THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

20/9/2019
DATE

SIGNATURE

CASE NO: A457/17

In the matter between:

MHLALISENI SIPHESIHLE NGOBESE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

NOBANDA, AJ

Background

[1] The Appellant was convicted and sentenced in the Regional Court in Benoni on 8 March 2017 on the following counts:

Counts 1 & 3

Robbery with aggravating circumstances read with Section 51(2) of Act 105 of 1997. Both counts were taken together for purposes of sentence. The Appellant was sentenced to 15 years' imprisonment.

Count 2

Attempted murder read with Section 51(2) of Act 105 of 1997.
The Appellant was sentenced to 5 years' imprisonment.

The Appellant was therefore given an effective sentence of 20 years' imprisonment.

[2] The Appellant applied for leave to appeal against his conviction and sentence. Leave to appeal was granted in respect of count 2 only. This appeal proceeds on conviction only.

Grounds of Appeal

[3] It is contended on behalf of the Appellant that there was no evidence presented at trial to prove that the Appellant intended to kill the complainant. Furthermore, that the wounds inflicted upon the complainant cannot be said to be dangerous or life threatening. Accordingly, that the Appellant should have been found guilty of assault with intent to do grievous bodily harm instead of attempted murder.

Summary of Evidence

[4] Both State witnesses, Ms Kanjera and Mr Mlambo testified that on the day of the incident, 1 September 2016 at around 22h00 at Etwatwa, they were sitting in the dining room at Mr Mlambo's home watching television when three intruders entered the room. Each intruder was holding a firearm. Upon entering the room, one of them (later identified as the Appellant) pointed his firearm at Mr Mlambo. Mr Mlambo, who was sitting with his back to the intruders, asked them who they were; in the process, taking hold of the firearm pointed at him. Appellant ordered him not to hold his firearm and threatened to shoot him. They then instructed them to lie down on the floor on their stomachs. They obliged. Then they started assaulting Mr Mlambo by kicking him in the body and head saying they wanted money and threatening to kill him. Appellant then assaulted Mr Mlambo with a firearm on his mouth and above the right eye. At the same time, the Appellant fired at Mr Mlambo injuring him on his left upper thigh. The bullet also went through his right thigh. They then robbed Mr Mlambo of approximately R50 000.00 in cash that he had kept to pay the brewery for the tavern he was operating. They also took R5 000.00 cash from Ms Kanjera. They further robbed them of their cellphones and fled with Mr Mlambo's 4X4 motor vehicle.

Applicable legal principles

[5] There is a contradiction between the two State witnesses on how many shots the Appellant fired. According to Ms Kanjera, the Appellant fired three shots at Mr Mlambo whilst Mr Mlambo recalls only one shot that struck him. The magistrate found the contradiction to be immaterial. I disagree, this contradiction is material in that the number of shots fired at Mr Mlambo by the Appellant would determine whether the Appellant had the intention to kill Mr Mlambo or not.

[6] During the argument, the Appellant's counsel contended that the magistrate in his judgment dealt with that issue as if only one shot was fired. As such, that it should be accepted that the Appellant fired only one shot at the complainant.

[7] Counsel for the State conceded that only one shot was fired by the Appellant. Notwithstanding, the State contended that even if the Appellant had fired only one shot, judicial notice can be taken that the area where the Appellant shot the complainant, carries *femoral arteries* which if ruptured, could have led to the death of the complainant. Ineluctably, the wound inflicted was potentially life threatening.

[8] In addition, the State further contended that in any event, the force used by the assailants was excessive in that it exceeded the bounds of trying to induce the complainant to submission, to take his property. As such, that the circumstances of this case are distinguishable from the case of ***S v Mahlamuza and Another***[1] relied upon by the Appellant for his contention. The State relied on the previous decision of the same division in ***S v Moloto***[2] for its contention. This reliance by the State on ***Moloto*** (*supra*), in my view, is misinformed. The finding in ***Moloto*** is no different from what was found in the ***Mahlamuza*** case.

