

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: A 167/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

JUDGE KUNY

3 MAY 2023

In the matter between

ALEX NKATHA

First Appellant

COLLINS MOYO

Second Appellant

and

THE STATE

Respondent

JUDGMENT

KUNY J

- 1 The appellants were convicted on 4 November 2020 of attempted murder. On 2 December 2020 they were each sentenced to 10 years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA). The sentence was antedated from 4 August 2019 in terms of section 282 of the CPA. The

appellants were also declared unfit to possess a licensed firearm in terms of section 103(1) of the CPA.

- 2 The appeal is against both conviction and sentence. Each appellant was represented at the trial in the Regional Magistrates court by his own legal representative.
- 3 The charges against the appellants were that on 4 August 2019 at or near Crystal Park they, unlawfully and intentionally and with the furtherance of common purpose, attempted to kill John Nkomo ("the complainant") by stabbing him with a knife and hitting him with bricks. Both appellants pleaded not guilty.
- 4 The complainant was called to give evidence. His testimony was as follows:
 - 4.1 The appellants had lived in the same area and were known to him for a period of more than three years.
 - 4.2 Appellant no 1 owed him an amount of R6 400 and appellant no 2 owed him an amount of R8 200. The debt was due at the end of August 2018. The complainant had confronted the appellants about the fact that they had not repaid their debt to him. The appellants kept on making promises that they would pay.
 - 4.3 On 4 August 2019 he was on his way home from a society meeting in Alexander. Appellant no 1 called him that afternoon to come and collect his money. The complainant went to where the appellants were staying with his wife, Sithulisile Ndlovu, and their baby. They arrived just after 6pm and were met at the gate by appellant no 1. He told them to go inside where the complainant could collect his money. They went into the yard and found appellant no 2 standing outside the house, ready and waiting with a knife.
 - 4.4 Before the complainant could say anything appellant no 2 started stabbing him. He was first stabbed on his chest. The complainant started to fight

back with his hands. However, he was overpowered and fell to the ground. Appellant no 2 threw bricks at him and assaulted him with a stick. The complainant was hit with a stick on his shoulders and on the head. A brick hit his head and his thigh causing his cellphone in his pocket to break.

4.5 The complainant was also stabbed on his back and stomach. He received 6 puncture wounds and had to have six stitches.

4.6 At the time that the stabbing and assaults occurred, the complainant's wife started screaming. This alerted appellant no 2's employer (Havenger) who came outside to see what was happening. The complainant testified that at this stage that he was paralysed. His wife explained to Havenger what had taken place. The complainant testified that he woke up in hospital where he spent a week being treated for his injuries. He was operated on and medicated. The wound on his stomach was so serious, that it caused his intestines to protrude from his body.

4.7 There was a streetlight close to the gate and he was able to identify appellant no 1 when they arrived. The complainant also testified that the appellants were known to his wife and she would be able to identify them.

APPELLANT NO 1'S VERSION PUT TO THE COMPLAINANT

5 The following was put to the complainant in cross-examination by appellant no 1's legal representative:

5.1 On the day in question appellant no 1 was with the complainant's wife when the complainant arrived at the place where appellant no 1 was staying.

5.2 The complainant was angry with appellant no 1 and he slapped him twice at the gate on the day in question.

- 5.3 Appellant no 1 let the complainant into the property and they walked towards the house. The complainant asked appellant no 1 where appellant no 2 was.
- 5.4 Appellant no 1 told the complainant that appellant no 2 was taking a shower and the complainant slapped him in the face.
- 5.5 Shortly thereafter, appellant no 2 came out of his room with a chair and invited the complainant to sit down. The complainant refused to do so, walked towards appellant no 2 and started hitting him in the face with his fists.
- 5.6 The complainant took out a knife and tried to stab appellant no 2. There was a struggle for the knife. Appellant no 2 managed to grab it.
- 5.7 Appellant no 1 notice that the complainant was bleeding but he could not tell exactly what had happened to him because it was dark.
- 5.8 Appellant no 2's employer came out of the house after hearing the commotion and called CMS members who arrived with an ambulance.
- 5.9 Appellant no 1 would say that he did not in any way attack the complainant. He had tried to separate the complainant and appellant no 2. The complainant had been the aggressor on the day in question and had produced a knife.
- 6 The complainant denied appellant no 1 version put to him in cross-examination in all material respects.

