REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2019/00100

In the matter between:

LAHYA ND DUMENI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Dumeni v S* (HC-MD-CRI-APP-CAL-2019/00100) [2020] NAHCMD 224 (15 June 2020)

Coram: LIEBENBERG J *et* MILLER AJ
Heard: 28 May 2020
Delivered: 15 June 2020

Flynote: Criminal Procedure – Appeal – Interference with findings of facts by trial judge – Contradictions and deviations in witness evidence – Court of Appeal will not readily interfere with factual findings by trial judge, unless serious misdirection committed – Grounds of appeal – Not permissible to introduce new grounds of appeal in heads of argument – Appellant bound by grounds in the notice of appeal – The court will consider the nature, number

and importance of contradictions – Deviation immaterial – This court cannot fault the trial court in its analysis of the facts and evidence and satisfied with the reasons given – Appeal dismissed.

ORDER

1. The appeal is dismissed.
2. The matter is finalised and removed from the roll.

CRIMINAL APPEAL JUDGMENT

LIEBENBERG J (MILLER AJ, concurring):

Introduction

[1] The appellant was convicted and sentenced on 15 May 2019, in the magistrate's court of Otjiwarongo on a charge of Common Assault. She was sentenced to a fine of N$1 000 or 4 months' imprisonment, of which, N$500 and 2 months' imprisonment was suspended for 1 year on condition of good behaviour. From what can be gleaned from the charge, the case relates to an incident which occurred on 12 October 2018 at the offices of the Ministry of Labour in Otjiwarongo, in which it reads, the appellant assaulted Mr Kleofas Geingob by pushing him in his face with her hands. The appellant paid the fine imposed by the learned magistrate.

[2] Displeased by the outcome of the trial, the appellant lodged an appeal against the finding of the trial court. The notice of appeal filed with the clerk of court dated 4 June 2019, informs this court that the appeal lies against the conviction only.

[3] Mr *Shimakeleni* represents the appellant and Mr *Lilungwe* represents the state. Both counsel agreed in writing, which agreement is filed of record, that the appeal may be decided on the papers and in chambers, thereby waiving oral submissions. The court therefore had regard to the papers filed of record and the heads of argument filed by the respective parties.

[4] Having read the notice of appeal and grounds stated therein, it is quite clear *ex facie*, the notice, that some of the grounds of appeal either overlap or are simply not worthy of consideration as it does not pass muster with the established requirements. In particular grounds 1.3 and 1.7 fall victim thereto. These two grounds are mere conclusions by the drafter and fail to enthuse clarity and specificity and will not be considered by this court. Grounds 1.1, 1.2, and 1.5 overlap with one another and will therefore be considered together and what remains is 1.4, 1.6 and 2. This court therefore only recognises 4 grounds of appeal which will now be dealt with *infra*.

[5] The requirements and purpose of a proper ground of appeal has been well established. In *S v Gey van Pittius*,[1] where *Strydom* AJP (as he then was) at 36H stated:

> 'The purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues. (See further in this respect the judgment of my Brother *Frank* AJ in the matter of *S v Wellington* (1990 NR 20) and the cases referred to therein.)' (Emphasis Added)

[6] In addition, the appellant's heads of argument raise additional issues, *inter alia,* the failure of the state to call further witnesses; the court failing to make an adverse inference for such failure and the magistrate having adopted the wrong approach to the evaluation of the evidence. It is a trite principle of law and practice of this court, that an appellant cannot introduce additional grounds of appeal in his/her heads of argument which were not encapsulated within the notice of appeal. There being no application for amendment of the notice, as provided for in Rule 67(5) of the Magistrate Court Rules, the

[1] S v Gey Van Pittius and Another 1990 NR 35 (HC).

appellant is bound by the grounds raised in the notice of appeal. For this reason the court will further not consider these issues raised.

[7] The general approach by the appeal court, is that the court will be very slow to interfere with factual findings made by the trial court unless there is a clear misdirection committed by that court. Where a misdirection is proven it must be further shown to be material, as not every misdirection will enable the court of appeal to disregard the findings of the trial court. The sentiments expressed in *R v Dhliwayo and Another,*[2] should further be borne in mind:

> 'An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.'

[8] The first ground of appeal relates to the finding of the learned magistrate that the court was satisfied that the appellant pushed the complainant and that the two state witnesses corroborated each other, despite contradictions in their evidence.

[9] Firstly it is necessary to establish what exactly the contradiction was the appellant complains of. The appellant contends that the third state witness and the complainant's evidence contradicted each other on the specific allegation that the appellant pushed the complainant. The evidence of the complainant on this point can be gleaned from page 14 of the record, the paragraph reads as follows:

> '…And I turned back and she (appellant) pushed me in my face on my medical glasses and I nearly fell down but since I am a man I stand my ground.'

On the same point, the third state witness, *Mr Rodney Goroseb* at p. 23 to 26 of the record reads as follows:

> '..**PP**: How was complainant pushed?

[2] *R v Dhliwayo* 1948 (2) SA 677 AD at pages 705 – 706

A: Indicating (hand on the mouth) pushed with right hand around mouth and eyes area'

It is argued on behalf of the appellant that there is a difference between being pushed on the medical glasses and being pushed around the mouth and *eyes area*.

