REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A61/2023
DPP REF. NO: 10/2/5/1/3-SA15/2023

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

[redacted]

13-12-2024 **PD. PHAHLANE**
DATE SIGNATURE

In the matter between:

VEELAN KISTNASAMY **APPELLANT**

And

THE STATE **RESPONDENT**

Delivered: This judgment was prepared and issued by the Judge whose name is reflected herein and is handed down electronically by circulation to the parties/their legal representatives by email. The date of this judgment is deemed to be 09 December 2024.

JUDGMENT

PHAHLANE, J

[1] This is an appeal against conviction and sentence imposed by the Benoni Regional Court on 30 April 2021. The appellant who was legally represented in the *court a quo*, was arraigned on a charge of attempted murder, read with the provisions of section 51(2)(c)(i) of Act 105 of 1997 ("the Act"), and sentenced to five (5) years imprisonment. This appeal comes with leave granted by the court *a quo*.

[2] The grounds of appeal as noted in the notice of appeal in respect of conviction can be summarized as follows:

2.1 *"The Learned Magistrate erred in finding that the State proved its case beyond a reasonable doubt that the appellant had the intent to kill the complainant and was not acting in self-defence.*

2.2 *The Learned Magistrate erred by only accepting a short portion of the CCTV footage which was obtained by the complainant himself and not by any police officers which could have depicted different versions to the court a quo.*

2.3 *The Learned Magistrate erred by accepting the version of the complainant even with significant contradictions between Mr Ncube who testified on behalf of the State and two witnesses that were released by the State and testified on behalf of the appellant. The trial court further erred by not giving the benefit of doubt to the appellant beyond a reasonable doubt. This shows clear misconduct and an act of bias on the part of the Learned Magistrate.*

2.4 *The Learned Magistrate erred by accepting that the complainant's testimony that he was in the hospital for a month without providing any concrete proof thereof which is clearly contradictory to the testimony of Mr Dhaver who testified that the complainant attended his home the day after the shooting with other people enquiring into the whereabouts of the appellant. The Learned Magistrate misdirected herself by rejecting the testimony of the appellant's witness and only accepted the complainant's testimony which was contradictory in itself and lacking evidence.*

[3] The grounds set out in respect of sentence are as follows:

3.1 *The Learned Magistrate erred in sentencing the appellant in terms of section 51(2)(c)(i) of the Act in that the appellant during testimony testified that he acted*

in self-defence and same was corroborated by two of the witnesses that the appellant was in actual fact on the ground being kicked and hit by various assailants when the shots were fired.

3.2 The Learned Magistrate further erred by not taking into consideration any of the circumstances of the evidence produced at the trial or the personal circumstances of the appellant and by so doing overemphasized the seriousness of the offence and the interests of society.

3.3 The Learned Magistrate erred in not taking into consideration the J88 Form which was lacking vital information in addition to the generalized testimony of the doctor in relation specifically the complainant's injury based only on assumptions and generalisation.

3.4 The Learned Magistrate further erred in not taking into account the appellant having not specifically aimed the gunshot with the intent to kill by specifically aiming at the complainant's head, chest, or stomach area with the intent to damage vital organs, but in contrary the appellant only fired two warning shots in order to disperse his assailants as he had found himself in a life threatening situation since the appellant was alone in his own defence being assaulted by a large number of people.(sic)

3.5 The Learned Magistrate erred in not taking into consideration that the wound which the complainant sustained was not, in fact, life threatening and due to this, the Learned Magistrate erred by imposing a harsher and disproportionately excessive sentence and conviction than what would have been appropriate given the circumstances and harm caused to the appellant due to the assault.

3.6 The court a quo erred in imposing a sentence which is shockingly excessive, particularly given the fact that the evidence which was put before the court a quo, clearly shows none of the elements of the crime of attempted murder, but alternatively shows the appellant being placed in a position in which he was forced to protect his own safety and well-being and life and being left with little choice in his actions. (sic)

[4] The conviction of the appellant flows from the incident that occurred on 24 August 2019 at Quarter Deck Pub in Benoni, where the appellant unlawfully and intentionally

attempted to kill the complaint, Mr Deon Rajkumai by shooting him with a firearm. It is common cause that the firearm used for shooting the complainant is a legal firearm belonging to the appellant.