APPELLANT NO 2'S VERSION PUT TO THE COMPLAINANT

- 7 The following was put to the complainant in cross-examination by appellant no 2's legal representative:

- 7.1 Appellant no 2 had only borrowed an amount of R2 000 from the complainant and not the R8 200, as alleged.
- 7.2 Two to three weeks before the incident the complainant came to appellant no 2's place. He was very angry. The complainant took a fridge, TV, a bag full of clothes, a blanket, DVD and speakers and shoes as security for repayment of the money that appellant no 2 borrowed from him.
- 7.3 The complainant returned on a second occasion. He was angry. Appellant no 1 opened for him. The complainant started hitting appellant no 2 with his fists. Appellant no 2 fell down and the complainant continued to hit him with his fists and stomp on him with his feet.
- 7.4 Appellant no 2 saw the complainant take a knife out of his pocket. There was a struggle for the knife. Appellant no 2 twisted the complainant's hand towards the complainant and that is how he (the complainant) got stabbed.
- 8 The complainant denied appellant no 2's version put to him in cross examination in all material respects. This included a denial that he had taken appellant no 2's possessions as security for the debt. The complainant denied that he had attacked appellant no 2 on the day in question. The complainant pointed out in evidence that he had been stabbed on the back and that appellant no 2's version did not explain how this injury was incurred.

EVIDENCE OF SITHULISILE NDLOVU

- 9 Ms Ndlovu gave evidence for the state. Her testimony was as follows:
- 9.1 She was the complainant's wife. She conducted a money lending business. She confirmed that she and the complainant had been called to the house where the Appellants stayed on 4 August 2019.
- 9.2 When they arrived appellant no 1 opened the gate for them. She and her

husband entered the property. They found appellant no 2 standing outside. The appellants started assaulting her husband. Appellant no 2 had lifted his hands and hit the complainant with something. She did not see the weapon involved because it was “a bit dark”.

9.3 Her husband was struck on the chest. Appellant no 1 hit her husband on his head with a stick. The complainant was pushed towards a hole or a pit in the yard and fell inside. The appellants continued hitting him in the pit.

9.4 Ms Ndlovu screamed out to try and get the attention of the owner of the house. The owner of the house came outside and Ms Ndlovu told him that the appellants had been hitting her husband. She asked this person to help her because the complainant was bleeding profusely. Whilst being assaulted her husband lost his shoes.

9.5 Security guards arrived and came back with the appellants. Her husband was put on a drip because he had been bleeding profusely. An ambulance was called and her husband was taken to Tembisa hospital. Ms Ndlovu noticed that her husband had been stabbed in his stomach. He was swollen on his forehead and his hands.

9.6 Her husband was not armed when they entered the property and when appellant no 2 was approached. She confirmed in all material respects the complainant’s version that he had been attacked by the appellants.

EVIDENCE OF JOSEPH PRINSLOO

10 Mr Prinsloo testified as follows:

10.1 He was employed by CMS Security. He had been called to the scene by the owner of the house. On his arrival at the premises in question he observed a man who had been injured being dragged outside. The victim was placed flat on the grounds next to his vehicle. A paramedic team had been called to the premises.

- 10.2 He was informed by one of the ladies that the victim had been stabbed. Mr Prinsloo spoke to the owner of the property at the gate who made a report to him. He requested back-up as he did not know how many suspects there were or what kind of weapons they had.
- 10.3 After back-up had arrived they entered the premises and found to suspects at the back rooms of the house. The suspects were asked what had happened and they admitted stabbing the victim. One of the suspects pointed out a knife that had been used in the attack and a knife was found lying in the dust near to a braai area. The suspects were taken into custody.
- 10.4 The complainant's intestines were protruding from his stomach. He had been stabbed five or six times. The wounds were in front on the complainant's right shoulder, on the right side in front on his chest, in the middle of his back, and on his left arm. The knife that was retrieved and shown to the police. Mr Prinsloo identified appellant no 2 as having been one of the attackers.

