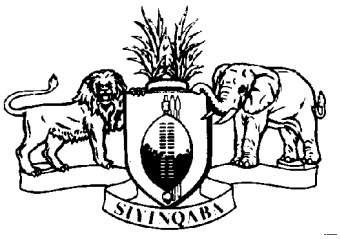

IN THE HIGH COURT OF SWAZILAND

CRIMINAL CASE NO.54_01

In the matter between:

HENNIE ENGELBRECHT	**APPELLANT**
VS	
REX	**RESPONDENT**
CORAM	**MATSEBULA J**
	MAPHALALA J
FOR THE APPELLANT	**MR. HLOPHE**
FOR THE DEFENDANT	**MR. P. DLAMINI**

JUDGMENT

25/02/03

Matsebula J:

The appellant appeared before the Senior Magistrate sitting at Manzini charged with the offence of assault common and in that upon or about the 22nd June, 2000 at A6 Fire Station he did unlawfully and intentionally assault Evart Motsa by manhandling him and threatening then and there to throw him out of a watch tower, causing the said Evart Motsa to believe the said accused intends and had the means forthwith to carry out his threats.

The appellant pleaded not guilty to the charge. At the close of the trial he was found guilty and sentenced for E100.00 fine.

The appellant appeals against the conviction on the following grounds:

"1. The ***court aquo*** erred in law and in fact in finding that the appellant by uttering the words complained of intended assaulting the complainant;

2. The ***court aquo*** erred in law in finding that the complainant had been assaulted in as much as the complainant had himself noted that but for the presence of the other employees he would have been assaulted. This is more so because:

2.1 One of the requirements of assault by threats is that the complainant must believe that the alleged assailant has the means and ability to effect his threats there and then.

2.2 The belief by the complainant ought to be reasonable.

3. Alternatively the alleged assault amounted to a ***deminimis non-curat lex*** and as such ought not be enforced by the courts."

The learned Magistrate accepted the evidence of PW1 about what preceded the threats. It was his finding that PW2 corroborated PW1's evidence. I can find no misdirection on the part of the Magistrate thus far.

The Magistrate also found on the evidence that the appellant admitted having uttered the words that he was going to throw the complainant out of the watchtower and appellant admitted having touched the complainant on his shoulders and uttered the threats but jokingly so said the appellant. As he uttered the words he was holding the complainant by his clothes.

The magistrate found that in view of the fact that the appellant was unhappy about the failure of the complainant to carry out his instructions it was unlikely that he could have patted the complainant in the manner described by him. On the basis of the evidence accepted by the learned magistrate, he rejected the appellant's story. When the manner was argued before us, Mr. Hlophe referred us to page 4 of the typed record of proceedings

where the following question appears:-

QUESTION: "You said you believed that he was not going to effect his threat because of the other people there".

ANSWER: "Yes".

Now, this was an unfair question, a reference to the record which contains the witness' evidence in chief; does not contain any such evidence. The above question and its answer should have been disallowed as an unfair question.

However the question was not disallowed. At page 6 of the recording of proceedings Mr. Hlophe puts the following question.

QUESTION: "You have told the court already that you believed that the accused could not throw you out because of the presence of the others".

ANSWER: "That's not correct. I told the court that I thought he did not carry out his threat because of the presence of the other people". Mr. Hlophe not satisfied with the witness' answer puts another question at the bottom of page 6 which reads as follows:

QUESTION: "A minute ago you realised that he was not going to throw you out because of the presence of the others".

It was at that stage that the public prosecutor objected to the question and said that was not what the witness said. The public prosecutor said the witness had said he thought that the accused did not carry out his threat because of the presence of the others in the tower, not that he believed that the accused was not going to throw him out.

The court sustained the objection.

If either Mr. Hlophe or the Crown prosecutor was not satisfied with the contents of the record the proper procedure would have been to make an application timeously for the amendment of the record while there was a chance that the presiding officer might still have an independent recollection of the evidence which was given before him (see **R VS BRUCE 1954(3) SA 243 (C).** We are in respectful agreement with the law applied in the above case. As this was not

done, we are bound by the contents of the record as it stands.

I now turn to the other legal issues raised during arguments. Mention was made of the de minimis rule ***"de minimis non curat lex".*** Loosely translated this rule means:- "the law does not concern itself about trifles".

According to the learned author HUNT – SA CRIMINAL LAW AND PROCEDURE VOL.II COMMON LAW CRIMES quoting from Smith and Hogan page 265 of Strauss op.cit 345 "there is an implied consent to the degree of contact which is necessary or customary in everyday usage". This would cover cases of a friendly handshake, slap on the back, tug at the sleeve etc: The above are incidences which properly fall under the ***de minimis*** principle. For this rule to apply the assault should be completely trivial so that for all intents and purposes it is disregarded by law. Pointing a loaded firearm at another person in a jovial and joking gesture would certainly amount an assault and the rule would not apply. **R VS DU PLESSES 1956(1) PH H H 115 SA.**

For there to be a punishable assault some degree of force is not always necessary. A mere touch may in the circumstances not be trivial and technically the slightest contact may constitute an assault. In **R VS HERBERT 1900 10 CTR 424** – the accused pulled complainant's hat off his head. This amounted to an assault.

The essential thing about assault is the inspiring of an apprehension of violence.

This can be done by an act or gesture. If the person against whom the act or gesture believes upon reasonable grounds that the person doing the act or gesture has the present ability to effect his purpose an assault has taken place!

In the instant case in view of the circumstances of the case it would

appear that the complainant believed that the appellant would carry out his threat and this would constitute an assault in law. The learned Senior Magistrate was correct in the conclusions he arrived at and I would not find any fault in his reasoning. The appellant by grabbing the complainant and uttering the words “I will kill you” had intended to assault the complainant. The evidence of PW1 established that the complainant and the appellant were in the watchtower, which is about 50 metres high. The appellant grabbed the complainant by his clothes on the chest and pulled him towards him and said he was going to kill the complainant and throw him out of the window.

For the afore-going reasons I would propose that the appeal be dismissed, and it is so ordered.

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J.M. MATSEBULA

Judge

I AGREE:

_____

S.B. MAPHALALA
Judge