[9] In ***Mahlamuza***, one of the appellants, during a robbery, had fired a shot at close range towards one of the complainants missing him, after threatening to shoot him. Thereafter he hit the complainant with the butt of the revolver on his head causing him to fall over. After tying him up, the appellants proceeded to fiercely kick him in the ribs. Thereafter they robbed the complainants of their belongings. Both complainants were admitted to hospital after the assaults. The trial court convicted the appellants of robbery with aggravating circumstances and attempted murder. The convictions were upheld by the High Court but the High Court granted the appellants leave to appeal to the Supreme Court of Appeal.

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[1] 2015 (2) SACR 385 (SCA)

[2] 1982 (1) SA 844 (A)

[10] In the Supreme Court of Appeal, Meyer AJA discussed the principle in ***Moloto*** that the court is entitled to find the accused guilty of attempted murder where there was excessive violence that puts the victim's life in danger, that exceeded the limits and bounds of robbery. In addition, the State still has to prove beyond reasonable doubt that the accused also had the intention to kill and not merely to use force aimed at temporarily incapacitating the victim. Based on the evidence the Court held:

> *"[13] The totality of the evidence also did not prove beyond a reasonable doubt, contrary to the findings of the courts below, that the appellants had the further intention (either directly or by way of dolus eventualis) to kill Mr or Mrs Neethling. The evidence established that the violence used against them was perpetrated only with the intent of depriving them of their belongings, by inducing them to submit to the deprivation and to overcome any resistance they might have offered.*
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> ...
>
> *[16] All the acts of violence used against Mr and Mrs Neethling formed part of the robbery. The ineluctable inference to be drawn is that the killing of Mr or Mrs Neethling was not desired nor was the possibility of killing them foreseen. It follows that the convictions of the appellants on the charges of attempted murder relating to Mr and Mrs Neethling (counts 2 and 3) and the sentences on these counts must be set aside."*

[11] Other than Ms Kanjera's evidence, contradicted by Mr Mlambo, there was no other further evidence either in the form of ballistic reports or any other evidence to support Ms Kanjera's testimony that the Appellant fired three shots. Counsel for the State conceded that there was no further evidence supporting Ms Kanjera's testimony. As already stated above, the State conceded that only one shot was fired. The magistrate also appears to have accepted that the Appellant fired only one shot. To that end, the magistrate found:

"Both Mr Mlambo and Ms Kanjera impressed the court as witnesses. They both gave their evidence in a logic chronological manner. I could not find any improbabilities in their version. It is so that Ms Kanjera testified that three shots were fired. Mr Mlambo however said that he was struck with one shot.

He did not make any reference to any further shots. That can be viewed as a contradiction. However, to my mind it is not material in the circumstances. One must bear in mind that it was a very dramatic event which lead (sic) to witnesses [indistinct 11:58:11]. It is also true that shots do eco in small enclosures and maybe the eco was such that Ms Kanjero thought that there were three shots [indistinct 11:58] will not affect the credibility of any of the two witnesses."

[12] It is therefore baffling why the magistrate found that Appellant was guilty of attempted murder when the magistrate did not give any reasons why he convicted the Appellant of attempted murder. The magistrate merely states that the State has proved the accused's guilt beyond reasonable doubt on the charges proffered against him.

[13] Accordingly, in light of the material contradictions between the State witnesses and the absence of any further evidence tendered by the State, I find that the State failed to prove beyond a reasonable doubt that the Appellant intended (whether directly or by way of *dolus eventualis*) to kill the complainant when he fired that shot. Counsel for the State contended that it is probable that the Appellant was a bad marksman and inadvertently shot the complainant in the thigh. This contention is far-fetched and unsubstantiated. The complainant was shot in the thigh whilst lying on the floor. If the Appellant intended to kill the complainant, he could have aimed at his upper body.

[14] Although the bullet wounded not only one but both complainant's thighs, it cannot be said that the wounds inflicted upon the complainant under the circumstances

were life threatening. The State's contention that the wound inflicted was potentially life threatening goes beyond what the court can take judicial notice of. As such, it follows that the conviction on a charge of attempted murder cannot stand and ought to be set aside. The Appellant should have been convicted of the offence of assault with an intention to do grievous bodily harm.

