19/10/2017

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A611/15

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

19/10/17
DATE

SIGNATURE

In the matter between:

VICTOR NQOBILE MTSHWENI Appellant

and

THE STATE Respondent

JUDGMENT

SELLO, AJ:

Introduction

[1] The appellant, and three co-accused were arraigned in the Regional Court, Ermelo Mpumalanga on eight counts which included six counts of attempted murder, malicious damage to property, possession of

unlicensed fire-arm, housebreaking with intent to assault, assault with intent to do grievous bodily harm and pointing of a firearm. At the commencement of the trial three of the charges (counts 3, 7 and 8) were withdrawn against all the accused.

[2] The trial proceeded with the remaining counts and the accused were found guilty and sentenced to varying imprisonment terms. The appellant was convicted of all charges and was sentenced as follows:

2.1. Count 1 [attempted murder] – 4 years imprisonment

2.2. Count 2 [malicious damage to property] – 4 years imprisonment.

2.3. Count 4 [possession of an unlicensed firearm] – 12 years imprisonment.

2.4. Count 5 [housebreaking with intent to assault and assault with intent to do grievous bodily harm] – 4 years imprisonment.

2.5. Count 6 [pointing of a firearm] – 12 months imprisonment.

[3] The sentences on counts 1, 2, 5 and 6 were ordered to run concurrently with the sentence on count 4. The appellant was therefore sentenced to an effective period of 12 years imprisonment.

[4] The appellant appeals with leave having been granted on petition. It is important to take note that in his petition to this court, the appellant had

applied for leave to appeal conviction only but the judges who granted leave also granted leave to appeal against sentence.

[5] The issues raised in the appeal against the conviction of the appellant are that the trial court misdirected itself by rejecting his version and that of his co-accused and accepting the version of the State, in circumstances where there were material contradictions in the State's case. It was argued on behalf of the appellant that the magistrate should have accepted the appellant's version and that of his co-accused as reasonably possibly true and acquitted him.

[6] The State disagreed with the submissions and argued that the appellant was correctly convicted.

The evidence

[7] The State led the evidence of seven witnesses. The appellant testified in his own defence and led the evidence of the doctor who completed the J88 medical report relating to injuries he sustained at the time of the commission of the offences.

Count 2

[8] Nkululeko Cindi and Baphetile Cindi testified in respect of count 2. Baphetile Cindi's name appears to have been misspelt in the transcript and recorded as 'Petilo Thendi'. For convenience, she is referred to as Ms Cindi in this judgment.

[9] The versions of Nkululeko and Baphetile corroborate each other in material respects. The general tenor of their evidence is as follows. On 22 September 2012 at around 21:20 Nkululeko ran screaming from the back yard asking Baphetile to open the door, as there were people chasing him. Baphetile opened the kitchen door and saw Nkululeko running towards the house. Both ran into the house and she closed and locked the door. Soon thereafter someone started hitting the door from the outside and they heard one of the windows being broken. The door broke open and four people ran the into the house, at which point Nkululeko ran out of the house through another door. These people then gave chase. The fact that Nkululeko exited through another door was confirmed by accused 3 who testified that he saw him exit. Baphetile fled to the bedroom from where she called the police.

[10] The appellant, who was accused 1 in the trial, admitted that after he had been assaulted, he and a group of people chased after Nkululeko who ran to a house shouting for his mother or someone to open the door for him. Nkululeko then broke the door down, went inside the house and threw himself on the floor. The appellant and the group chasing him followed him into the house, whereupon Nkululeko broke a window, jumped out and ran.

[11] The magistrate accepted the versions of the two witnesses that the appellant broke down Baphetile's door and window while attempting to gain access to her house in pursuit of Nkululeko and proceeded to find the appellant guilty. Before this court the appellant did not lead argument

as to how the magistrate had misdirected himself. The magistrate in convicting the appellant of this count took into account the totality of the evidence.

Count 1

[12] Nkululeko was the complainant in count 1. He testified that after he exited the house through the front door, he jumped the fence to the neighbour's yard. Thembinkosi Dube, who was accused 2, appeared and stabbed him on the back. The lighting was good and he could recognise that the person stabbing him was accused 2. He was stabbed once and sustained an open wound. After he was stabbed he managed to jump over another fence onto a street. He once more met up with the people that had previously chased after him and they gave chase again. He ran to his grandmother's place and when he got to the gate he looked back and saw the appellant, who fired a shot at him. He sustained an injury on his left hand from the gunshot fired, for which he received medical treatment at the hospital. Nkululeko testified that during both incidents there was sufficient lighting from the Apollo lights in both areas and he could clearly identify the appellant and accused 2.