EVIDENCE OF GRANT HAVENGER

- 11 Mr Havenger testified as follows:
- 11.1 He was the owner of an agricultural holding in Benoni described as plot number 3[...] N[...] Road. Appellant no 2 was his former employee who worked on the plot and stayed in a room at the back of the house. Appellant no 1 was also renting a room from him in the same building that appellant no 2 stayed in.
- 11.2 The complainant and his wife had previously been to his property to claim money from the appellants. The incident had taken place at between 6pm and 7pm in the evening. Part of the premises were lit by a bright flood light that shone down the driveway towards the side gate.

- 11.3 On 4 August 2019 his wife came running inside to tell him that there had been an incident outside. He went outside and observed appellant no 2 pulling a lady with a child on her back by the arm, up the driveway, towards the driveway gate.
- 11.4 He observed appellant no 1 throwing bricks at a man who he later found out was the husband of the lady with the child.
- 11.5 It became clear to Mr Havenger that the appellants had ejected the complainant and his wife from the property and once they had done so they had locked the gate with a chain. The appellants reported to Mr Havenger that the complainant and his wife had attended at the premises to get their money because they (the appellants) owed them money. There had been an argument as to how much money had been owed by the appellants to the complainant.
- 11.6 Mr Havenger was informed by the lady that her husband had been stabbed. He went outside to have a look and noticed that the complainant's stomach had been cut open and he had a stab wound on his back and shoulder. His intestines were protruding from his stomach.
- 11.7 The appellants retreated to their rooms and CMS security and the police were called. An ambulance arrived. Mr Havenger went to the bottom of the plot where the appellants were standing. He and the persons who were with him wanted to establish the whereabouts of the knife that had been used in the attack. The appellants would not reveal where the knife was.
- 11.8 The appellants were interrogated by CMS officer and it was decided to place the appellants under arrest. The police arrived and a bloodied knife was found at the rooms where the appellants stayed. The knife was placed in a plastic bag and taken into evidence by the police.

11.9 In re-examination Mr Havenger was asked whether the appellants had ever reported to him that they had been attacked by the complainant. He testified that they had not.

12 It was put to Mr Havenger under cross-examination that appellant no 1 would testify that he never threw stones at the complainant. Mr Havenger responded as follows:

Mr Havenger: Well, that is very interesting because it actually was not stones it was bricks if I can be more precise.

Ms Eliza: Yes.

Mr Havenger: And that is those bricks were found at the gate at the exit to the gate as well and I mean that is what I saw with my own eyes and definitely witnessed him doing that. So, that is interesting to say the least.

13 After all the witnesses for the prosecution had given evidence the state handed in the medical records of the complainant without objection from the appellants.

EVIDENCE OF APPELLANT NO 1

14 Appellant no 1 disputed that he owed the complainant and his wife R6 400. He stated that an amount of R2 000 had been borrowed. He had repaid R1 200, leaving a balance of R800 owing.

15 Appellant no 1 testified that the complainant and his wife had come to the property where he was staying on the day in question to collect money that he and appellant no 2 owed them. He testified that the complainant had slapped him three times at the gate. Appellant no 1 opened the gate for the complainant and his wife. They entered the property. They met appellant no 2 who offered a chair to the complainant. The complainant grabbed appellant no 2's shirt and started beating him. Appellant no 2 fought back with his fists.

