REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A03/2019

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

27/10/2020
DATE

SIGNATURE

In the matter between:

THABO AARON LEGODI APPELLANT

and

THE STATE RESPONDENT

JUDGEMENT

MAAKANE AJ

INTRODUCTION

[1] The appellant was convicted in the Regional Court of Soshanguve on two counts, namely robbery with aggravating circumstances read with section 51 (2) of Act 105 of 1997, count 1, and one (1) count of Attempted Murder, being count two (2).

[2] He was throughout legally represented and following his conviction, was sentenced as follows:

2.1 Count 1; Fifteen (15) years imprisonment.

2.2 Count 2; Eight (8) years imprisonment.

2.3 It was ordered that five (5) years of the sentence in count 2, run concurrently with the sentence in count 1.

2.4 In terms of section 103 of the Firearms Control Act 60 of 2000, Appellant was further declared unfit to possess a firearm.

[3] This appeal is against his conviction only and is with leave of that court.

GROUNDS OF APPEAL.

[4] The grounds of appeal are very lengthy and quiet detailed. However, the issues were curtailed as a result of the formal admissions made by the Appellant at the commencement of the trial.

[5] For that reason, the main and relevant issues on this appeal are;

[5.1] the identity of the Appellant. In other words, whether on the evidence led it can be said that, the state has succeeded in proving beyond reasonable doubt the identity of the Appellant. More specifically, whether on the evidence presented, it has been proved that the Appellant was one of the three (3) robbers who attacked the complainant and his wife on that day.

[5.2] the presence or not of contradictions between what the complainant stated in his written statement on the one hand,

and his *viva voce* evidence in court on the other. If so, whether such contradictions are material in nature and or affect the credibility of the complainant, given the general circumstances under which his statement was obtained.

PLEA AND FORMAL ADMISSIONS.

[6] The Appellant pleaded not guilty to all the charges. He thereafter through his attorney, made certain formal admissions, which were fully set out in a written statement. The written statement was handed in as an exhibit. The admissions were with the Appellant's consent, recorded and accepted as formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 ("the CPA").

[7] To be more specific, the written statement reads as follows.

Admissions in terms of Section 220 of Act 51 of 1977

I the undersigned

Thabo Legodi

State as follows:

I am the accused in this matter and make this statement freely and voluntarily, without undue influence and while I am in my sound and sober senses.

I admit the following:

Count 1

1. *That the incident happened on or about 24 January 2018, at or near block R, Soshanguve, in the Regional Division of Gauteng North.*
2. *That the complainant, Sello David Moima, was unlawfully and intentionally assaulted by being pointed with a firearm.*
3. *That a Toyota Corolla motor vehicle with registration number FNW 720 GP, a Tom Tom GPS and Pioneer car radio were taken by force from him.*
4. *That the total value of the items was R22 000.00.*
5. *That the items were in his lawful possession.*

Count 3.

1. *That the incident happened on or about 24 January 2018, at or near block R, Soshanguve, in the Regional Division of Gauteng North.*
2. *That the complainant, Sello David Moima, was unlawfully and intentionally shot with a firearm.*

Signed on this the 12th day of February 2019 at Soshanguve.

_____

(Accused)"

EVIDENCE.

[8] Sello David Moima, the complainant in the second count, the attempted murder charge, testified that prior to the incident in 2018, he was renting a residential place. He then developed a desire of having a house of his own. He drove around Soshanguve to see if

he could find a vandalised or abandoned house that he can repair and renovate. Having found and identified one such a house, he then went to the municipality to check on the status of the house, particularly ownership thereof. This is house no 1108 Block R, in Soshanguve.

[9] Following enquiries he went and met a person known as Victor, who in turn took him to Winterveld, which happens to be the Appellant's parental home. The idea was to meet the Appellant's mother, regarding that house. Unfortunately, the mother was not home, having gone to work. He instead met the Appellant's younger brother, who later called the Appellant and both of them had a conversation with the complainant. This was on a Monday. It appears that the complainant was meeting the Appellant for the first time.

[10] After being referred to different places including Hammanskraal, complainant was ultimately able to find and meet the real lawful owner of that house, namely Ms. Legodi. They met in Mamelodi. Ms.

Legodi is an elderly person. She was throughout represented by her son, Mr Titus Legodi. Ms Legodi is the grandmother of the Appellant.

