THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 253/2013
Reportable

In the matter between

JOHAN IZAK FREDERICK PISTORIUS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Pistorius v The State* (253/13) [2014] ZASCA 47 (01 April 2014)

Coram: Bosielo, Shongwe and Leach JJA

Heard: **13 March 2014**

Delivered: **01 April 2014**

Summary: Criminal appeal – conviction – the appellant convicted of assault with intent to cause grievous bodily harm and *crimen injuria* – trial court relied on the evidence of a single witness – proper judicial approach – whether the court treated the evidence with caution – whether the court below erred in finding that the guilt of the appellant was proved beyond reasonable doubt.

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Erasmus and Rauling JJ sitting as a court of appeal):

The appeal is dismissed.

JUDGMENT

Bosielo JA (Shongwe and Leach JJA concurring):

[1] In the afternoon of 26 December 2006, the appellant met with the complainant on his farm. The appellant confronted the complainant and asked him what he was doing on the farm whereupon the complainant answered that he was a security officer. He then demanded his identification documents and when the complainant failed to produce these, he ordered him to leave the farm. The complainant exited the farm but later the same day laid a complaint against the appellant with the police at Vaal Police Station.

[2] Arising from these facts, the appellant was tried and convicted in the magistrates' court, Standerton, on charges of assault with intent to do grievous bodily harm and *crimen injuria*. The two counts were taken together for the purpose of sentencing and appellant was sentenced to a fine of R5000.00 or twelve months' imprisonment, half of which was

suspended on suitable conditions. An appeal followed by an application for leave to appeal to this court failed in the court below. This appeal is with special leave of this court. The appeal is against conviction only.

[3] The following facts appear to be common cause, or at least not in dispute. The appellant was accompanied by two of his friends, Cronje and Strydom, driving on his farm on the day in question. Two of Strydom's children were sitting at the back of his vehicle. As it was the holiday period, he did not expect the complainant or any other person to be on the farm. On seeing the complainant, he stopped his vehicle and interrogated him as to the reason for his presence on his farm. The complainant explained that he was a security officer. He did not believe the complainant as the construction company that was working on his farm had closed for the holidays. He demanded his identification and when the complainant failed to produce it, he ordered him to leave.

[4] The State called two witnesses, the complainant and Dr Nyembe, who treated him on 27 December 2007.

[5] The appellant testified that he was employed by a security company called Vaal Rand Security, which was contracted by Murray & Roberts to undertake security work on the appellant's farm where they were laying a large pipeline. On this day, he had just arrived on the farm where he relieved his colleague, one Godfrey. One of his duties was to patrol the farm as he had to secure machinery belonging to Murray & Roberts. Whilst walking on the farm he met with the appellant who confronted him and asked him what he was doing there as the contractors had closed for the holidays. When he explained to him that he was

executing some security duties, the appellant remarked that 'die kaffer praat kak'. On being asked how he felt about these words, the complainant replied that he felt that the appellant did not regard him as a human being.

[6] At this stage, the appellant then alighted from his vehicle and started to hit him with the butt of a rifle on his back. When he realised that he was being assaulted, he fled. The appellant chased after him with his vehicle and bumped him several times, causing him to fall to the ground. When he reached the gate, he pressed him with his vehicle against the gate with his vehicle. He managed to jump over the gate when the appellant reversed his vehicle. As he fled, he lost his bag, which, amongst other belongings, contained his mobile phone.

[7] The complainant went to report the incident to the police at the Vaal Police Station the same day. He subsequently consulted with Dr Nyembe. He testified that he was injured on his back and left arm. Furthermore, he explained that he was swollen and had open wounds for which he was sutured and given some medication. He confirmed that he received a J88 form from the police, which he handed over to the police officer after the doctor had completed it as well as a sick note which he gave to his employers. He did not know what the police had done with the J88. He explained that he lost a copy of the doctor's sick note in a fire when his house burnt down.

[8] The complainant was subjected to a very lengthy and robust cross-examination. Suffice it to say that except for a few instances (which I will deal with later) he remained consistent and unshaken.

[9] The state then called Dr Nyembe, the medical doctor who treated the complainant. I hasten to state that his evidence was left unchallenged. Essentially, Dr Nyembe confirmed that he is a qualified medical doctor with three degrees and that he examined the complainant on 27 December 2007. He described the injuries he observed on the complainant as huge haematomas with severe or gross oedema at several and multiple locations on the back. These locations were at the level of the scapula of the right hand. Furthermore, he described a haematoma – a large collection of blood – at the site of the injury.

