be discussed at a committee meeting, then tabled. A councillor cannot be chased out of a meeting.

[19] In answer to questions by the magistrate on various aspects of his role as leader of the ANC in council the appellant said that he has to ensure that ANC councillors follow the rules both in and outside council. When asked if it was not his duty to see that his party's councillors behave, he said that was why he approached Mr Nxolwana to seek an adjournment, so that he could address the issue with the

ANC councillors. He said that he could not take them out of the chamber while the meeting was in progress. When asked by the magistrate why he could not do so he said he was a new councillor and because of respect for the Speaker it was not easy for him to take the ANC councillors out of the chamber.

[20] The appellant had no intention of approaching the Speaker who at this stage was standing and not trying to run away. He said that there was no rule of which he had been informed that councillors could not approach the Speaker's bench when they wanted to speak to the Speaker, but also said that it is acceptable to approach the Speaker's adviser but not acceptable to go directly to the Speaker. When the appellant was reminded that it had been put to State witnesses that the appellant wanted to get the attention of the Speaker, he said that one speaks to the adviser who will convey your message to the Speaker. When reminded of his written statement taken by Sita in which he said that he was speaking to the Speaker, he said that the adviser and the Speaker are at the same table and in his statement he was referring to the office of the Speaker. The appellant said that when the Speaker stands there should be silence. The speaker stood several times but the situation in the chamber was volatile and chaotic.

[21] On the appellant's arrival at the Speaker's table, three DA councillors came to him, the first being Arends, who was swearing at him and wanted to assault him. Arends grabbed him on his right shoulder and with his other hand grabbed the appellant's right hand and moved it behind his back, squeezing his arm backwards. When it was put to him that the video did not show Arends twisting his arm behind his back, he said that after his arm was twisted behind him, he loosened himself from

Arends' hold and then Arends took him by the shoulder. In his police statement where he said Arends had dived at him wanting to take him down, he said that the diving he was referring to was the diving of grabbing his hands and shoulder and twisting his arm backwards at the same time. He loosened himself from Arends' grip and then someone else who was on his left, he did not know who, attacked him. It was at that stage that he jumped.

[22] After Arends got hold of him, two DA councillors approached, one undoing his buttons. The three DA councillors were handling him and he thought that they were assaulting him. No conversation took place between the appellant and Kayser or Arends because there was no time to talk. Kayser bent down and went for his body as if to attack him. It was maybe then that he picked up the jug while he was being manhandled. When expressly asked why he picked up the jug he said it was because one was holding him, another was on the other side, and Kayser was coming to him. During cross-examination he said that Kayser wanted to punch him with a fist in the stomach but the fist ended up just in front of his face. Later he said it was an open hand at his face. He also said that he felt Kayser's hand which came to his stomach and squeezed in his stomach and moved backwards. Kayser's other hand ended up on the appellant's face.

[23] The appellant was very scared. He took a jug from the secretaries' table and thought that he would throw water at Kayser. His intention was to pave the way for his escape. He did not know what the jug was made of because he was a new councillor. At that stage the appellant's eyes were closed. He hit Kayser once with the jug. His intention was to pour water on Kayser but he ended up hitting him with

the jug. He said he was scared because they were on top of him and attacking him as he was running. He did not dispute that he hit Kayser very hard with the jug but said that his eyes were closed. Later he said that he did not know what force he used because he had not prepared himself to use force against a colleague. Later still he said he did not say that he hit Kayser very hard. When reminded that he did not dispute that he had hit him very hard, he said that he had said his eyes were closed. When it was put to him that it was not necessary to hit Kayser so hard he said he was throwing water because he was being attacked. He found a gap to run away and was released from the hold on his shoulder and the arm which had been twisted. He ran away because he was being assaulted and attacked. While he was running away he was assaulted on his back. At the time he made his statement to Sita he was not sure with what he had been assaulted but after viewing the video he saw that it was the flagpole and not fists, and that he was hit only once. The appellant did not dispute that he must have sustained the cuts to his fingers when he hit Kayser with the jug.

[24] In his judgment the magistrate said that the state witnesses had impressed him. He found that there were contradictions in the evidence of the state witnesses, for example concerning when the appellant picked up the jug, but found that they were not material. He went further and said that the fact that there were differences in their evidence pointed to their honesty and not to collusion. The magistrate was not impressed by the appellant. He found that he was vague and evasive and gave long-winded answers to questions which required a yes or no answer. He said that he contradicted himself during cross-examination and contradicted statements which had been put to the state witnesses by his attorney during cross-examination.