Sentence

[15] Although it is not clear whether the Appellant was granted leave to appeal against sentence too, this court can interfere *mero moto* with sentence where it sets aside a conviction and finds the Appellant guilty of another charge[3].

[16] In terms of the provisions of Part IV of Schedule 2 of Act 105 of 1997, a first offender may be sentenced to imprisonment for a period of not less than 5 years for assault causing a dangerous wound using a firearm. It has already been found that the wounds inflicted upon the complainant were not dangerous wounds. As such, these provisions are not applicable in *casu*.

[17] Notwithstanding and taking into account the personal circumstances of the Appellant, the aggravating circumstances of the case and the interests of the society at large, I am of the view that there is nothing special about the circumstances of the Appellant other than the fact that he is a first offender and that has a young child with his live-in girlfriend of 21 years.

[18] the aggravating circumstances, on the other hand, are that the Appellant has been convicted of a serious crime as it was committed with a dangerous weapon, to wit - a firearm during a robbery. It is fortunate that the complainant did not sustain more serious injuries than the ones he sustained. The bullet did not only injure the

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[3] S v Bogaards 2013 (1) SACR 1 (CC)

complainant in only one leg but in both legs. The fact that the Appellant fired at the complainant whilst the complainant was already subdued and lying on the floor on his stomach shows the excessive nature of the force used. The Appellant and his co-perpetrators, in addition, kicked the complainant in the head and body and the Appellant struck him with a firearm on his mouth and right eye whilst lying in that position. All this violence was unnecessary. As such, the aggravating factors far outweigh the mitigating factors in favour of the Appellant. The interests of the society demands that the society should be protected from such violent crimes by the sentences imposed and to deter others.

[19] The Appellant's counsel proposed a sentence of three (3) years imprisonment while the State contended that the court should not interfere with the sentence imposed because of the excessive violence used in perpetrating this crime. In addition, the counsel for the State contended that the sentence imposed should not be ordered to run concurrently with the sentence imposed in counts 1 and 3. The State contended that the offence was a separate offence to that in counts 1 and 3 in that the assault was unnecessary as the complainant was already subdued when he was shot.

[20] I agree with the counsel for the State. As indicated above, the violence used was excessive and unnecessary as the complainant had already been subdued. The subsequent shooting of the complainant constitutes a separate offence even if it was part of the offence of robbery with aggravating circumstances. The robbery was aggravated because the Appellant used a firearm in perpetrating that offence. Even if the Appellant had not fired the firearm, the Appellant would still have been convicted of robbery as contemplated in Section 51 (2) of Act 105 of 1997. Therefore, by firing at and wounding the complainant, the Appellant committed a separate offence and in this case, assault with the intention to do grievous bodily harm.[4]

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[4] See: Mahlamuza (supra) at [10]

Order

[21] In the premises, I make the following order:

1. The appeal against conviction is upheld;

2. The conviction by the magistrate is set aside and substituted as follows:

Count 2

2.1 The accused is found guilty of the alternative offence of assault with intent to do grievous bodily harm;

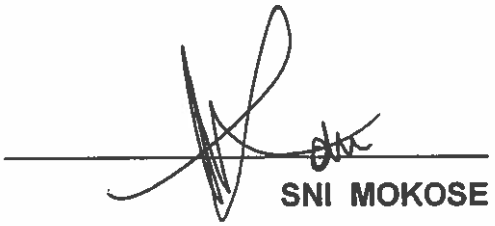
2.2 The accused is sentenced to five (5) years imprisonment;

3. The sentence imposed in count 2 is to run consecutively with the sentence imposed in respect of counts 1 and 3.

4. The sentence imposed is ante-dated to 8 March 2017.

PL NOBANDA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree and is so ordered



SNI MOKOSE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Heard on	:	12 September 2019
Judgment delivered on	:	20 September 2019

Appearances:

For the appellant	:	Adv L.H Van Wyk
Instructed by	:	Legal Aid SA
For Respondent	:	Adv E Leonard
Instructed by	:	Office of the DPP