[5] The complainant testified that he was in the company of his cousin and a friend when the appellant approached and – out of the blue, punched him in the face. He was seeing the appellant for the first time that day. According to him, the appellant was very aggressive, and when he asked him why he was punching him, the appellant responded that he came to prove a point.

5.1 The appellant had a beer bottle in his possession, which he swung over the head of the complainant and hit him on the head. The complainant pushed him, and he fell on the floor – but he got back up and started a brawl with him. The appellant was taken out of the pub, but he managed to come back and assaulted the complainant again. A bouncer took him outside and he (the appellant) got involved in a fight with other men.

- This evidence was corroborated by the bouncer Mr Kebenya who testified that there was a group of people who fought with the appellant, but did not form part of the complainant's friends. He testified further that the complainant and his friends remained inside the pub while the appellant was fighting with other people outside the pub.
- Further corroboration was by Mr Ncube who testified that after the fight between the appellant and he complainant, he saw the appellant pointing a firearm at the complainant, and thereafter saw the complainant lying down. He explained that he witnessed the shooting while he was standing at the door – the appellant was standing when shooting at the complainant, and that people were pleading with the appellant not to shoot.

5.2 It is not in dispute that the appellant fired two shots before shooting at the complaint.

5.3 The complainant testified that as he was about to leave and go home, the appellant saw him and started shooting randomly. He pointed him with a firearm and shot him (in the shin below the left knee).

5.4 The complainant testified that he sustained a tibia and fibula fracture, and steel plates were inserted on his leg during the operation. He explained that the bullet which struck him is lodged in his leg and could not be removed. He stated that he was retrenched from him employment because he is medically unfit to perform any of the duties which he previously performed as an engineer.

5.4.1 It is common cause that the complainant was walking with crutches when he testified. He stated that the doctors informed him that he will no longer be able to walk properly, and will have to use the crutches for the rest of his life.

[6] It is common cause that a CCTV footage (admitted into evidence as exhibit 1) was played in court and the appellant could be seen pointing a threatening finger at the complainant. He was also seen picking up a pool stick, also known as a cue, and approached the complainant but was stopped by the someone named Sebastian who took him outside the pool hall. The video footage further confirmed the evidence that the complainant pushed the appellant, and he fell to the ground. The appellant got on his feet and wanted to fight the complainant but was stopped by other individuals who disarmed him[1]. The footage further confirmed the evidence that the appellant had a beer bottle which he swung twice at the complainant.

6.1 It should be noted that the appellant never objected to the CCTV footage, and the footage was played several times in court.

6.2 It is further common cause that the evidence of doctor Kazadi who testified and confirmed the injuries sustained by the complainant was also not disputed.

[1] Judgment at paginated page 249.

[7] The trial court accepted the evidence of the complainant and held that it was corroborated in all material respects and by exhibit 1, and by the evidence of another witness, Mr Kabeya[2].

[8] In rejecting the evidence of the appellant, the trial court found that the appellant contradicted himself and the video footage, and further that some of the aspects were not put to one of the witnesses named Mr Ndou. The court further held that the overwhelming evidence shows that the appellant was not attacked by the complaint, or a group of people, but that he was attacked by Keano and Junior – because according to the evidence of Mr Ncube, the complainant was about eight metres away from the appellant when Keano was fighting with the appellant.

8.1 The court further held that when the appellant fired the first shot, he was on his haunches, and the people around ran away.

8.2 That the appellant stood up and went closer to the complainant and shot at him while standing[3]. The complainant was alone at the time.

8.3 That after shooting the complainant, he walked to the pool hall and was still holding his firearm in his hand.

8.4 That the totality of the evidence shows that the appellant was the only person in possession of a firearm.

8.5 That the appellant was not a credible witness because he contradicted himself; his statements; and the footage which clearly showed how the incident unfolded. In this regard, the court found that 'contrary to what could be observed on exhibit 1 – which is his aggressive behaviour, and his own evidence-in-chief, he disputed that he acted aggressively towards the complainant'[4].