[10] Dr Nyembe testified further that he observed weals on the complainant's upper back at almost the level of the shoulder but more medial. He described a weal as similar to when a person has been dragged with his face or his naked flesh on the ground, leaving areas slightly open, others dark with blood, others completely closed and swollen with the interstitial fluid. Importantly, he elaborated further that contusions are areas where a person has been struck by some blunt force as opposed to a sharp object like a knife.

[11] Commenting on the possible weapons which could have caused the injuries on the appellant, Dr Nyembe opined that it could be a knobkerrie or sjambok or a pipe or anything which will not perforate or cause the skin to open. Although he was unable to state with precision what object was used to assault the complainant, he opined that it was a blunt and not a sharp object.

[12] Dr Nyembe remained firm and unshaken under cross-examination. However, he conceded that it was difficult to determine the age of the

injuries but insisted that a blunt object had been used. He stated that from a medical point of view, these injuries were serious because a person who has sustained internal injuries of the nature similar to these may suffer kidney failure, stroke or a mini stroke. He conceded that he did not make any note of open wounds in his clinical notes. When asked pertinently if the complainant had any open wounds on his left arm, he stated that he never treated the complainant's arms. However, he qualified his response by stating that he cannot remember seeing wounds on the complainant's arm. He explained that this incident occurred almost two years previously. However, he conceded that if he had sutured the complainant's arms, he would have noted this on his clinical notes.

[13] The appellant and his two witnesses testified. They told a different story to that of the complainant. As the versions of the appellant and those of his witnesses are similar, I will give a general tenor of their evidence. Although admitting that they met the complainant on the appellant's farm in the afternoon of 26 December 2007 and that the appellant asked the complainant what he wanted on his farm, the appellant denied that he uttered the alleged words or assaulted him in any manner whatsoever. The appellant testified that his conversation with the appellant was friendly. He only requested him to leave his farm when he failed to produce proof that he is a security officer as he doubted his explanation. This is because he was not dressed in uniform and because he did not know the complainant. However, he knew about the people working for the contractors on his farm although he did not know them personally. He knew that the contractors had closed for the holidays and that all the workers had left for that reason. He did not expect to see the complainant on his farm. He was never told that there would be people on

his farm to guard the property of the contractors. He never made any independent enquiries to establish whether the complainant was a security officer. He maintained that he never saw any property belonging to the contractors on his farm.

[14] Importantly, he denied bumping the complainant with his vehicle. His version is that the complainant left the farm on his own. When he reached the gate, he jumped over it of his own volition. Whilst on the other side of the gate, he was surprised to see the complainant dropping his bag and running away. Out of curiosity, Strydom went and opened the bag to see what it contained. He could find neither a security uniform nor an identification card.

[15] In cross-examination, the appellant maintained that as it was the 26th December, he did not expect to see any person on his farm. He confronted the complainant to verify why he was on his farm because normally at time of the year (Christmas) they experience instances of stock theft. Out of caution they chase people whom they do not know off the farm. This is the reason why they chased the complainant away. The appellant conceded that he never made any enquiries to verify if the complainant was in truth a security officer.

[16] Both Strydom and Cronje testified as defence witnesses. As I indicated earlier, except for admitting that the rifle in the vehicle was his, Strydom's evidence is the same as that of the appellant. The same holds true for Cronje except that he stated that when they met the complainant he did not see any injuries on him. They both denied any alleged

utterances of the words attributed to the appellant and any assault on the complainant.

[17] The appellant's counsel launched a two-pronged attack against the judgment of the magistrate. The first leg is that the evidence of the complainant being a single witness, ought to be approached with caution, particularly as he had contradicted himself, and further that his evidence is contradicted by Dr Nyembe. The magistrate erred in not doing so, or so it was contended. Secondly, that the magistrate erred in rejecting the appellant's version which was fully corroborated by his two witnesses and in circumstances where it was never criticised. The contention was that, absent any criticism the regional magistrate had no reason to reject it.

[18] The appellant's counsel made much of the fact that the complainant testified that he had open wounds on his arm which were sutured by Dr Nyembe, whilst Dr Nyembe testified to the contrary. It was argued further that the complainant lied when he said that he reported the incident to the police the same day (26 December 2006) as the copy of the charge-sheet reflected the CAS/CR/MAS/MR No as 01/01/07, the suggestion being that this is the official date on which this case was registered by the police for the first time. A rather tentative attack was made against the complainant based on the fact that although he testified that he handed his J88 to the police, it was never produced in court including a doctor's note which Dr Nyembe had given him for his employers. Based on this it was submitted that the state's version fell far short of the required standard of proof beyond reasonable doubt on the count of assault with intent to

cause grievous bodily harm and that the appellant should have been acquitted.