Further, the magistrate was of the view that the appellant tailored his version as the trial progressed.

[25] The magistrate was of the view that the issue to decide was whether or not the appellant acted unlawfully in striking Kayser. He found that the State witnesses' evidence was corroborated by the video footage. He said it was clear from the video footage that Kayser did not strike or attempt to strike the appellant, and that Arends had his hand on the shoulder of the appellant, but that Arends also did not strike or attempt to strike the appellant. Kayser and Arends were unarmed and even though there was chaos in the chamber, there was no reason for the appellant to hit Kayser. The magistrate consequently found that the appellant acted unlawfully.

[26] It is trite that an appellate court will not readily interfere with the trial court's factual findings. In *S v Monyane* 2008 (1) SACR 543 (SCA) at para [15] Ponnan JA said the following:

> "This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645*e* - *f*). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (*S v Francis* 1991 (1) SACR 198 (A) at 204*e*)."

[27] A reading of the record in this matter does not in my view indicate a material misdirection by the trial court. On the contrary, the magistrate's assessment of all the witnesses' credibility, including that of the appellant, is borne out by the record.

[28] The magistrate was criticised for not considering a defence of putative private defence. When the appellant struck Kayser, so it was submitted, he subjectively believed that he was under attack. He therefore did not have the requisite mens rea when he struck Kayser. This was not the appellant's defence at the trial. The tenor of his evidence as well as what was put to the State witnesses, was that he was attacked and had to defend himself. It follows from this evidence that when he struck Kayser he had the requisite intention. Even if the defence of putative private defence is considered, one must have regard to the evidence as a whole and the credibility of the various witnesses, including the appellant, before reaching a conclusion on the appellant's subjective state of mind.

[29] As already mentioned, the magistrate was impressed by the State witnesses. It is so that there were different accounts of when the appellant picked up the jug. It is possible that Gouws fabricated his evidence that the appellant took the jug from where he was seated, but it is equally possible that he assumed that this was so. Kayser's evidence of when the appellant picked up the jug was not the clearest to follow, and Arends did correct his evidence of when the appellant picked up the jug, but as I said, the video shows that the appellant was in possession of the jug when Arends took him by the shoulder. When Kayser was struck Arends had turned away from the appellant. I agree with the magistrate that precisely when the appellant picked up the jug was not relevant. The important point is that he had it in his

possession when Arends took him by the shoulder and before Kayser came close to him. The appellant's evidence that he picked it up when Kayser appeared to be approaching him aggressively, or was attepting to punch him in the stomach, was not borne out by the video. The video further corroborates the State witnesses' evidence that Arends and Kayser were not aggressive and were not assaulting or attempting to assault the appellant.

[30] It was submitted that Arends and Kayser were also unlawfully in the Speaker's precinct. It was not in dispute that the appellant and Feni were the first to approach the Speaker's table. This prompted Arends and Kayser to approach as well, which in the circumstances was reasonable conduct. Order needed to be restored and the conduct of Feni and the appellant in impermissibly approaching the Speaker's table needed to be dealt with.

[31] In my view, the appellant was simply not a credible witness. The summary of his evidence above demonstrates the poor quality of his evidence and how he adjusted his version as he went along. He was a very evasive witness. His version grew and changed in the telling and was difficult to follow. His evidence of the alleged attack on him chopped and changed. His allegation that Arends had twisted his arm behind his back was not visible on the video. His evidence that this happened before Arends took him by the shoulder could not be true because in the video Arends is seen approaching him, putting his hand on his shoulder, holding him and then turning away. It was not put to Arends that he had twisted the appellant's arm behind his back, nor that he had approached the appellant swearing and wanting to assault him. The appellant's evidence that he picked up the jug after

Kayser tried to assault him is not borne out by the video. It was not put to Kayser that he had tried to assault the appellant by bending down and aiming a punch at his stomach. When Arends took the appellant by the shoulder, the appellant turned towards him and the jug is visible in his hand. It was at that stage that Kayser moved closer to the appellant. Kayser's evidence that he tried to take the jug from the appellant is also borne out by the video. He was not attacking the appellant. It was not put to Kayser that the appellant intended to throw water at him. The manner in which the appellant struck Kayser on his head, as shown in the video, is not consistent with an attempt to throw water on him. The appellant raised the jug in the air and brought it down on Kayser's temple. The appellant did not give a persuasive reason for why he hit the appellant very hard with the jug, when his intention was to throw water at him. The version he gave to Sita differed from his evidence at the trial. One might have thought he was describing two different events. Nobody dived at him trying to take him down. He did not jump over anyone. Kayser did not try to hit him with a fist. He was not assaulted many times on his back as he ran away. His version of being attacked before he hit Kayser was completely discredited.