- 16 Appellant no 1 testified that he had intervened and stopped the fight between the complainant and appellant no 2. He did so by getting between them and by getting hold of appellant no 2 and the complainant. He asked them to “please stop fighting”. After that, the complainant walked away unassisted to the gate of the property. Appellant no 1 opened the gate to allow the complainant to leave the property. He did not see that the complainant was injured. He only saw that he was bleeding later on, after he and appellant no 2 had been arrested. However, he did not know why he was bleeding and how the complainant got injured.
- 17 Appellant no 1 denied seeing a knife being used in the fight between appellant no 2 and the complainant. He testified however, that appellant no 2 had told him after the fight that the complainant had a knife and wanted to stab him.
- 18 It was put to appellant no 1 in cross-examination that it had been put to the complainant on his behalf, that he would testify that the complainant had tried to stab appellant no 2 with a knife and that during the struggle appellant no 2 had managed to take the knife. His evidence therefore differed from the version that was put to the complainant.
- 19 Upon being challenged about the contradictory aspects of his evidence, appellant no 1 changed his evidence and said that he saw a knife fall down. He explained the discrepancy by saying he did not understand properly earlier on what was being asked of him. Appellant no 1 then conceded that the complainant was bleeding from his stomach because he had been stabbed with a knife.
- 20 Appellant no 1 denied having admitted that he had stabbed the complainant. Under questioning from the court, he testified that he had not reported to Mr Havenger or CMS that the complainant had attacked him and appellant no 2. He had been told by appellant no 2 that the knife that belonged to the complainant had been produced. He did not see the knife being produced by the complainant.

EVIDENCE OF APPELLANT NO 2

- 21 Appellant no 2 testified that on the day in question he was approached by the complainant who held him by the shirt and started hitting him with closed fists. He fell down. He asked the complainant why he was beating him and did not get an answer. He tried to get away from the complainant but was unable to do so. His shirt got torn. Whilst he was on the ground, the complainant produced a knife. Appellant no 2 got hold of the complainant's hand with the knife in it.
- 22 Appellant no 2 elaborated under cross-examination that the complainant was on top of him and kicked him and continued to assault him. He never retaliated. Whilst he was on the ground, the complainant produced a knife. Appellant no 2 held the complainant's wrist with one hand and his shirt with another. He testified that he did not try to take the knife from the complainant's hand and did not know how the complainant got stabbed. Appellant no 2 had not fallen to the ground during the fight. The fight came to an end when the complainant let go of him and started running. Appellant no 2 then stood up. When the complainant left the premises, he was walking properly.
- 23 Appellant no 2 was asked to explain how the complainant sustained the stab wounds to his chest and back. He testified that there was a small gate and after the complainant had run away he had fallen at a place where there was steel. Appellant no 2 was emphatic that he never stabbed the complainant and never used any weapon to injure him.
- 24 Appellant no 2, when confronted with appellant no 1's version that he (appellant no 1) had attempted to stop the fight by coming between the two of them, said that he could not remember.
- 25 The magistrate in his judgment summarised the evidence given by all the witnesses at the trial. He found that the version put forward by the appellants had to be rejected in its totality based on the contradictions in their case. He accepted the evidence of Mr Prinsloo and Mr Havenger, commenting that it was independent evidence.

EVALUATION OF EVIDENCE

- 26 In my view the magistrate was correct in rejecting the appellants' evidence. The evidence of appellant no 1 and appellant no 2 was contradictory and unsatisfactory in material respects.
- 27 Insofar as the evidence of appellant no 1 is concerned, the following is relevant:
- 27.1 Appellant no 1's evidence was totally different from his version that was put to the complainant by his legal representative in cross-examination. Appellant no 1 testified that he did not see a knife being used in the fight between the complainant and appellant no 1 and that he did not see how the complainant sustained his injuries. This contradicted his version put in cross-examination, that appellant no 1 would say that the complainant took out a knife, tried to stab appellant no 2 and that in the ensuing struggle, appellant no 2 managed to grab the knife.
- 27.2 It was not put to the complainant when he gave evidence that appellant no 1 would testify that he tried to intervene and stop the fight between the complainant and appellant no 1. This evidence was given for the first time when appellant no 1 testified.
- 27.3 Appellant no 1's evidence that after the fight, the complainant walked unassisted to the gate is highly improbable. It is clear from the evidence, including the medical records, that the complainant had been grievously injured in the attack upon him (see record page 237). There were two stab wounds to the complainant's back, a stab wound to the front of his left shoulder, a laceration to his scalp and a large wound to his stomach. Both Havenger and Prinsloo confirmed that the complainant's intestines were protruding from his body.
- 28 Insofar as the evidence of appellant no 2 is concerned, the following is relevant:
- 28.1 Appellant no 2's testimony as to how the fight between him and the