[13] The appellant and his co-accused denied stabbing or shooting the complainant. The appellant contended that when he caught up with the complainant, he was being assaulted and stabbed by two boys he knew only as Buti, who is accused 2, and Chiko. He intervened to save the complainant from further harm. The appellant claimed that by the time he

caught up with the complainant, all feelings of revenge had dissipated, hence he sought to protect the complainant from the assault by the group of people, a version denied by the complainant. Accused 2 contradicted the versions of both the claimant and the appellant and denied that he had assaulted or stabbed the complainant. He testified that before he could assault the complainant the appellant appeared and ordered them to stop and he complied. He denied that he carried a knife on the day.

[14] The J88 medical report in respect of this witness was admitted into evidence which confirmed that the complainant had sustained the injuries referred to.

[15] The police conducted a primer residue test on the appellant to determine whether he had discharged a firearm on the day. The results were positive. The appellant argued that the residue was from discharge of a firearm later that night at a different scene and after the incident with the complainant.

[16] The magistrate rejected the versions of the appellant and his co-accused. It was common cause that the appellant had been injured at the wedding and that he gave chase after the complainant with the intent to exact revenge on him. The magistrate found it was improbable that when the accused caught up with the complainant they had a sudden change of heart. The magistrate accepted the version of the complainant

that he sustained the injuries from the assault by the appellant and his co-accused.

Count 4

[17] The state called Daranooa Oluwafemi and Allen Fanazi Mahlenze to testify in respect of count 4.

[18] Daranooa testified that he was a security guard at Dube Tonight Club. He was on duty with his fellow security guard on 22 September 2012. As security guards, they were positioned close together at the entrance of the club. His colleague controlled the entrance gate and he searched people coming in through that gate. At around 01:20 he and his colleague heard a gunshot and he saw his colleague fall down. He heard one shot. He did not know who had fired the shot. He then saw someone walk towards him pointing a pistol. He was able to overpower the assailant and gain control of the firearm. He pinned the person to the ground and called for his bosses. When the bosses arrived at the scene they called the police and his colleague was rushed to the hospital. When the police arrived he handed the firearm and the assailant to them. Daranooa testified that after he had overpowered the assailant the firearm did not discharge. He identified the appellant in court as the assailant whom he had dispossessed of the firearm which he handed to the police.

[19] Daranooa did not know why his colleague had been shot. The colleague had since left the country and was not available to testify.

[20] Under cross-examination by counsel for the appellant, Daranooa stated that he had not seen where the gun shot had come from. He confirmed that he had made a statement to the police following the incident, which statement he had read through and satisfied himself as to its accuracy. Counsel pointed out certain contradictions between the witness' statement and his testimony in court. In his statement he had stated that he had heard gunshots fired outside the premises. Thereafter he saw a man running towards the door pointing a gun at his colleague and proceeded to shoot him. He conceded under cross examination that in his statement he had stated that he actually saw the appellant shoot his. He explained that he had not seen who fired the shot outside, but he did see when the appellant fired a shot at his colleague at the club.

[21] The witness then confirmed that he had actually heard two shots on the day, but only saw when the gun was fired at his colleague. He denied that he was attempting to alter his testimony to fit what he had stated in the statement he had made to the police. He testified that it was the appellant he saw shoot his colleague.

[22] The witness denied the version of the appellant as was put to him in cross-examination. He denied in particular that he 'sorted' the appellant out on the instructions of the owner of the premises. He further denied that either he or his colleague were carrying firearms on the day, and maintained that as security guards they are not issued with firearms. He testified that his statement is incorrect to the extent that it suggests that he had heard more than two shots fired on the day.

[23] Daranooa did observe injuries on the appellant's head, although he was not sure whether he sustained those during the brawl.

[24] The State then called Allen Fanazi Mahlenze. Mahlenze testified that he was a trustee of Dube Tonight. He confirmed that Daranooa performed security services at the premises and was on duty on that day together with a colleague. The establishment does not issue firearms to the security guards.