[32] It was submitted on behalf of the appellant that the questioning by the magistrate (see paragraph [19] above) was confrontational and therefore unnerving for the appellant. As mentioned, the magistrate questioned the appellant in relation to his role as leader of his party in council, in particular what was expected of him in the chaos which occurred. I do not think that this questioning was such as to amount to an irregularity and it did not impinge on the circumstances of the actual assault with the jug.

[33] In my view the magistrate was correct to accept the evidence of the State witnesses and to reject that of the appellant. Even if one considers the defence of putative private defence, in that factual scenario it is not reasonably possibly true that the appellant subjectively believed that he was under attack. It follows that the magistrate was correct in finding that the State had proved all the elements of the offence.

Sentence

[34] A correctional supervision report was obtained. The correctional officer stated that the appellant was a suitable candidate for correctional supervision. She said that the appellant did not admit guilt but said he respected and accepted the judgment of the court. The appellant had no previous convictions.

[35] The appellant testified in mitigation of sentence. He was 38 years old at the time of the offence and is married with seven children whom he supports financially. He also provides financial support to his parents and siblings. He earns a salary as a councillor and has an ad hoc income from writing. He said that he was remorseful about the incident and sympathised with Kayser. Although he had pleaded not guilty, he respected the court's verdict. When asked by the prosecutor how he reconciled his expression of remorse with the fact that he did not admit guilt, he said it was because of the court's decision to find him guilty. When asked what he meant by remorse he said his heart was painful because Kayser was injured.

[36] Mr Nkosi Jack testified on behalf of the appellant. He knew the appellant as a student who wanted to do good in society and improve the lives of people. He said the appellant is a pleasant and respectful person and a patriot. He met the appellant on the day of the incident. The appellant was shocked at what he had done. Jack was of the view that if the appellant was sent to prison an opportunity to rehabilitate him would be lost.

[37] Kayser testified that he lost consciousness after being struck and lost a lot of blood. He was told by the doctor that he was lucky to be alive because the injury was close to his temple. Pieces of glass still lodged in his skin had to be surgically removed. He still suffers from migraines. He was humiliated by the experience and embarrassed because of the media coverage.

[38] Kayser completed a victim impact statement which was admitted as an exhibit. In it he said, inter alia, that the incident had humiliated his family who had to endure being mocked by some people. He still had flashbacks of the incident and his sleeping pattern was disturbed. The constant headaches resulting from the injury, for which he consults his medical practitioner, contributed to his distress. He constantly takes painkillers and suffers from short term memory loss.

[39] Kayser said that despite what had happened he and the appellant still have the responsibility to interact with each other. They are colleagues in the council. The appellant had attempted through colleagues to tender an apology but Kayser did not, as he put it, process that request. After the incident the appellant would greet him and they would shake hands.

[40] In his judgment on sentence the magistate alluded to the so-called triad of the personal circumstances of an accused, the interests of society and the nature and seriousness of the offence. He also bore in mind the general principles of punishment, namely reformation, deterrence and retribution and that a sentence should be blended with a measure of mercy.

[41] He said that assault with intent to do grievous bodily harm is a serious and prevalent offence and that people resort to violence to resolve minor differences. Where offences are prevalent, the courts need to impose sentences which deter not only the accused person but also would be offenders.

[42] The magistrate considered the circumstances in which the offence was committed. The appellant was a councillor and an elected public official tasked with furthering the interests of the community which he serves. The incident occurred during a council meeting when matters affecting the community are deliberated upon. The community expects a certain level of behaviour from their representatives. Instead of attending to the interests of the community, so the magistrate said, the appellant and other councillors behaved like “common street thugs”. He was of the view that the appellant betrayed the trust placed in him by the community and the community had a direct interest in the sentence imposed. The community need to know that courts will not allow senseless violence in the community and the country. If a court failed to impose effective sentences the community might take the law into their own hands if they lose confidence in the criminal justice system.

[43] The magistrate took into account the injuries suffered by Kayser and said that the blow to his head could have had fatal consequences. If an object like a glass jug is used to assault someone the possibility of death is present. He referred to the effect that the incident had on Kayser and his family and the fact that Kayser still suffers headaches, takes pain medication, and has short term memory loss.

[44] The magistrate was of the view that it was clear from the correctional supervision report that the appellant was not remorseful and that when he testified in mitigation, although he accepted the verdict, he appeared not to take responsibility for his actions. The magistrate pointed out that there is a difference between remorse, and regret at being convicted.