[11] Following negotiations between the parties, an agreement was reached. The agreement reached with Ms Legodi was that complainant will settle an amount of R35 000.00, which at that time was owing to the municipality. He will thereafter be entitled to the title deed of the house. The house was vandalised and he had to repair same at his own further costs. Complainant complied and did fix the house. He thereafter took occupation thereof, with his wife and three children.

[12] Sometime after taking occupation, Appellant came to the house. Appellant went on to tell complainant that the house is his, as his granny has given it to him. He further told him that he has a buyer for the house and that if the complainant wants it he must pay him R70 000.00, failing which he must vacate the house. The two could not agree. Complainant produced and showed Appellant the signed

agreement. However Appellant disputed Ms Legodi's signature, alleging that same is forged.

[13] After about a few weeks or so, Appellant again came to the house. It was on a Saturday, about noon. Complainant was home. Appellant repeated what he said on a previous occasion, namely that complainant must pay him R70 000.00 for the house or vacate same. The complainant then invited him and both of them drove to another section of Soshanguve Block R where a family ceremony or funeral was held. Ms Legodi and other family members were present at this ceremony.

[14] Ms Legodi together with other family members present, confirmed before the Appellant the validity or authenticity of the contract she concluded with the complainant. The Appellant was further reprimanded by Mr Legodi his uncle in the presence of other family members, not to interfere with or disturb the complainant in the occupation and enjoyment of the house. It was even suggested that they go to the police so as to resolve this issue once and for all.

However, Appellant refused and said he does not was the police to get involved.

[15] On the third occasion, when he came, the complainant was not home, but his wife was. The wife did give evidence and confirmed this. It was sometime in December 2017. Again on this occasion, the Appellant told the wife that the house belongs to him and that the complainant refused to co-operate with him. He threated to burn down the house, while they are inside.

[16] On the day of this incident, the 24 January 2018 at about 02h00, he was inside the said house sleeping, together with his wife and children. He heard a sound like a hammer hitting the carport outside. He went and opened the door, intending to check outside. After unlocking the burglar door, he was surprised to be approached by two men. They started to force open the security door, while he tried to close same. Both men had covered their faces, one with a hat and another with stockings.

[17] As they were fighting for the burglar door, a third person approached, brandishing a firearm. He had also covered his face with stockings. The first two attackers entered the house, while the third was holding him around on the side of his armpit, putting and pointing the firearm on the side of his stomach. This attacker then said to complainant:

"Do you think you are clever? Do you think you can be more clever than me?"

[18] At that moment, he recognised the voice as being that of Thabo, the Appellant. After uttering these words, this third attacker, the Appellant then shot him on his stomach. He fell on the ground. One of the assailants who was inside the house came out and said to the Appellant:

"No T-man..... Do not finish him off".

[19] This assailant also suggested that the complainant be taken inside the house because neighbours must have heard the gun shot, and

may raise alarm. Neighbours should not see what was happening. They carried him in and left him at the door of the house. His wife tried to pull him to the bedroom. Unfortunately, both of them fell on the passage and his wife left him there.

[20] At that time, Appellant was holding the couple's second child putting the gun to his head and threatening to shoot the child if anyone was to make noise. He stated that at that moment, Appellant removed the stockings he had covered his face with. He gets the impression that he was suffocating due to the covering stockings. It was therefore at this stage that he was now able to see the Appellant's face and satisfy himself that it is indeed the Appellant. He hereafter never put back this stocking or cover his face again. He removed it up to the forehead. Inside the house, electric lights were throughout on. That is why he was able to identify the Appellant.

[21] The attackers then asked his wife how to open the carport or garage wherein the car was parked. Complainant instructed his wife to open the carport for them so that they can leave the child alone. His wife

complied. However, they were unable to get the car started. They again took his wife to show them how to get the car started. Once again she complied and showed them.

[22] While inside the house and before they drove off, these assailants took a Tom-Tom GPS navigator as well as a face clip of the car radio. Complainant testified that he normally removed these items out of the car and keep them overnight safe in the house. These items were therefore, taken from inside the house. Appellant and his accomplices hereafter went out of the house, and drove off in the complainant's car.

[23] The police arrived at his home. After four hours, an ambulance also arrived and transported him George Mukhari Hospital. He was admitted from that day being 24 January 2018 up to the 14th February of 2018. He had to undergo about three (3) operations. The police came to the hospital during one of the scheduled operations and there insisted on taking his statement. I will deal with this issue later.

[24] Upon his discharge from hospital, he went to his parental house, and no longer at his house. The same police officer Constable Segokodi, the investigating officer who came at the hospital came to him, at his parental house. The investigating officer told him that his car has been found with two suspects. Because he had already told them that he knew one suspect, namely the Appellant, he must come and show them where he, the Appellant lives. This was to determine whether or the Appellant was one of the suspects found with the car. However when they arrived at his house, Appellant was there and duly arrested.