8.6 The Learned Magistrate further held that his evidence was not reasonably possibly true.

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[2] Judgment at paginated page 271.
[3] Judgment at paginated page 256.
[4] Judgment at paginated page 258.

[9] It is trite law that a court of appeal will not interfere with the trial court's decision regarding a conviction unless it finds that the trial court misdirected itself as regards its finding or the law[5].

[10] As a court of appeal, this court must determine whether the appellant was correctly convicted, looking at the totality of the evidence led, including evidence led on behalf of the defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decision.

[11] There are well-established principles governing the hearing of appeals against findings of fact. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong[6].

[12] As indicated above, the appellant contends that the Learned Magistrate erred in finding that the State proved its case beyond a reasonable doubt against him, and further holding that he had the intent to kill the complainant and was not acting in self-defence.

[13] To succeed on appeal, the appellant must convince this court on adequate grounds that the trial court was wrong in accepting the evidence of the State and rejecting his version as not being reasonably possibly true.

[14] In ***Botha v S***[7] Tshiqi JA (Seriti and Zondi JJA and Mokgohloa concurring, Schippers JA dissenting) set out the principles to be applied when a defence of self-defence is raised as follows: "In order to successfully raise self-defence, an accused must show the following: **(a)** that it was necessary to avert the attack; **(b)** that the means used were a reasonable response to the attack; and **(c)** that they were directed at the attacker.

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[5] R v Dlumayo and Another 1948 (2) SA 677 (AD) at 705-6.

6 S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f. See also: S v Monyane and Others 2008 (1) SACR 543 (SCA) at para 15; S v Francis 1991 (1) SACR 198 (A) at 204e.

7 2019 (1) SACR 127 at para 10 (SCA). See also: Jonathan Burchell, Principles of Criminal Law 5 ed (2016) at 125.

[15] The proper consideration is whether, taking all the factors into account, the appellant acted reasonably in or was indeed defending himself[8].

[16] In this court, counsel on behalf of the appellant **conceded** that (1) the complainant was not part of a group of people who were attacking the appellant, and (2) when the appellant shot at the deceased, he was not lying on the ground as the appellant testified, but that he was in a standing position and aiming his firearm at the complainant who was at the time alone and not even armed.

[17] In my view, the Learned Magistrate, properly assessed all the evidence before her when she held that the appellant's version was inherently improbable, given the fact that his version was contradicted by the CCTV footage that was repeatedly played in court and corroborated by the evidence of the complainant and the other State's witnesses.

[18] If regard is had to the requirement of self-defence as noted in ***Botha***, the appellant fails the test in respect of paragraph **(a)** because there was nothing to defend and clearly nothing necessitated him to act in the manner that he did. In respect of paragraph **(b),** the accepted evidence shows that nothing necessitated the appellant to use his firearm. Exhibit 1 shows that he was the only person who was armed. Even if one were to accept that he was attacked by a group of people as he wanted the court to believe, using a firearm was an extreme action to defend oneself, and accordingly, he did not act reasonably. In respect of paragraph **(c)** the evidence before court shows that the complainant could not have been the attacker because he was unarmed and, on the ground, when he was shot by the appellant. In the circumstances, the appellant fails the third test or requirement for the defence of self-defence.

[19] Having regard to what is noted in the preceding paragraph and considering the totality of the evidence before the court, this court finds that the Learned Magistrate did not misdirect herself in rejecting the appellant's version as not being reasonably possibly true. Consequently, I cannot find any fault on the trial court's finding in this regard.

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[8] S v Steyn 2019 (1) SACR 127 (SCA)

[20] With regards to the grounds set out for appeal, I have already stated that it appears on the record of the proceedings that the footage was played several times when the appellant was testifying because it became apparent that he denied attacking the complainant twice with a beer bottle. What was more worrying was the fact that after viewing the footage several times, his counsel put to the complainant that the complainant was never attacked with a beer bottle[9]. Furthermore, the appellant raised a new aspect which was never put to the complainant by either his first counsel or the second counsel – that the appellant took out his firearm and his hand was kicked, and a shot went off.