[45] The magistrate took into account as mitigating factors that the appellant was a first offender, was employed and supported his family. The magistrate regarded the seriousness and prevalence of the offence and the circumstances in which it was committed as aggravating factors.

[46] The magistrate considered other sentence options such as a suspended sentence, a sentence with the option of a fine, or correctional supervision. He was of the view that a non-custodial sentence would over-emphasise the appellant's personal circumstances to the detriment of the seriousness and prevalence of the offence and the interest of the community and Kayser. He also was mindful that courts endeavour not to impose direct imprisonment on a first offender but that this may and does happen for serious offences, one of which is assault with intent to do

grievous bodily harm. He was of the view that imprisonment was the appropriate sentence in the circumstances of the case and imposed sentence accordingly.

[47] In *S v Bogaards* 2013 (1) SACR 1 (CC) at para [41] Khampepe J stated:

> "Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it."

[48] It was submitted on behalf of the appellant that the sentence not only induced a sense of shock but also that it was imposed to satisfy the community. The magistrate, so it was submitted, sacrificed the appellant on the altar of deterrence. It was further submitted that the circumstances which prevailed when the offence was committed should have been accorded more weight. Emotions were running high and the chaos which erupted was not caused by the appellant, yet he was sentenced *eo nomine*. Sentencing the appellant in order to deter others should not have been a serious consideration. It was unlikely that others would follow the appellant's example in council chambers.

[49] In my view the magistrate did not misdirect himself when he took into account the interests of the community and the relationship of trust between the community and the appellant. The appellant is a democratically elected councillor who represents the community and has responsibilities towards the community he was elected to serve. The community is entitled to expect a certain standard of conduct

from him. That expectation or trust is betrayed when a councillor exhibits behaviour, especially criminal behaviour, contrary to the purpose for which he was elected. I do not think that the magistrate saw the community as "a vengeful mass uninterested in the moral and social recuperation of one of its members".[1] His focus was on the relationship between the appellant as an elected councillor and the community he serves. I do not think this is a misdirection. There are numerous examples of relationships of trust, for example parent and child, teacher and pupil, police and the public. A breach of a trust relationship is rightly taken into account in the sentencing process. It was submitted that the appellant should have been treated as an ordinary person and not as a councillor. In my view it was appropriate to have regard to the office of the appellant and the fact that he was carrying out his official duties when the assault occurred.

[50] Nor do I think that the chaos which had erupted should reduce the moral blameworthiness of the appellant. He was not provoked nor was he under threat. He chose to approach the Speaker's precinct. There was no reason for him to pick up a jug of water. He himself said that he was not upset that the motion concerning Sabani had been passed. He was more concerned with the correct procedure which he said should have been followed. If there was chaos, it was for him as a leader to set an example to the councillors who fell under his leadership, and indeed to any other councillors of any political party who were not adhering to the proper standard of conduct in the chamber.

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[1] *S v M (Centre for Child Law as Amicus Curiae* 2007 (2) SACR 539 at para [75], referred to in the appellant's heads of argument.

[51] The magistrate was correct to accord the seriousness of the assault its appropriate weight. This was a violent crime. Kayser was struck so hard that the jug shattered. He was struck with force on a vital and vulnerable part of his body and almost two years later still suffered after effects. He was a fellow councillor trying to restore calm in the chamber.

[52] I do not think that the magistrate was wrong in considering that the appellant was not remorseful. It was clear when he testified in mitigation that he did not accept responsibility for his actions. His repeated assertion that he accepted the court's verdict could not be equated with remorse.

[53] The sentence is a robust one. I might have imposed a lesser sentence but the difference between what I would have imposed and the actual sentence imposed is not so appreciable that it is a ground for interference.

[54] The State conceded that the wording of the condition of suspension needed to be amended. The present wording would mean that the suspended portion of the sentence could be brought into operation for a minor assault.

[55] The following order will issue:

[55.1] The appeal against conviction is dismissed.

[55.2] The appeal against sentence succeeds to the extent that the condition of suspension is amended by the addition of the words "and for which the

accused is sentenced to unsuspended imprisonment without the option of a fine".

_____
J M ROBERSON
JUDGE OF THE HIGH COURT

RENQE AJ

I agree

_____
F Y RENQE
JUDGE OF THE HIGH COURT (ACTING)

Appearances

Appellant: Adv T Ngcukaitobi instructed by Netteltons Attorneys, Grahamstown (heads of argument drafted by Adv A Hattingh)

Respondent: Adv N Turner, Director of Public Prosecutions, Grahamstown