[25] Mahlenze confirmed that he knew the appellant. He used to see him at the location and also at the club. He confirmed that he saw him on 22 September 2012. When he saw him he was lying on the floor at the main entrance of the club. He had been alerted to what was happening by one of the customers, who told him that there had been a shooting at the entrance. When he got to the reception the appellant was on the floor and the other security guard was lying next to the door at the entrance of the security checkpoint. Daranooa informed him that his colleague had been shot. He did not speak to the appellant either at that point or at any time on that day.

[26] He confirmed that when he arrived at the scene Daranooa was holding a firearm which he stated he had he taken from the appellant.

[27] In cross-examination he testified that on the day he had been inside the nightclub on the first floor. Loud music was playing from a powerful sound equipment and he did not hear any shots on the day. He denied that the appellant had entered the nightclub and that the witness had

told him that he was not welcome there. He maintained that he never saw him inside the club. The first time he saw the appellant was when he was lying on the ground by the entrance after he had been summoned.

[28] He categorically denied that he had given the two guards instructions to assault the appellant. He was questioned whether the premises have a closed-circuit camera and he confirmed that they did. He testified that he had not studied the video of the day nor was he requested by the police to make such footage available. He confirmed that he could provide the footage of that night if it was still available.

[29] The appellant's evidence was that on the night in question, and long after the incident concerning the fight at the wedding, he, in the company of his brother, his girlfriend, accused 3 and other people went to the Dube Tonight Club. On arrival they were searched at the door and were allowed entry into the club. Once inside they found a table and the group sat down. Shortly thereafter he had received a telephone call on his mobile phone and, because of the noise in the club, he left the table to take the call in the toilet.

[30] It turned out he had mistakenly entered the ladies toilet. Mahlenze approached him in the passage and accused him of trying to rape a female patron who was in the vicinity. He tried to explain to him how he ended up in the ladies toilet, but Mahlenze got very aggressive and called his bouncers and ordered them to assault him. He identified Daranooa as one of the bouncers. One of the bouncers assaulted him

and dragged him to the door. At the door the other guard joined in the assault. The appellant fought back to defend himself and Daranooa pulled out a firearm. At this point the appellant grabbed the other guard's firearm which he was carrying on his waist. A struggle ensued over the gun. He did not know how to operate the gun, but it discharged and the other guard was shot. The appellant was then shot on the head by Daranooa and he lost consciousness. He is not aware when the gun was recovered by the police.

[31] He was subsequently admitted to hospital where he was treated for his injury. He was discharged on 24 September 2012 and immediately taken into custody. On 25 September he laid a charge of assault and theft against Daranooa and Mahlenze. The theft charge related to theft of his watch and wallet containing R150.00 by Mahlenze.

[32] The J88 medical report relating to the injuries the appellant had allegedly sustained was challenged by the prosecution. Dr Mtambawe, the doctor who completed the J88, testified in support of the appellant's case. The J88 medical report is stamped 24 September 2012 and states Dr Mtambawe was the doctor who carried out the examination. The attached confirmation of the accompanying annexure, signed on 3 September 2014, states that the examination was carried out on 23 December 2012.

[33] Dr Mtambawe testified that he is not the doctor who examined the appellant on the day he alleges he was examined for the injuries. He

only completed the J88 based on the information he obtained from the appellant's hospital records, because the doctor who had examined the appellant had since left the employ of the hospital and could not be traced.

[34] Dr Mtambawe testified that he obtained the J88 medical form from his manager at the hospital on 3 September 2014. When he received the form it bore the police stamp for that day but had not been completed. He proceeded to complete the form on the basis of the hospital records. Whilst the J88 medical form states that Dr Mtambawe conducted the examination in 2012, he conceded that this was in fact not correct and that the date of 23 December 2012, reflected as the date of examination, was an error.

[35] Based on the information obtained from the medical records, Dr Mtambawe testified that the appellant had sustained two lacerations, one on the left frontal part of his head and another on the back on the left side of his head. The records reflected that the appellant had alleged that he had been assaulted with a gun, so it was concluded that the laceration was a gunshot wound. He confirmed that these were not the doctor's conclusions, but the report obtained from the appellant. Dr Mtambawe concluded that the lacerations sustained by the appellant could not have been caused by being hit with a bottle.

[36] The trial court rejected Dr Mtambawe's evidence as unreliable. Dr Mtambawe's evidence that an assault with a bottle would cause a

laceration and the conclusion therefore that the injury was caused by a gunshot was found to be devoid of credible explanation, in the light of the fact that the appellant had sustained two lacerations at different times on the night in question.