20.1 The appellant argued in his heads of argument that "whilst on the ground and allegedly being assaulted, he got his firearm out and a shot went off after one of the assailants kicked his hand and thereafter he fired another warning shot – and testified that he does not know which one of the shots hit the complainant and whether it was indeed his firearm that caused the gunshot wound to the complainant as his firearm was never sent for ballistics tests and the bullet was allegedly never removed from the leg of the complaint".

[21] In my view, this argument is misplaced because it clearly does not make sense why the appellant would plead self-defence and then turn around to suggest that he does not know if the shot which hit and injured the complainant came from his firearm.

21.1 It is clear from this argument that the appellant does not say that there was another person shooting, and neither was this his argument during the proceedings at the court *a quo*. Accordingly, the only reasonable inference to be drawn is that the complainant was shot by the bullet which was fired from the firearm of the appellant.

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[9] The court stated the following: "It was put to Mr Rajkumar that the accused was never in possession of a beer bottle. This took the court by surprise having viewed the CCTV footage in court with all the officers of the court – counsel, prosecutor, everybody viewing the same CCTV footage. Now with the assistance of the regulate court the footage was viewed again Mr Coetzee paused on a frame that clearly shows the accused was in possession of beer bottle when he re-entered the beer hall and clearly swung twice with the beer bottle in his hand at the complainant". (see paginated page 325)

21.2 On the same token, it is preposterous to argued that the bullet was never tested because it was never removed from the leg of the complainant – considering his plea.

[22] At paragraph 22 of the appellant's heads of argument, it is argued that the court erred by accepting that the complainant was admitted in hospital for a month without proof, and that the doctor who testified never talked about the complainant's vitals during the examination. Despite the J88 presented as evidence, it was argued on behalf of the appellant that there is no proof that the complainant had screws inserted in his leg.

[23] In my view, this argument is a non-starter. The fact that the complainant was admitted to hospital for a month, or whether he has screws in his leg – is immaterial because this is a criminal case and not a claim for damages where the injured party would be expected to proof the extent of his/her injuries and the sequelae thereof. This case is about whether the appellant attempted to kill the complainant and whether he fulfilled the requirements of self-defence.

[24] Relying on the decision of ***S v Mlambo***[10], where the court held that using a firearm on another person, regardless of the area targeted is a demonstration of a clear disregard for human life, advocate Ngobeni appearing for the respondent submitted, and correctly so, that the fact that the complainant was shot in his lower leg does not reduce the charge of attempted murder to anything less.

[25] On the conspectus of the evidence as it appears on record, I am of the view that the Learned Magistrate evaluated all the evidence before her and considered the probabilities and improbabilities inherent in the case. Having given proper and due consideration to all the circumstances, I agree with the finding of the trial court, and I am of the view that the trial court did not misdirect itself in convicting the appellant. It appears from the judgment that the Learned Magistrate followed the '*holistic*' approach

[10] 1957 (4) SA 727 (A)

required of a trial court in examining the evidence as a whole, as enunciated in ***S v Chabalala***[11].

[26] This principle was accordingly followed by the Learned Magistrate as she correctly pointed out that the court has to consider the totality of the evidence before it and not to follow a piecemeal approach in order to come to a correct and just decision. With regards to the question whether magistrate was correct in finding that the State proved its case against the appellant, the evidence of the State has to be measured against the evidence or version of the appellant as to whether his version could be said to have been reasonably possibly true - by considering the totality of the evidence in order to come to a just decision[12].

