THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 468/2001

In the matter between:
JOSEPH KEVIN TRAINOR Appellant

and

THE STATE Respondent

Coram: *Olivier, Cameron and Navsa JJA*

Date of hearing: **17 September 2002**
Date of delivery: **26 September 2002**

Summary: **Breach of prohibition order issued i.t.o the Domestic Violence Act 116 of 1998 – evaluation of evidence – requirements for private defence.**

JUDGMENT

NAVSA JA:

[1] On 10 November 1999 the Wynberg Magistrates' Court issued an order ('the order') in terms of the provisions of the Prevention of Family Violence Act 133 of 1993 ('the FVA') prohibiting the appellant, *inter alia*, from assaulting his wife Melinda Trainor. The FVA was replaced by the Domestic Violence Act 116 of 1998 ('the Act'), which came into effect on 15 December 1999. In terms of s 21 (2) of the Act an order granted in terms of the FVA is deemed to have been made in terms of the Act. In terms of s 17 (a) of the Act it is an offence to breach an order such as was made against the appellant.

[2] On 10 March 2000 the appellant was convicted in the Magistrates' Court for the district of Wynberg of contravening s 17 (a) of the Act on the basis that he had assaulted his wife, the complainant, on 23 December 1999. In terms of s 297 (1) (a)(ii) of the Criminal Procedure Act 51 of 1977 the Magistrate postponed the passing of sentence for one year. The appellant appealed unsuccessfully to the Cape High Court (Thring and Moosa JJ) against his conviction. The present appeal against the conviction is with leave of that court.

[3] The issue in this appeal is whether in breach of the order the appellant assaulted his wife on 23 December 1999.

[4] It is common cause that the order was in force at the material time. At the trial the Magistrate was faced with two versions of what had occurred on 23 December 1999. A brief summary of the complainant's version of events is as follows. She and the appellant had arranged that on the day in question they would discuss the venue at which they would celebrate Christmas day. The appellant was preparing to leave the house for work when he engaged her in discussion on the subject. The complainant expressed incredulity that he wanted to discuss the matter whilst on his way out of the house. She walked with him to his motor vehicle in the garage. He sat in the motor vehicle and was about to drive off when she put her hand through the open window on the driver's side of the motor vehicle and attempted to remove the keys from the ignition. In response the appellant started assaulting her. Initially he hit her hand. He got out of the vehicle and continued hitting and kicking her. He struck her on her arms, face, legs shoulders and back. She smacked him in a bid to get away. She finally managed to make her way out of the garage into the house and phoned the police. The appellant drove off.

[5] I turn to the appellant's version of events. Shortly before he was due to leave for work he attempted to engage the complainant on the question of Christmas day celebrations. He agrees that she stated that he was

'unbelievable'. He interpreted this to mean that she did not wish to discuss the matter and made his was to his motor vehicle. She followed him. The appellant confirmed that the complainant attempted to remove the keys from the ignition at which point he pushed her hand aside. In response she assaulted him. She punched him through the window. He got out of the vehicle and warded off the blows that she rained down on him. He struck her once on the arm in self-defence and kicked her once on the shin after she had kicked him. She then departed and he saw her making a telephone call.

[6] In evaluating the evidence the magistrate said the following:

> 'Even though I have accepted the complainant's evidence, the Court must still look at the accused's evidence and if the accused's evidence is reasonably possibly true, even though I do not accept it, even though I find that he is lying in certain instances, as the rules of the High Court … have put down, then I am bound to accept that version, there should be a doubt in my mind, and the benefit of the doubt will then go to the accused.'

The magistrate, however, did not make any credibility findings. He considered that on the appellant's own version of events, namely, that he struck the complainant once and kicked her on the shin, the appellant was guilty of an assault and in breach of the order.

[7] In the Court below Thring J re-examined the appellant's evidence. He had regard to the appellant's repeated statements that he used force in response to force applied to him and that he kicked and punched back. The

learned judge considered this to be the language of retaliation and not self-defence. He took the view that the complainant and the appellant had indulged in juvenile behaviour. He considered however, that since it was common cause that the appellant was bigger and stronger he could literally have held the complainant at bay and could have walked away from her. Thring J considered that the appellant was provoked but took the view that the appellant exceeded the bounds of self-defence. The Court below held that the appellant was correctly convicted.

[8] The passage from the magistrate's judgment quoted in paragraph [6] demonstrates a misconception of how evidence is to be evaluated. In ***S v Van Aswegen*** **2001 (2) SACR 97 (SCA)** Cameron JA (at **101 a – e**), after observing that this misconception has its origins in cases like ***S v Kubeka*** **1982 (1) SA 534 (W)** at **537 F – G** and ***S v Munyai*** **1986 (4) SA 712 (V)** at **715 G**, referred with approval to ***S v Van Tellingen*** **1992 (2) SACR 104 (C)** at **106 a – h** and ***S v Van der Meyden*** **1999 (1) SACR 447 (W)** at **449 h – 450 b**. In the latter case Nugent J, with reference to the *dictum* in the ***Kubeka*** case, said the following (at **449 h – 450 b**):

> 'It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is "completely acceptable and unshaken". The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or

> improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence …
>
> The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[9] A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence must of course be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong.

