

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Appeal No.: A57/2022

DPP Ref No:10/2/5/1(033/2022)

Date of Appeal: 6 February 2023

In the matter between:

**MABOTJA, PHUTI BRUTUS
APPELLANT**

DELETE WHICHEVER IS NOT APPLICABLE
REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED

..... DATE

SIGNATURE

and

THE STATE

RESPONDENT

Neutral Citation: *Mabotja, Phuti Brutus v the State* (Case No: A57/2022) [2023]
ZAGPJHC 482 (1 May 2023)

JUDGMENT

Karam AJ:

INTRODUCTION

1. The appellant was convicted in the Johannesburg District Court on a charge of assault with intent to do grievous bodily harm.

2. He was sentenced to R6000,00 or 3 months imprisonment, suspended for a period of 3 years on various conditions.

3. Leave to appeal was sought and granted by the trial court against conviction only.

THE EVIDENCE

4.1 Thembile Cynthia Kgashane testified. She is the complainant. As a result of an invitation by the appellant that she spend the Covid 19 lockdown with him at his residence, she moved in with him on 26 March 2020. Subsequent thereto, and as a result of the appellant having received a call from another woman, his attitude toward her changed and he became distant toward her. She informed him that she wished to go home, but he advised her that he did not want her to go home. Several days passed but she felt unhappy and disrespected as he was speaking to other women on his telephone.

4.2 In the afternoon of 1 April 2020 she sat him down and confronted him regarding her unhappiness. He did not respond, was angry and then ignored her. She prepared dinner and they watched television and he continued to ignore her, not speaking to her. She was feeling cold on her legs and feet and requested him to lend her a pair of his socks. He did not respond, turned up the volume of the television, and then went outside taking his telephone with him. After a while she went to the door reminding him that she wanted the socks. He ignored her and continued speaking on his telephone. After some five minutes, she called out to him, reminding him about the socks. He then approached her, ended the call and telling her that he cannot stand for shit, commenced assaulting her. He hit her several times with his fists on her eye, lip and twisted her hand, advising

her that he was going to strangle and kill her that day. She attempted to capture the assault on her cellular telephone but the appellant dispossessed her of same.

4.3 The complainant then managed to stop the assault by running and locking herself in a bedroom, opened the windows thereof and screamed out for help. She witnessed the appellant throwing her cellular telephone out of the residential complex. The police subsequently arrived and she exited the room and explained to them what had transpired. The following day she reported the matter.

5 The State then closed its case and the appellant then applied for a discharge in terms of Section 174 of the Criminal Procedure Act 51 of 1977. Same was refused.

6 The appellant did not testify and the Defence then closed its case.

7.1 The learned Magistrate then called as a Court witness, Vivian Dikona Oliphant. She testified that she responded to complaints on the evening in question on the emergency 10111 number by neighbours of the appellant who had alleged that a person appeared to be held hostage there. Upon her arrival there, the complainant advised her that the appellant had assaulted her. The complainant was emotional and further reported to her that the appellant had a firearm. She searched for a firearm and did not find same, although she saw an application for a firearm but their control room indicated that there was nothing on their system which indicated that a firearm had been issued to the appellant. The witness gave the complainant a J88 form advising her that she could lay a charge against the complainant. The complainant did not wish to lay a charge against the appellant advising that he may lose his job as a result. The witness did not observe any visible injuries on the complainant. On a subsequent date, the witness was shown the complainant's injuries on a telephone when the latter was with the investigating officer.

7.2 The complainant was unwilling to return to her residence due to embarrassment and the gossip that may arise. Ultimately, they transported the complainant to her mother's residence. The appellant insisted on accompanying them thereto as he wished to apologise to the complainant's mother. He duly did so. The witness explained to the complainant's mother as to what had occurred and well as that a case could be opened and that she had given the complainant a J88 form.

ISSUES ON APPEAL

8 The issues to be determined are whether the State had established a prima case requiring the appellant to be put to his defence, and ultimately whether the State had succeeded in proving its case beyond reasonable doubt.

