

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR510/16

In the matter between:

**XOLANI KHUMALO  
JABULANI KHUMALO  
KHETHEYAKHE KHUMALO**

**Appellant 1  
Appellant 2  
Appellant 3**

**and**

**THE STATE**

**Respondent**

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**APPEAL JUDGMENT**

**Delivered on: 03 March 2017**

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**ME NKOSI AJ:**

[1] This is an appeal by the three appellants, a father and his two sons, against both their conviction and sentences by the court *a quo* for the crimes of assault with intent to do grievous bodily harm and malicious damage to property. Each appellant was convicted of both crimes on the doctrine of common purpose and sentenced to imprisonment for a period of three years. The appeal is with the leave of the court *a quo*.

[2] The incident that led to the appellants' conviction and sentence is alleged to have occurred on 02 April 2015. The appellants were charged with assaulting the complainant, Philani Hadebe, with the intent to cause him grievous bodily harm, maliciously causing damage to his vehicle and the theft of certain items from the vehicle during the course of the assault upon the complainant. They all pleaded not

guilty to all three charges, with the third appellant denying having been at the scene of the incidents.

[3] There are two conflicting versions given by the complainant and the appellants, respectively, as to what led to the complainant's alleged assault by the appellants. To say the least, neither one of the two versions makes much sense, although I find the complainant's version sounds more bizarre for the reasons set out hereunder.

[4] The complainant's version, briefly stated, is that he was driving along a certain road in KwaHaza, near Pietermaritzburg, when he came across the three appellants walking alongside the road. For some inexplicable reason, they then stopped in the middle of the road, which caused the complainant to stop his vehicle as he was afraid to drive past because there were some people working on the road.<sup>1</sup>

[5] After he had stopped, he was approached by the third appellant who asked him why he "left his sons on the veld"<sup>2</sup>, whatever that was supposed to mean. There is nowhere in the appeal record where an explanation is given by the complainant or any of the other witnesses as to what was meant by the third appellant when he allegedly asked the complainant why he "left his sons on the veld." Strangely enough, neither the magistrate nor the prosecutor had bothered to ask the complainant to clarify the meaning of that question.

[6] In any event, it would seem that the complainant was aware of what was meant by the third appellant, because, instead of asking him for an explanation of his aforesaid question, his evidence was that "I apologised to him and told him that we would later on discuss that issue." However, no further mention is made of "that issue" anywhere in the appeal record.

[7] Nothing was said by the complainant about the third appellant's response to his aforesaid apology. According to his evidence, he was still sitting in his car when one of the appellants opened his car door, and the second appellant pulled him out.

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<sup>1</sup> Page 5 lines 1-4 of the appeal record

<sup>2</sup> Page 5 line 6 of the appeal record

He was then punched by the third appellant, who accused him of being arrogant and said he should be killed and his house should be burnt.<sup>3</sup>

[8] The complainant further testified that he somehow managed to get back into his car, and drove past the appellants to his friend's house, Nkosinathi Cebekhulu, who was called as the second witness for the state. He said the appellants followed him to Cebekhulu's house, where he was assaulted by all three appellants, with the second appellant and/or the third appellant using a stick.<sup>4</sup>

[9] Just like the complainant's version of what triggered off his alleged assault by the third appellant on the street, his version of what triggered off his alleged assault by all three appellants outside Cebekhulu's house is equally confusing. According to his evidence, this was the continuation of the first assault incident by the third appellant on the street, and it occurred without any provocation.

[10] The complainant's version of the second incident is corroborated to a certain extent by the evidence of the other two state witnesses, namely, Cebekhulu<sup>5</sup> and Simphiwe Sithole.<sup>6</sup> Both Cebekhulu and Sithole testified to having witnessed the assault of the complainant by the first and second appellants. However, the complainant's evidence about the third appellant having participated in his assault was not corroborated by either one of the other two witnesses for the state. This means that the third appellant's alleged participation in the complainant's assault was based on the evidence of a single witness, that is the complainant himself and, therefore, had to be approached with caution.

[11] Cebekhulu's evidence was that he did not<sup>7</sup> see the third appellant at the scene of the incident. Sithole's evidence, on the other hand, was that he saw the third appellant coming to the scene of the incident, but he did not see what he did.<sup>8</sup> Therefore, in the light of the alibi defence raised by the third appellant, which was corroborated by his wife, I find that the state's case against the third appellant was

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<sup>3</sup> Page 6 lines 1-9 of the appeal record

<sup>4</sup> Pages 24-25 of the appeal record

<sup>5</sup> Pages 26 to 38 of the appeal record

<sup>6</sup> Pages 39 to 46 of the appeal record

<sup>7</sup> Page 35 lines 1-8 of the appeal record

<sup>8</sup> Page 44 lines 18-25 of the appeal record

not sufficiently strong to establish the presence of the third appellant at the scene of either the first or second incident.