[10] In my view the most damning (and unchallenged) evidence against the appellant is that of Doctor Steven Cornell who testified in support of the State's case. Dr Cornell testified that he saw a fresh large bruise on the lateral aspect of her left knee, a fresh bruise on her left upper outer thigh, a small laceration on her right wrist, bruises on her right upper arm, a bruise around her left wrist and a bruise on her right shin. He also noted older bruises that are irrelevant. According to Dr Cornell the injuries sustained

by the complainant were 'fairly severe'. He testified that the complainant would have been struck 'fairly substantially' to sustain the bruising he witnessed when he examined her shortly after the incident in question. His description of the injuries he saw is destructive of the appellant's version that he struck the complainant once and kicked her once and acted only in retaliation and self-defence.

[11] The Magistrate whilst stating that he accepted Dr Cornell's uncontested evidence makes no later mention of it. The Court below does not allude to Dr Cornell's evidence. That evidence controverts the appellant's claim that he applied force to the complainant in the limited manner described earlier and that he acted in self-defence. Dr Cornell's evidence is consistent with the complainant's description of events and should be taken into account when considering whether the appellant exceeded the bounds of private defence.

[12] In dealing with the requirement (when assessing a claim of private defence) that there must be a reasonable connection between an attack and a defensive act C R Snyman in ***Criminal Law*** (4th ed) states the following at **107**:

> 'It is not feasible to formulate the nature of the relationship which must exist between the attack and the defence in precise, abstract terms. Whether this requirement for private defence has been complied with is in practice more a question of fact than of law.'

[13] At page **109** the learned author states:

> 'It is submitted that the furthest one is entitled to generalise, is to require that there should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. In order to decide whether there was such a reasonable relationship between attack and defence, the relative strength of the parties, their sex and age, the means they have at their disposal, the nature

> of the threat, the value of the interest threatened, and the persistence of the attack are all factors (among others) which must be taken into consideration. One must consider the possible means or methods which the defending party had at her disposal at the crucial moment. If she could have averted the attack by resorting to conduct which was less harmful than that actually employed by her, and if she inflicted injury or harm to the attacker which was unnecessary to overcome the threat, her conduct does not comply with this requirement for private defence.'

[14] It is clear from the evidence that the appellant is physically stronger than the complainant. The door connecting the garage to the house was open as was the garage door leading to the street. The appellant testified that the complainant was standing in a position that prevented the car door from being closed. Whilst sitting in the vehicle the appellant considered pushing her out of the way but thought that he could not do so from that position. He did not testify that he attempted to push her away after he got out of the vehicle. On his version of events he struck the complainant on her upper body and kicked her on the shin while they were standing face to face and apart from one another. The appellant testified that he sustained a bruise on his arm but did not supply corroborative medical evidence.

[15] It is abundantly clear that the appellant did not consider walking out of the garage or into the house. He made no attempt to remove the complainant from where she stood to enable him to drive away.

[16] It appears from the evidence that the complainant was angered by the appellant's dismissive attitude to a discussion about Christmas celebrations.

This was the trigger for her subsequent actions. The appellant in turn was angered by her behaviour and instead of getting out of the car and considering a way to pacify or avoid her gave vent to his anger and struck her in the manner corresponding to Dr Cornell's findings. The appellant inflicted greater harm to the complainant than was necessary to overcome the physical harassment she subjected him to.

[17] It is clear from the evidence of the appellant, the complainant and Dr Cornell that the marital relationship was tempestuous. It is also clear that there was a degree of provocation on the part of the complainant. This was a factor taken into account during sentencing.

[18] That the appellant’s wife was prone to exaggeration as submitted by his counsel is evident from the record. It is equally clear that she is an aggressive person. These factors do not detract from the core of her evidence (as substantiated by Dr Cornell) that the appellant assaulted her. The appellant's evidence that during the confrontation in the garage he told the complainant that she was attempting to provoke him in order to have him arrested for breach of the order makes it clear that he was aware that if he assaulted her he would be in breach of the order in contravention of s 17 (a) of the Act. The appeal to absence of *mens rea* must therefore fail. The complainant's initial aggressive and provocative behaviour does not in the

totality of the circumstances excuse the appellant's actions, which the Magistrate and the Court below correctly, in my view, found to constitute an assault, which rendered him in breach of the protection order and in contravention of section 17 (a) of the Act.

[19] In light of the foregoing conclusions the appeal is dismissed.

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M S NAVSA
JUDGE OF APPEAL

CONCUR:

Olivier JA
Cameron JA