LAW AND ANALYSIS

9 It is trite that in a criminal trial, the onus of proof is on the State to prove its case beyond reasonable doubt. This is indeed a stringent test but is applied in order to ensure that only the proven guilty are convicted. It is further trite that the court is required to adopt a holistic approach in respect of the evidence and its assessment thereof, and use a common sense approach. It is not sufficient if the guilt of the accused appears possible or even probable – his guilt must be proven beyond reasonable doubt.

S v Hadebe & Others 1998 (1) SACR 422 (SCA)

S v Van Der Meyden 1999 (1) SACR 447 (SCA)

S v Phallo & Others 1999 (2) SACR 558 (SCA)

S v Van Aswegen 2001 (2) SACR 97 (SCA)

S v Shackel 2001 (2) SACR 185 (SCA)

S v Chabalala 2003 (1) SACR 134 (SCA)

10 It is further trite that a court can convict on the evidence of a single witness if such evidence is satisfactory in all material respects. The evidence must not only be credible, but must also be reliable.

R v Mokoena 1932 OPD 79

S v Webber 1971 (3) SA 754 (A)

S v Sauls & Others 1981 (3) SA

S v Stevens 2005 1 All SA 1

S v Gentle 2005 (1) SACR 420 (SCA)

11.1 The complainant was a credible witness. Her evidence was clear and convincing. She was extensively cross examined and nothing material emanated therefrom. She was clearly overwhelmed by the incident. Whilst it is apparent that she exaggerated the extent and duration of the assault in her evidence, but this does not detract from the fact that the assault occurred. and was greatly concerned about her privacy, not wanting to be taken home and even requesting Oliphant not to divulge what had occurred to her mother. Her version was further and independently corroborated by the injuries reflected on the J88, which was handed in by consent.

11.2 It is evident therefrom that she reported the matter the following day and the injuries sustained were soft tissue injuries, namely swelling under her lip with bruising, swelling and abrasions to her right hand and slight swelling of the left lower orbit of the eye. All the injuries were likely due to blunt trauma.

Notwithstanding that she was a single witness, I am of the view that her evidence was satisfactory in all material respects.

11.3 It should be noted that whilst Oliphant testified that she observed no visible injuries on the complainant, one does not need to be a medical expert to know that the type of injuries sustained by the complainant, namely swelling and bruising, are not the type of injuries that are immediately visible and apparent and often only manifest with the passage of time.

12 I am of the view that the learned Magistrate was fully justified and correct in refusing the Section 174 application and finding that a prima facie case had been established.

- There are various questions that the appellant was required to answer, inter alia –
- Why did the complainant lock herself in the bedroom, if the appellant had done nothing to her;
- Why did she open the bedroom windows and scream for help if nothing untoward had occurred;
- Why was it necessary for her to scream for help if the appellant had not removed her cellular telephone from her – she could simply have called the police and/or family members to come and rescue her;
- Why did she only exit the locked room when she saw the blue flashing lights of the police vehicle arriving if nothing untoward had occurred;
- Why was it necessary to accompany the complainant to her mother to apologise to her mother, if he had done nothing wrong.
- Where and how did the complainant sustain her injuries.

13 Regarding the failure of the appellant to testify.

13.1 Whilst the appellant had a right not to testify, the nature of the damning evidence against him certainly resulted in a case that he had to answer to. However, and notwithstanding his failure to testify, the stringent onus on the State remains the same and is in no manner altered or diminished.

See S v Boesak 2001 (1) SA 912 (CC)

13.2 Mphanama v S (Case No 1107/2020) ZACSA 11 an unreported judgment of the Supreme Court of Appeal handed down on 24 January 2022. It is further trite that versions put on behalf of an accused by their legal representative do not constitute evidence, unless same is testified to by the accused. The failure by the appellant to testify resulted in the learned Magistrate having to determine the matter on the solely on the evidence presented.

14 Having regard to all of the foregoing, I am of the view that the learned Magistrate was correct in finding that the State had proved its case beyond reasonable doubt and was thus correct in convicting the appellant.

15 In the circumstances, I propose the following Order:

15.1 The appeal against conviction is dismissed.

W KARAM
ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

S YACOOB
JUDGE OF THE HIGH COURT

Appearances:

APPELLANT: Adv T P Ndhlovu

Instructed by Legal Aid SA

Johannesburg Office

RESPONDENT: Adv S K Mthiyane

Director of Public Prosecutions

Gauteng Local Division