[25] Complainant was subjected to thorough cross examination. He confirmed that indeed the Appellant did remove his covering stockings. The cross examination was to a very large extended, based on what the defence submitted were material differences between his written statement on the one hand, and the evidence he gave in court. On the other. In this regard, the complainant fully explained the general circumstances under which he made the

statement. This was done during a scheduled operation while still admitted in hospital. All in all, he stuck to his version.

[26] Complainant's wife, Betty Ledwaba testified and in all material respects corroborated the complainant with regards to the events of the 24 February 2018 when they were attacked by the three assailants. More specifically, she confirmed the shooting of the complainant and that the robbers also stole their car, car radio as well as a Tom Tom GPS Navigator. She confirmed, she also went out with the robbers to open the carport for them and also assisted and showed them how to get the car started. She did this because the robbers were threating to shoot their child if they don't submit and co-operate.

[27] Most importantly she confirms that she knew the Appellant and had seen him before. On one Saturday he came to the house in the absence of the complainant and told her about the house. It was during December 2017. He told her that the house belongs to him

and that the complainant does not co-operate with him regarding the house. He told her that.

[28] Finally she confirms that after shooting the complainant, Appellant pulled up his face cover the stockings up to the forehead, she was therefore able to fully and properly identify him as the Appellant. Appellant never hereafter, pull back the stockings or cover his face again.

[29] Under cross examination she confirmed that the Appellant did after shooting, remove the stocking covering his head. She gets the impression that he was uncomfortable or suffocating. She also stuck to her version.

[30] The Appellant himself did testify in his own defence. He confirmed all the different instances and occasions on which he met and spoke to the complaint about the house. He also confirmed the two meetings at Winterveld when the complainant came to speak to his mother about the house that is house 1187 Block R Soshanguve.

[31] He referred to various other occasions on which he met the complainant and that they did have discussions about the house situated at 1187 Block R. He confirmed an occasion when they went to meet his own family at a family ceremony or funeral and was told by all present that there is indeed an agreement in place that complainant pay all arrear amounts due to the municipality and take possession and occupation of that house.

[32] Regarding the day of the incident, being the 24 January 2018, he denied that he was at Block R Soshanguve on that day. He further denied that he was one of the three assailants and or that he has All Star snickers. He stated that he was at Winterveld on that day.

[33] Under cross examination he stated that he left the house during 2014, and that until 2017 the house was unoccupied, vandalised and damaged. He conceded that he did not and would not financially have been in a position to pay the R35 000.00 arrear amount owing to the municipality in respect of this house. It follows therefore that

he also would not have been able to repair and fix the vandalised the house and or restore to it a fully habitable state as the complainant did.

[34] Constable Keorapetse Segokodi testified that he is the Investigating Officer in this case. He is the one that took the complainant's statement. He stated that at that time, complainant was still admitted in hospital. At the time he wanted to obtain the statement, the doctors were also busy and had to attend to him. There was a scheduled operation on him. The doctors told him they were still busy with the complainant. He insisted he wants to take the statement whereafter, doctors can continue with their medical attendance and operation on the patient, that is the complainant.

[35] Under cross examination he conceded that having spent about 40 to 50 minutes with the complainant, he may have left out certain information because his statement is only about one and a half pages, and therefore simply a summary of what he was told.

LEGAL POSITION AND ANALYSIS

[36] The legal position is that the powers of the court of appeal are limited. More specifically a court of appeal is not entitled to interfere with the findings of fact of a trial court unless the appeal court is satisfied that the trial court was wrong.

[37] In S v Francis 1991 (1) SACR 198 (A) the then Appellate Division described these limited powers of the court of appeal as follows:

"The powers of a Court of Appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of witnesses' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of Appeal on adequate grounds that the trial court was wrong in accepting the witness evidence- reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising of a witness, it is only in

exceptional cases that the Court of Appeal will be entitled to interfere with trial court's evaluation of oral testimony (at 198(j)-199(a))".

[38] Regarding the evidence on record, it is clear that there are two conflicting versions, that of the state on the one hand, and also that of the Appellant on the other. It is trite that in such a situation, the correct approach is for the court to consider all the evidence in its totality. The court is not supposed to adopt a piecemeal approach or deal with the evidence in compartments.