[19] Regarding the count of *crimen injuria*, counsel argued in the main that the appellant's denial should be accepted, more so that the complainant had proved himself not to be reliable as a single witness. In the alternative, counsel submitted that even if it can be found that the appellant uttered the words complained of, the magistrate was wrong to find that they amounted to *crimen injuria* as the words on their own are not injurious and further that the complainant never stated explicitly that he felt that his dignity was impaired, this being an essential element of the charge.

[20] Although conceding that there were some inconsistencies in the complainant's version, read together with that of Dr Nyembe, counsel for the state contended that these are not so material as to affect the probative value of the complainant's evidence; more so, if we take into account that the complainant testified four years after the incident. Furthermore, counsel submitted that the complainant's version was amply corroborated by Dr Nyembe, whose evidence proved that the injuries he observed on the complainant were consistent with the manner of attack as described to him by the complainant. In conclusion, he contended that, even if the magistrate did not criticise the appellant and his witnesses, the inherent probabilities of this case are over-whelming in favour of accepting the State's version over that of the appellant.

[21] On the count of *crimen injuria*, counsel contended that the words allegedly uttered by the appellant are notoriously known and accepted,

given the painful history of this country, to be hurtful and injurious. He submitted that the response by the complainant, that these words made him feel as if he is not human, articulate the deep hurt and humiliation felt by the complainant.

[22] Undeniably, the two versions contradict each other. It is trite that the state bears the onus to prove the guilt of the appellant beyond reasonable doubt and that there is no duty on the appellant to convince the court of the truthfulness of any explanation which he gives. *S v V* 2000 (1) SACR 453 (SCA) at 455b.

[23] After having carefully evaluated the evidence as a whole, including the inherent probabilities, the magistrates delivered a clear and well-reasoned judgment. It is clear from the judgment that the magistrate was alive to the important fact that the complainant was a single witness and importantly, that there is a contradiction between his evidence and that of Dr Nyembe regarding the injuries to his left arm. However, the magistrate remarked, correctly so, that the complainant could not be disbelieved solely due to this. On the contrary, the magistrate found that it would be unfair to criticise the complainant on this as he was never confronted with Dr Nyembe's report so that he could have had an opportunity to reply thereto or even explain it.

[24] The Constitutional Court stated the following about the importance of cross-examination in *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) at para 61:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that

a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Brown v Dunn* (1893) 6 R 67 (HL) and has been adopted and consistently followed by our courts.

… The rule in *Browne v Dunn* is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. [See the speech of Lord Hershell in *Browne v Dunn* above]…

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.'

[25] Based on the salutary approach enunciated in and *Sarfu's* case, I agree with the regional magistrate.

[26] It is important to consider this fact against Dr Nyembe's evidence to the effect that he could not remember seeing the wounds on the complainant's arm as he testified two years after the event, implying that he might have forgotten. Given the known fact that doctors are generally busy, it is possible that Dr Nyembe saw many patients during those two intervening years. It is therefore understandable that he might not remember this incident particularly in the absence of the J88, which would have contained the photographs which could possibly have shed some light on the appellant's injuries. To my mind, the fact that Dr

Nyembe cannot recall the open wounds on the complainant's left arm does not necessarily mean that the complainant is mendacious.

[27] In any event it is trite that contradictions per se do not necessarily lead to the rejection of a witness' evidence. It is essential that proper weight be accorded to the number, nature, importance and their bearing on the other evidence. We are confronted here with a single incident. In the light of the totality of the evidence and Dr Nyembe's explanation, which I find to be eminently reasonable, I do not regard this inconsistency as so serious as to detract from the veracity and reliability of the complainant's version. *S v Mkohle* 1990 (1) SACR 95 (A) at 98E-H.

[28] Importantly, the magistrate made positive credibility findings in favour of the complainant despite the fact that he was a single witness. It is clear from his well-reasoned judgment that he was aware of this fact. He evaluated his evidence cognisant of the warning expressed in *S v Sauls & another* 1981 (3) SA 172 (A) at p180C-H where Diemont JA expounded the salutary approach to the evidence of a single witness as follows:

'In *R v T* 1958 (2) SA 676 (A) at 678 Ogilvie Thompson AJA said that the cautionary remarks made in the 1932 case were equally applicable to s 256 of the 1955 Criminal Procedure Code, but that these remarks must not be elevated to an absolute rule of law. Section 256 has now been replaced by s 208 of the Criminal Procedure Act 51 of 1977. This section no longer refers to "the single evidence of any competent and credible witness"; it provides merely that

"an accused may be convicted on the single evidence of any competent witness".

The absence of the word "credible" is of no significance; the single witness must still be credible, but there are, as *Wigmore* points out, "indefinite degrees in this character

we call credibility". (Wigmore on Evidence vol III para 2034 at 262.) There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean

"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"

(per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

The question then is not whether there were flaws in Lennox's evidence – it would be remarkable if there were not in a witness of this kind. The question is what weight, if any, must be given to the many criticisms that were voiced by counsel in argument.'