[10] It is trite, that the approach to contradictions and deviations in witness evidence is that it does not, per say, lead to the rejection of a witness's evidence as it may simply be indicative of an error. The court must consider the nature, number and importance of the contradiction. In other words, the court must determine whether the deviation is material and whether it makes a material difference to the evidence viewed holistically.[3]

[11] The court must point out that it is at wits' end in understanding the assertion by counsel for the appellant that there is a material difference between being pushed on the medical glasses and being pushed around the mouth *and eyes area* for the following reasons. Firstly the *area* at which one is being pushed on your medical glasses, which invariably is placed in front of the eye area and resting on one's nose, overlaps with *the eye area*. Secondly, even if the court would consider it to be a deviation, the deviation is immaterial and makes no difference to the proving of the charge, as the charge to which the appellant pleaded, reads, 'Pushing him in *his face* with her hands'. In fact, the versions of the two witnesses corroborate the contention that the complainant was pushed in the face. The record on page 24, clearly demonstrates this, where *Mr Rodney Goroseb* testified,

'...Complainant was at both places and second place he took the register and she followed him and pushed him in the face….

…….

PP: What fight?

[3] *S v Mkohle 1990* (1) SACR 95 (A) where the appeal court approved and applied the dicta in *S v Oosthuizen* 1982 (3) SA 517B-C and 576G-H where it was said: "Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witnesses evidence.'

> **A**: They were stopped when she pushed him in the face he wanted to fight back.
>
> …….
>
> **Q**: Did he come in disrespective manner
>
> **A**: I said he came in without knocking and he went to your side and picked up the register and you stood up and pushed him in the face….'
>
> (Emphasis added)

[12] This court is thus satisfied that the trial court did not misdirect itself when finding that the two witnesses corroborated each other's evidence. The deviation as alleged is not material and does not taint the evidence and findings by the trial court at all.

[13] The second ground of appeal relates to the trial court stating that the appellant made a remark that she will pay witnesses to come and lie, when in fact all the appellant did was to ask who would be responsible for the witnesses' expenses, should she call them to testify. Nothing more need to be said in this regard, other than that the record reflects such remarks by the appellant at page 33,

> '**Acc**: I have defended myself enough and I am sure of my version or I can call witness to come and lie also but if I am given an opportunity to call them I can go and call them to come and testify. I will see if they are willing to testify or I can maybe pay them to lie like the state witnesses paid…. '
>
> (Emphasis added)

From the above passage, this ground is equally without merit.

[14] The third ground of appeal is that the magistrate erred when finding the appellant's version cannot be reasonably possibly true because there were too many versions to the defence case, when in fact appellant only had one version.

[15] Having perused evidence by the appellant and that of her witnesses as it appears on the record, her assertion, unfortunately, cannot be further from

the truth as the defence witnesses' evidence not only materially contradict each other but that of the appellant too. From the record of proceedings, material aspects of the appellant's evidence such as the allegation that the complainant walked into the board room twice and called the appellant 'a stupid arbitrator' and that the complainant grabbed the attendance register by force whereby she nearly fell off the chair; that she stood up and a Mr Hunagal intervened and took the complainant out of the boardroom, was never put to the complainant and state witnesses when they testified.[4] Even worse, these assertions were not supported by either of the two defence witnesses.

[16] The version of the first defence witness differs markedly, in that it states that the complainant came into the boardroom, asked for the diary and the appellant indicated that she is busy with it, whereupon he exited the boardroom. He entered thereafter again and proceeded to 'pull the book'. A further inconsistency is clear where he did not confirm that Mr Hunagal took the complainant out of the office as alleged by the appellant, but stated that he and others intervened and took the complainant out. During cross examination the witness stated that the appellant never stood up from where she sat, but this is inconsistent with the testimony of the appellant who testified that she stood up, where Mr Hunagal then intervened and took the complainant outside.[5]

[17] The second defence witness testified to facts vastly inconsistent with the appellant's and first defence witness's evidence. His testimony states that the complainant firstly pushed the appellant before grabbing the attendance register. He also stated that he intervened and stopped the fight.[6] It is thus clear that the learned magistrate considered these as 'different versions' and this conclusion by the trial court is justified in light of the conflicting evidence given by the appellant and her two witnesses.

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[4] Record P. 27.
[5] Record P. 27, 35.
[6] Record P. 41-44.

[18] This court is satisfied that the trial court carefully considered the evidence before making its findings and rightfully assessed the inconsistencies in the defence case.

[19] The last ground of appeal is that the learned magistrate misdirected herself, without any legal basis in disregarding the evidence of four witnesses who testified that they had not seen appellant pushing the complainant.

[20] The assertion that the learned magistrate does not have a legal basis to disregard a witness's evidence, is unfounded. It is trite that a court of law, sits as trier of fact and exercises its discretion which must be exercised judiciously in consideration of the facts and application of the law. Moreover, this court cannot fault the trial court in its analysis of the facts and evidence and is satisfied with the reasons given. There is no clear misdirection on record which would lead this court to interfere with the credibility findings and/or the evidence upon which the trial court concluded that the appellant is guilty.

Conclusion

[21] Having considered the arguments advanced by the appellant and the state and the grounds of appeal raised, we are satisfied that the appeal against conviction is without merit and falls to be dismissed.

[22] In the result, it is ordered:

1. The appeal is dismissed.
2. The matter is finalised and removed from the roll.

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JC LIEBENBERG

JUDGE

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K MILLER

JUDGE ACTING

APPEARANCES

APPELLANT	A Shimakeleni Of Appolos Shimakeleni Lawyers, Windhoek.
RESPONDENT	B Lilungwe Of the Office of the Prosecutor-General, Windhoek