[39] This approach was explained in S v Janse van Rensburg 2009 (2) SACR 26 (C) as follows:

"Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However, the dictates of logic do not displace the standard of proof required either in civil or criminal matters. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider

not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold, in this case proof beyond reasonable doubt. (See S v Saban en 'n Ander 1992 (1) SACR 199 (A) at 203j to 204a-b; S v Van der Meyden 1999 (1) SACR 447 (W) at 44g-j-45a-b and S v Trainor 2003 (1) SACR 35 (SCA) at para 9)."

[40] Similarly in S v M 2006 (1) SACR 67 (SCA) the SCA per Cameron JA, as he then was, stated the proper approach to be adopted as follows"

"The point is that the totality of the evidence must be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the state that any reasonable doubt about the accused's guilt is excluded."

(at paragraph 8)

[41] In S v Singh 1975 (1) SA 227 (N) the correct approach of a Court of Appeal to two mutually destructive versions is stated as follows:

"*Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witness and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused. Must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and the defence witnesses but also the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a*

court has applied its mind in the proper manner in the abovementioned example is to be found in its reason for judgement including its reasons for the acceptance and the rejection of the respective witnesses."

[42] The important question to be answered is therefore that upon proper consideration, can it be said that the trial court erred and or misdirected itself in the analysis of the evidence and its final findings and conclusions.

[43] With that approach in mind, it must be remembered that the issues in dispute at this stage are very narrow. At the commencement of the trial, Appellant made formal admissions which in effect admits all the elements of and actual commission of the offences, namely robbery with aggravating circumstances as well as attempted murder. The evidence of both witnesses therefore with regard to the actual commission of the crimes stand undisputed what he placed in dispute, is his presence at the scene and or participation in the commission of the crimes.

[44] It flows from the above that on this appeal, there are two main issues to be considered. Firstly, is the issue of identity. That is whether on the evidence on record, the identity of the appellant as being one of the three assailants, has been proved beyond reasonable doubt. In the second place, is the issue of contradictions or inconsistencies between the written statement of the complainant on the one hand and his oral evidence in court on the other. The defence argued strongly on this point and went to the extent of calling as a witness, the investigating officer, who took complainant's statement in hospital.

[45] I propose to first deal with the latter issue. The complainant testified that following his shooting, he was taken to George Mokhari Hospital by ambulance. He was admitted there for almost a month or so. On the day he made the statement, he was surrounded by doctors and was just about to undergo a scheduled operation. This is one of a total of about three operations he had to undergo.

[46] While the doctors were busy attending to him, the Investigating Officer, Constable Segokodi came. He wanted to take a statement from him. Complainant in his testimony stated:

"There was an [ex] change of words between the doctor and the police officer because the ward was open and the doctors wanted to close it.

[And] the police officer wanted to take down the statement...the police officer informed them that he is asking just 10 minutes for him to take down the statement then he will leave."

[47] I have already dealt with the evidence of constable Segokodi in this regard. In essence, he corroborates the version of the complainant regarding the general circumstances under which his statement was obtained. In short, he confirms that he went to the hospital only to find that doctors were busy preparing a scheduled operation on the person the complainant. He pleaded for some time just to take the statement and that they can continue thereafter. Doctors could not agree and insisted that it was in opportune to do so. They insisted

that they must be given their space to do their work. On the other hand, the investigating officer, insisted on being given an opportunity to also do his work. Evidence is that there was an exchange of words between them.

[48] That being the case, I find that whatever contradictions there may be, the explanation for that is abundantly clear from this unfortunate state of affairs. The general circumstances under which complainant had to give his statement were from this evidence, just not condusive for such an important task. Be that as it may, be despite these circumstances, complainant mentioned Appellant as being one of the three (3) robbers. This was therefore not an after thought.

[49] In any event, in my view, the contradictions referred to by the defence, are not of a material nature. This is so despite the circumstances under which the statement was taken. Furthermore, these contradictions must be considered in the light of the admissions already made by the Appellant at the commencement

of the trial, recorded and formally accepted as such in terms of section 220 of the CPA.

[50] In other words therefore, as regards the actual manner and commission of the offences, this is admitted and therefore common cause that evidence stands. The appellant's defence is that of a bare denial. In my view therefore, if this is so, he is unable to dispute under what circumstances the offences were committed.

[51] What is important from the totality of the evidence of the state, it that the three robbers clearly had formed a common purpose, and had all worked together and co-operated in the furtherance of this common purpose. In his statement, complainant mention the Appellant as being one of the robbers.