[29] On the contrary, the magistrate found that the 'accused version and that of his witnesses is a made up story and is not reasonably possibly true…'.

[30] It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 706; *Kebana v S* 2010 (1) All SA 310 (SCA) para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testifying in his presence in court. As the saying goes he was

steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, *this court* is not at liberty to interfere with his finding.

[31] It is true that the magistrate did not specifically point to any contradictions in the defence version. However, it is clear that the magistrate, in analysing and evaluating the evidence, considered the inherent probabilities of the case. The magistrate found it highly improbable that the complainant, after being confronted about his unwelcome presence on the farm and being ordered to leave which he did peacefully and without any altercation or fight, would, some few hours thereafter, report at Vaal Police Station to lay a charge against the appellant. Moreover, at the time when he had serious injuries to which Dr Nyembe testified. This is inherently improbable, in my view.

[32] On the appellant's version the only explanation for this would be that another person had injured the complainant who then falsely decided to blame the appellant who had done no wrong to him. And it becomes even more improbable if not plainly preposterous, in the light of the appellant's version that he spoke with the complainant in a pleasant and friendly manner that afternoon.

[33] Another unanswered question is: if the appellant did not assault the complainant, why did the complainant run even after he had jumped over the gate? The probabilities are strong that he had been assaulted by the appellant and he still feared that this unlawful assault would continue hence he had to run for his own safety. It is settled law that it is permissible for a court, in determining whether the accused's version is reasonably possibly true, to look at the probabilities. *S v V* above.

[34] It is correct that the appellant was corroborated by both Cronje and Strydom. However, sight should not be lost of the fact that both of them are the appellant's friends and they were having fun together that day. In the circumstances, they can hardly claim or be seen to be impartial and unbiased witnesses.

[35] Having had the benefit of reading the record, I cannot find any fault with the reasoning and conclusion of the magistrate. The probabilities are consistent with the finding that when the appellant and his friend accidentally and unexpectedly came across the complainant on his farm, they suspected him to be on the farm for some criminal activities, became angry, confronted, insulted and assaulted him in the manner described by the complainant. This is so because, according to the appellant, the complainant was not supposed to be on the farm. This is bolstered further by the fact that it appears that during this time of the year, the appellant normally has problems with stock theft on his farm. This suspicion must have weighed heavily with the appellant and his two friends.

[36] Regarding the charge of *crimen injuria*, given the above facts, I have no doubt that the appellant uttered the words complained of. In direct response to a question about how he felt when this word was used, the complainant retorted: 'I felt as if I am not a human being'. This is exactly what the appellant intended to do, namely to dehumanise, denigrate and humiliate the complainant. I find that the magistrate was correct to convict the appellant on this count as well.

[37] It is a well-known fact that these words formed part of the apartheid-era lexicon. They were used during the apartheid years as derogatory terms to insult, denigrate and degrade the African people of this country. Similarly words like ‘boer’, ‘coolie’ and ‘bantu’, the word is both offensive and demeaning. Its use during apartheid times brought untold pain and suffering to the majority of the people of this country. Suffice to say that post-1994, we, as a nation, wounded and scarred by apartheid, embarked on an ambitious project to heal the wounds of the past and create an egalitarian society where all, irrespective of race, colour, sex or creed would have their rights to equality and dignity protected and promoted. Our Constitution demands this. Undoubtedly, utterances like these will have the effect of re-opening old wounds and fanning racial tension and hostility.

[38] It is most unfortunate and regrettable that the appellant’s counsel attempted to defend the use of such a vile word. It needs to be stressed that in line with its ambitious and laudable national project of national reconciliation, the government has taken bold steps to eradicate these obdurate vestiges of the odius apartheid past. One of these steps is the promulgation of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which seeks, amongst other things, to prevent and prohibit hate speech. This resolve to deal with this problem effectively is bolstered by the creation of specialised Equality Courts.

[39] Suffice to say that, given the enormous efforts we have taken as a nation over the past 20 years to reconcile with one another, such utterances have no place in the new South Africa with its vision of a non-sexist and non-racist society founded on human dignity, equality and

advancements of human rights and freedoms for all (s 1 of the Constitution). Such utterances should be visited with severe sentences.

[40] It follows that this appeal is devoid of any merits, and is therefore dismissed.

L.O. BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant	:	P A Van Wyk SC Instructed by: Van Heerden Schoeman Attorneys; Standerton Symington & De Kok, Bloemfontein
For Respondent	:	J J Kotze Instructed by: Director Public Prosecutions; Pretoria Director Public Prosecutions, Bloemfontein