complainant took place, differed from appellant no 1's account. Appellant no 2 did not confirm appellant no 1's evidence that he had tried to stop appellant no 2 and the complainant from fighting.

28.2 Appellant no 2's evidence as to how the fight occurred contradicted appellant no 1's evidence.

28.3 Appellant no 2's version put to the complainant in cross-examination differed from appellant no 2 testimony as to how the fight took place. It was put to the complainant that appellant no 2 would say that the complainant produced a knife and that a struggle ensued for the knife. Appellant no 2 alleged that he twisted the complainant hand towards him and that was how he (the complainant) got injured. However, when he gave evidence, appellant no 2 testified that he had not tried to take the knife from the complainant and he did not know how the complainant got stabbed.

28.4 Appellant no 2's evidence that the fight broke up when the complainant ran away and that he was able to walk normally out of the premises, in light of the objective evidence relating to the severity of the complainant's injuries, is so improbable that it can be rejected.

28.5 Appellant no 2 evidence as to how the fight between him and the complainant occurred, did not explain the objective evidence relating to the complainant's wounds.

28.6 Appellant no 2 evidence that the complainant had some two weeks prior to commission of the offence, taken property belonging to appellant no 2 as security for the monies loaned was uncorroborated. The complainant denied having done so.

29 The complainant's evidence, and the fact that the appellants were the aggressors, was supported by the complainant's wife. Mr Havenger, who observed appellant no 1 throwing bricks at the complainant, also supported the

evidence that the appellants had attacked the complainant.

- 30 In my view, the evidence of the appellants was so unsatisfactory and improbable, that it can safely be rejected as being false. All the evidence points to the fact that the appellants had called the complainant to their place on the day in question with the intention of assaulting him with a lethal weapon. There was a motive for the assault namely, that the appellants owed the complainant money and did not want to repay him.
- 31 The evidence demonstrates that the appellants acted in concert with one another. Appellant no 2 wielded the knife. The manner in which the assault occurred and the nature and severity of the wounds sustained by the complainant also demonstrates that the appellants meant to inflict lethal harm. Appellant no 1 actively associated himself with the attack by assaulting the complainant with a stick and bricks (see *S v Mgedezi* 1989 (1) SA 687 (A)). This was directed to overcoming his resistance and ensure that appellant no 2 who wielded the knife could inflict lethal harm. The assault was of a sustained nature and in all probability would have continued, had it not been for the cries of the complainant wife, who alerted Mr Havenger to the attack. In my judgment both appellants intended, by assaulting and stabbing the complainant, to bring about his death. Accordingly in my view, both appellants were correctly convicted of attempted murder.
- 32 I find that the sentence imposed by the magistrate was not inappropriate and does not induce a sense of shock. The sentence of 10 years imprisonment was justified given the circumstances in which the offence was committed. It is clear from the evidence that the appellants planned the attack upon the complainant. They called him to the premises where they were staying with the intention of carrying out the grievous bodily assault.
- 33 The complainant gave evidence in aggravation of sentence. He testified that he was healthy before the assault took place and that he continued to suffer from pain as a result of his injuries. The medical records speak to the severity of the attack upon the complainant and the seriousness of his injuries.

34 I accordingly make the following order:

- 1 The appellants' appeal against conviction and sentence is dismissed.

KUNY J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

MA LUKHAIMANE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 24 February 2022

DATE OF JUDGMENT: 3 May 2023

APPEARANCES

Counsel for the Appellants: Ms MMP Masete
Instructed by: Pretoria Justice Center

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Instructed by: Office of the Director of Public Prosecutions