[52] I now turn to the second issue which is that of identity. In S Mthethwa 1972 (1) SA the Appellant Division stated the following:

"Because of fallibility of human observation, evidence of identification is approached by the court with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors such as lighting, visibility and eyesight, the proximity of the witness, his opportunity for observation, both as time and situation. The extent of his prior knowledge of the accused and mobility of the scene. Corroboration of the suggestibility, the accused's face, voice, build, gait and dress, the result of the identification parade. If any, and of course. The evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and the probabilities. (My emphasis)."

[53] Regarding the identity of the Appellant, it appears clearly from the background evidence of the complainant that he had been in physical contact with and had conversations with the Appellant on

several occasions prior to the day of this incident. All of these took place in broad daylight and were for a substantial periods of time.

[53] The first and initial meeting was at Winterveld. After that, there were a number of other meetings where Appellant went to the complainant's house and told him that he must pay him R70 000.00 or vacate the house. The last meeting immediately before the incident was during the family ceremony at Block R, where the Appellant in the presence of Ms. Legodi and of all other family members was reprimanded to leave the complainant in peace. It was confirmed to him by family elders that occupation of the house is pursuant to a valid and formal agreement between complainant and Ms Legodi, the lawful owner of the house. All the elders as well as family members, confirmed to Appellant that they all know about the contract relating to the house.

[55] Taking into account all of the above, it is common cause therefore that the complainant and his wife knew the Appellant, even before

the shooting incident. Because they knew him, both were and could therefore be in a position to positively identify him.

[56] In his evidence, complainant stated that over and above his prior knowledge of the Appellant he was able to identify the Appellant as being one of the assailants as follows:

[56.1] His voice, when he appeared, armed with a firearm and before shooting him, said to him:

"Do you think you can be clever than me."

[56.2] after he shot him, one of the assailants uttered the words.

"No T-man... do not finish him off."

[56.3] by his clothing that he wore every time they met on previous occasions, particularly, his All-Star tekkies.

[56.4] Most importantly and conclusive he did later remove his cover or stockings with which he had covered his face. He removed it, up to the forehead and thereafter never covered his face again, until they drove off in his car.

[57] The most important fact in this regards is the fact that Appellant did remove his cover, the stockings. According to the complainant, he removed it up to his forehead. That is where he ultimately finally saw and satisfied himself that the person who shot him is in fact the Appellant. Again, this evidence find collaboration in the following.

[57.1] Direct evidence of the complainant's wife. She confirms that the Appellant did remove his cover, the stockings. She knows the Appellant because on some occasion he did come to the house, on a Saturday December of 2017, dispute. Complainant was not there and they spoke about the house. This visit is also confirmed by the Appellant himself, and the fact that the wife knew him.

[57.2] Despite the lengthy period of time spent in hospital, complainant mentioned the Appellant as being one of their attackers on that fateful day, and that in fact, he is the one who shot him.

[57.3] Despite having spent such a substantial amount of money in fixing the house, payments to the municipality and so on, since the day of the shooting, complainant and his family fled the house, leaving everything. All of this is because of the ordeal they went through on that day, at the hands of the Appellant and his accomplices. Appellant had previously and on or several occasions, persistently demanded from complainant an amount of R70 000.00 that they vacate the house. For their own safety and to save their children's lives, despite all the expenses they incurred, they chose to flee and save their lives. This is pure logic and common sense. Logic dictates that they could not do so if they did not

genuinely know and saw that Appellant was one of the assailants, and the threats of violence he previously made to the wife.

CONCLUSION

[58] Taking into account all the above, it is clear that the trial Magistrate did fully analyse the evidence, taking into consideration all the probabilities of the evidence from both sides and the history of dealings between the parties.

[59] Over and above the direct evidence on the identity of the Appellant, the general circumstances preceding the incident, previous dealings, issues around the house and the demand of money are also relevant, and serve to point out motive for the attack. Complainant refused to pay any money to the Appellant or to vacate the house. The only reasonable inference to be drawn from all of these is that this is the reason, the motive why the Appellant, acting

in common purpose with his accomplices attacked the complainant and his family.

[60] I therefore do not find any misdirection and or irregularity in the manner in which the Magistrate approached his analysis of the evidence, findings of fact, law, and conclusions reached.

[61] Having said that, I do not find any legal grounds upon which this court, being a court of appeal can interfere with the findings and conclusions of the trial court.

ORDER

Consequently, I make the following order:

1. The Appeal is dismissed.

SS MAAKANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

I AGREE

D. MAKHOBA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH, PRETORIA