[27] In ***De-Conceia, Castro Nora v The State, case number A296/2016***, paragraph 13, this court held that:

> *"In this case the appellant's hurdle is a challenging one, because the magistrate analysed the evidence thoroughly and his analysis was based on the probabilities of the versions. It is true, as counsel for the appellant submitted, that the appellant is entitled to an acquittal if his version is reasonably possibly true. But it is often forgotten that the version of an accused is required to be reasonably possibly true, given the version put up by the state against the version of the accused, and particularly the strength of the state case. In other words, what is required is a consideration of all of the evidence put up – that by the state as well as that by the accused – and then the assessment must be whether the version of the accused is reasonably possibly true".*

[28] I have already ruled that the Learned Magistrate did not misdirect herself in concluding that the appellant's version is not reasonably possibly true. In light of the above, I further agree with the trial court's finding that the State proved its case against the

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[11] 2003 (1) SACR 134 (SCA) at para 15
[12] S v Trainor 2003 (1) SACR 35 (SCA) at 9

appellant beyond any reasonable doubt. Accordingly, I cannot find any fault on the the Learned Magistrate decision to reject the evidence of the appellant.

[29] With regards to sentence, it was submitted on behalf of the appellant that the sentence imposed is overly harsh and inappropriate, given the fact that the court ignored the to take into account substantial and compelling circumstances. The respondent on the other hand submitted that the sentence is not shocking because the sentence imposed is prescribed by the legislature.

[30] This court as a court of appeal must determine whether the sentence imposed on the appellant was justified. It is a trite principle of our law that the imposition of sentence is pre-eminently the prerogative of the trial court. Subject of course to any limitations imposed by legislation, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence.

30.1 A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court[13]. Put differently, an appeal court is only entitled to interfere with the sentence imposed by the trial court where such a sentence is disturbingly inappropriate or is vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably.

[31] The principle was well articulated by the Supreme Court of Appeal in ***S v Kgosimore***[14] when it held that: "It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said

[13] S v Malgas 2001 SACR 496 at para 12 (SCA)
[14] 1999 (2) SACR 238 (SCA)

to be startling inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and sentence the court of appeal would impose. All these formulations, however, are aimed at determining the same thing, viz whether there was a proper reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis, this is the true inquiry. Either the discretion was properly and reasonably exercised, or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so".

[32] The SCA reaffirmed the principle in ***Mokela v The State***[15] there the court stated that: "This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentence which have been properly imposed by a sentencing court".

[33] In determining an appropriate sentence which is just and fair, the Learned Magistrate had due regard to the triad factors pertaining to sentence which includes a consideration of the personal circumstances of the appellant, and a balancing effect as pronounced by the court in ***S v Rabie***[16] that the sentence to be imposed should fit the crime; the criminal, and it must be fair to society. It also appears from the reading of the record that the court was also mindful of the purpose of punishment, being mindful of the question whether the prescribed sentence of five (5) years imprisonment in terms of section 51(2)(c)(i) of Act 105 of 1997 is a just one.

[34] The grounds raised at paragraph 3.3 that The Learned Magistrate erred in not taking into consideration the J88 Form which was lacking vital information as well as the ground at para 3.4 relating to the averment that the Learned Magistrate should have taken into account that the gunshot did not damage vital organs, - are illogical because they do not speak to the misdirection in respect of sentence and neither can it be said that these are the aspects to be considered as it relates to sentence.

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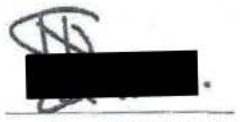
[15] 2012 (1) SACR 431 (SCA) para 9,
[16] 1975 (4) SA 855 (A).

[35] Having given proper and due consideration to all the circumstances, I am of the view that the trial court considered all the factors when imposing the sentence appealed against. This court cannot fault the decision of the sentencing court, nor can it be said that the sentence imposed was shocking or unjust. Accordingly, I cannot find any misdirection in the trial court's finding.

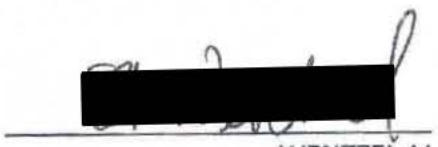
[36] In the circumstances, the following order is made:

1. The appeal against conviction and sentence is dismissed.



PD. PHAHLANE
JUDGE OF THE HIGH COURT

I agree,



WENTZEL AJ
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

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Counsel for the Respondent	: Adv. SD Ngobeni
Instructed by	: Director of Public Prosecutions, Pretoria
Heard on	: 27 November 2024
Date of Judgment	: 9 December 2024