[12] Besides, even if the third appellant's alibi defence was to be rejected as false, I find that the state had failed to prove beyond reasonable doubt that the third appellant took any part in the assault of the complainant or caused damage to his vehicle. For this reason, I do not believe that the doctrine of common purpose is applicable to the third appellant either in respect of the assault of the complainant or the extensive damage to his vehicle. I accordingly find that the court *a quo* had erred in convicting the third appellant of both crimes.

[13] I am now proceeding to consider the first and second appellants' version as to what triggered off the confrontation between them and the complainant. Their version, briefly stated, is that the first incident of their confrontation with the complainant was triggered off by the complainant's allegation that their brother, Sabelo, who is now deceased, had sworn at him.<sup>9</sup>

[14] They testified that they discussed the matter with the complainant and thought that it had been resolved. They said that the complainant then drove away in the opposite direction. However, he later drove back at high speed and hit the second appellant with the side of his vehicle.<sup>10</sup> According to the first and second appellants, it is this incident which led to their second confrontation with the complainant outside Cebekhulu's property.

[15] In essence, the first and second appellants deny that they assaulted the complainant. Instead, they allege that the complainant engaged in a fist fight with the first appellant.<sup>11</sup> This is denied by the complainant, whose evidence about the said incident of assault is corroborated by Cebekhulu and Sithole in all material respects. It was the evidence of all three state witnesses that the complainant was assaulted by the first and second appellants, together with their deceased brother, Sabelo.

[16] Therefore, having considered in its totality all the evidence led before the court *a quo*, I think the learned magistrate was correct in her finding that the

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<sup>9</sup> Pages 48, 49 and 57 of the appeal record

<sup>10</sup> Page 49 lines 10-15 and page 57 lines 18-25 of the appeal record

<sup>11</sup> Page 49 lines 21-25; page 50 lines 1-4 and 58 lines 20 of the appeal record

complainant's version, insofar as it is corroborated by Cebekhulu and Sithole in respect of the first and second appellants, is highly probable and reasonably possibly true.

[17] Consequently, I am satisfied that the court *a quo* was correct in its finding that the state had succeeded in proving beyond reasonable doubt that the first and second appellant were guilty of having assaulted the complainant. I am, however, not in agreement with the finding by the court *a quo* that such assault was with an intention to cause the complainant serious bodily harm. However, I believe that the court *a quo* erred in its finding that the state had also succeeded to prove beyond reasonable doubt that the damage to the complainant's vehicle was caused by any one of the three appellants. I find that there was simply no evidence to sustain such a finding.

[18] Insofar as the sentence imposed by the court *a quo* on the first and second appellants is concerned, I find that the learned magistrate had unduly emphasized the seriousness of the offence over the personal cumulative circumstances of the appellants when she sentenced them to three (3) years imprisonment for their first offence. Taking into account the cumulative personal circumstances of the first and second appellants, I find that the sentence imposed on them induces a sense of shock.

[19] In the circumstances, I propose that the following order should be made:

- (a) that the third appellant's appeal against both his conviction and sentence by the court *a quo* is granted;
- (b) that the first and second appellants' appeal against their conviction in respect of count 1, assault with intent to do grievous bodily harm, is set aside and is replaced with a conviction of assault;
- (c) that the first and second appellants' appeal against their conviction in respect of count 2, malicious damage to property, is granted;

- (d) that the first and second appellants' appeal against the sentence of three (3) years imprisonment imposed upon them by the court *a quo* is granted, and is replaced with the sentence of:
- (i) six (6) months imprisonment for the first appellant, which is wholly suspended for a period of five (5) years on condition that he is not again convicted of the offence of assault, or any other similar offence involving the use of violence which is committed during the period of suspension;
  - (ii) six (6) months imprisonment of the second appellant, which is wholly suspended for a period of five (5) years on condition that he is not again convicted of the offence of assault, or any other similar offence involving the use of violence which is committed during the period of suspension.

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ME NKOSI AJ

I agree:

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HADEBE AJ

Date of hearing : 23 February 2017  
Date delivered : 03 March 2017

**Appearances:**

For the Appellant : Adv WAJ Nicholson  
: 20<sup>th</sup> Floor, The Marine  
Durban

For the Respondents : Adv ZG Mshololo  
Instructed by : The Director of Public Prosecutions  
Durban