[37] The investigating officer, W/O Petros Msibi, testified that he had attended the scene on the night and had observed that the appellant had sustained head injuries.

Count 5

[38] Tshepo Nkosi and Ayanda Sibanyoni were the complainants in regard to this count. Nkosi testified that on the night in question he was home in the company of Ayanda Sibanyoni. Around 21:00 they heard people banging on his brother's door. His brother is Nduduzi, who is friends with Nkululeko Cindi. He opened the door to check what was happening, and a group of people moved towards the door and one of them shouted 'here is Ndu' (a reference to his brother). He tried to close the door but they forced it open, and the appellant, who was bleeding on the side of his head, grabbed hold of him and pushed him against the room divider. The appellant was carrying a knife and demanded to know where Ndu was, threatening to stab him. At that time someone said he was not Ndu. They then left.

[39] The witness sustained an injury on his arm. Under cross-examination he denied the appellant's version that he never entered the witness' house. He denied that he was mistaken as to the appellant's identity. The lights

in the house were on and he could see clearly. He knew the appellant by sight.

[40] Ayanda Sibanyoni's testimony corroborates that of Nkosi in all material respects. The witness identified accused 2 and 4 as the people who pointed out that the person the appellant had grabbed was not Ndu.

[41] The only challenge to the witness' evidence was that the appellant never entered this house as he was at that time giving chase to Nkululeko who had run in a different direction.

Count 6

[42] Thulani Mofokeng, the complainant in count 6, testified that on the day in question, at around 21:45 he was at home watching television. He heard people shouting outside the door threatening to break the door down if he did not open it. When he opened the door, four boys entered his house, three of them carrying knives and one had a firearm. At the time he recognised only the appellant and accused 2, as they all live in the same area. The appellant was the one carrying a firearm which he pointed at the witness' face. Visibility was good as the lights in the house were on.

[43] On entering the house they told Thulani that he knew who they were looking for. In fact he had no idea what they were talking about because he had not been at the wedding and was not aware of what had transpired earlier. Accused 4 entered the house and informed the others

that the witness was not the one involved in the fight with them, at which point they all left.

[44] Once again the only challenge to the complainant's evidence was that the appellant never entered his house as he was at that time giving chase to Nkululeko who had ran in a different direction.

[45] The appellant testified that he did not commit any of the crimes he was charged for and that the witnesses were falsely implicating him. He asserted that all the witnesses had fabricated their testimonies because they had sustained injuries or had been attacked in the course of that night and they blamed him as they concluded that they had been attacked because the appellant had dragged someone out of the wedding function. This assertion was made notwithstanding that the witnesses testified in respect of distinct and separate encounters with the appellant on the night.

[46] The trial court carefully considered all the evidence tendered. In respect of counts 1, 2, 5 and 6 which related to the appellant's reaction to being assaulted at the wedding, the court found that the witnesses' testimonies corroborated each other in all material respects: all witnesses identified the four accused as having committed the crimes; the witnesses in counts 1, 2 and 6 testified that the appellant was armed with a firearm and two of the witnesses who testified in respect of count 4 stated he threatened them with a knife; the witnesses testified that the appellant and his co-accused were searching for Ndu.

[47] The evidence of Daranooa was that when he encountered the appellant he was armed with a firearm. This evidence that the appellant had a firearm in his possession on the night is corroborated by the evidence of Nkululeko and Thulani Mofokeng who had encountered the appellant at a separate incident earlier that night.

[48] The magistrate concluded that the appellant's assertion that all these witnesses were part of a conspiracy to falsely implicate him could not be reasonably possibly be true. As regards the injuries sustained by the appellant, the magistrate found that the medical evidence did not support the contention that they were as a result of gunshots.

Appeal against conviction

[49] The appellant argued that the witnesses' testimonies were fraught with contradictions. Except for the fact that all the witnesses testified that the appellant was armed with a pistol, Sibanyoni and Nkosi testified that he was armed with a knife, details of the particularity of the contradictions contended for, the extent thereof and their materiality and in relation of which counts, were however not tendered in argument. The argument was made in general terms.

[50] With regard to contradictions in evidence, the principle enunciated in *S v Mkohle* 1990 (1) SACR 95 (A) at 98F–G is instructive. The court stated that:

> 'Contradictions per se do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in S v Oosthuizen

> 1982 (3) SA 571 (T) at 576B – C, they may simply be indicative of an error. And . . . not every error made by a witness 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 witness' evidence.'

[51] See also *S V Mafaladiso En Andere* 2003 (1) SACR 583 (SCA) wherein the SCA reiterated that this is the correct approach to adopt when a court is confronted with contradictions in evidence.

[52] In *S v Safatsa and Others* 1988 (1) SA 868 (A) the following was stated at 890G:

> 'The fallacy in the argument for the accused is that it presupposes that either or both of the witnesses must be untruthful or unreliable simply because their observations did not coincide. Such an approach to the evidence is unsound.'

[53] Sibanyoni and Nkosi were confronted by the appellant and his co-accused separately and at a different location. It is not improbable that the appellant could have threatened them with a knife, as they testified, and that the firearm was held by one of the other accused. Each witness testified as to what each personally experienced and observed when they were confronted by the appellant during separate incidents. In light of the fact that they were confronted at different times and places their observations cannot simply be disregarded because the experience of each was different. These differences do not, in my view, amount to contradictions.

[54] The trial court demonstrated that it was alive to the legal principlee enunciated above when it evaluated the evidence. It's findings on the

credibility of the complainants and the reasons thereof cannot be faulted. The approach the court adopted in regard to the contradictions is consonant with the principle enunciated *Mkohle.*

[55] It is trite that a court of appeal will not reverse a finding of the trial judge where there has been no misdirection on fact by the trial Judge and the presumption is that his conclusion is correct (See: *Rex V Dhlumayo And Another* 1948 (2) SA 677 (A)).

[56] The appellant has failed to demonstrate that the magistrate misdirected himself on the facts as regards his conviction in respect of each count.

[57] In the premises, the appeal against conviction must fail.

Appeal against sentence

[58] The appellant was convicted for various crimes and received imprisonment terms ranging between 12 months and 12 years. All the charges were serious in nature.

[59] It was argued on behalf of the appellant that the sentence in respect of count 4, for the possession of an unlicensed firearm, of 12 years imprisonment induces a sense of shock, entitling this court to interfere therewith.

[60] The basic approach in every appeal against sentence was set out in *S v Rabie* 1975 (4) SA 455 (A) at 857D-E to be the following:

the court hearing the appeal –

"*(a)* *should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial court', and*

(b) *should be careful not to erode such discretion hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.*"

[61] The test under (b) is whether the sentence is vitiated by any irregularity or misdirection or is disturbingly inappropriate (see also *S v Giannoulis* 1975 (4) SA 469 (A); *S v Barnard* 2004 (1) SACR 191 (SCA) at 194C-D; *S v Mayisela* 2013 (2) SACR 129 GNP at [13]).

[62] The court in *S v Malgas* 2001 (1) SACR 469 (SCA) at 478E-H stated that the appeal court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence the appellate court would have imposed had it been the trial court, is so marked that it can be described as "*shocking*", "*startling*", or "*disturbingly inappropriate*".

[63] The charge in respect of count 4, possession of an unlicensed firearm, was brought in terms of s 51(2) of Act 105 of 1997. The section prescribes a minimum sentence of 15 years for a first offender.

[64] The trial court imposed a reduced sentence of 12 years, based on the mitigating circumstances adduced on behalf of the appellant.

[65] In *S v Ncheche* 2005 (2) SACR 386 (W) the Full Court held that sentencing fell primarily within the discretion of the trial court and that the appeal court may only interfere where the trial court has not properly and

reasonably exercised its discretion when imposing sentence. It further held that where that sentencing discretion was properly and reasonably exercised, the appeal court had no power to interfere

[66] All the crimes for which the appellant was convicted of were perpetrated with the use of the very firearm. He discharged the firearm on two separate occasions, resulting in injury to the victims on each occasion, and in the one inflicting serious injury. In the other instance the fact that the bullet only grazed the complainant was not out of design on his part but was purely fortuitous.

[67] I am not in agreement that in the circumstances of this case the sentence imposed on the appellant for the unlawful possession of the firearm can be described as "*shocking*", "*startling*", or "*disturbingly inappropriate*".

[68] In the result I make the following order:

'The appeal against conviction and sentence is dismissed'.

Selep.

M SELLO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:

Selep.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE APPELLANT	R S MATLAPENG
INSTRUCTED BY	PRETORIA JUSTICE SYSTEM
FOR THE RESPONDENT	P W COETZER
INSTRUCTED BY	THE DIRECTOR OF PUBLIC PROSECUTIONS
DATE OF JUDGMENT	19 OCTOBER 2017