REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A147/2018

COURT *A QUO* CASE NO: 136/2018

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

27/3/19 .
DATE

SIGNATURE

In the matter between:

SHABANGU, PETER Appellant

and

THE STATE Respondent

JUDGMENT

WEINER, J

Introduction

[1] The appellant was convicted in the Regional Court at Protea of four charges:

1.1 Discharge of a firearm in a built-up/public place;

1.2 Attempted murder;

1.3 Possession of an unlicensed firearm;

1.4 Possession of ammunition.

[2] He was legally represented and on 24 August 2011 was convicted of all charges. He was sentenced as follows:

2.1 In respect of counts 1, 3 and 4 – they were taken as one for the purpose of sentence and he received 10 years' imprisonment.

2.2 In respect of count 2 he was sentenced to 5 years' imprisonment.

[3] The appellant appeals against both the convictions and sentences.

AD Conviction

[4] It is trite that the State must prove its case beyond a reasonable doubt, and that if an accused's version is reasonably possibly true, he is entitled to his acquittal. The State however does not have to prove its case beyond all doubt.[1] The court must apply its mind to the merits and demerits of the State's and defence's cases and also to the probabilities.[2] The probabilities must also be tested against the facts that are common cause.

[5] It is common cause that:

5.1 On the evening of 5 September 2010 the appellant was present in the house of Alpheus Nkosi (Nkosi). Nkosi was working in the kitchen where he was preparing food.

5.2 Lancelot Ngobese (Ngobese) was also in Nkosi's house.

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[1] See *S v Van As* 1991 (2) SACR 74 (W) at 82D-J.
[2] See *S v Mhlongo* 1991 (2) SACR 207 (A).

5.3 At some stage during the evening the appellant and Ngobese met up, and Ngobese and others held the appellant down and tied him up.

5.4 Nkosi and Ngobese went to the police station where they handed a firearm to Constable Moloto. There was no serial number on the firearm.

Evidence

[6] Nkosi testified that on 5 September he was at home where he sells liquor and food. He heard a noise outside at approximately 21h00. He went out and found one Tebogo, who was preventing the appellant from entering his premises. Nkosi told the appellant that he did not want any trouble at his premises. He managed to push the appellant out onto the driveway. The appellant then took out a firearm and fired a shot into the air. Nkosi closed the roller door and the small gate which were the entrances and exits from his premises. While inside, he heard another shot being fired, which was also heard by others inside the premises. Again Nkosi went out. However, he could not see the appellant. He opened the small gate for people to exit. Five minutes later, whilst in the kitchen, he saw the appellant with a firearm in his hand. People were taking cover. The appellant was between the kitchen and the lounge.

[7] Nkosi was behind the appellant, who was facing in the opposite direction. Ngobese came from the lounge and the appellant uttered the words '*Here is the dog that I want.*'

[8] The appellant then pointed his firearm at Ngobese who dived for the appellant's hand in which the firearm was held. The appellant fell and the firearm was dislodged from his hand. Ngobese grabbed the appellant so that he would not be able to reach the firearm. The appellant stood up and tried to run away, but with the help of others, they apprehended him and tied his hands with a speaker wire.

[9] Nkosi noticed that Ngobese was holding the appellant's firearm. They tied the appellant to the burglar bars and went to the police station. They handed in the firearm. The police then accompanied them to Nkosi's home where the appellant was handed over to the police.

[10] Nkosi testified that that was the first time he had met the appellant. He was unable to dispute whether or not the appellant was drinking there with other people. The appellant's version (that he has never possessed a firearm, did not shoot a firearm outside the premises, that he was inside when the shots were fired and that he did not point a firearm at or attempt to shoot Ngobese) was put to Nkosi and it was denied.

[11] Ngobese testified that he was at Nkosi's place on the night in question. He was drinking when he heard a firearm being discharged twice outside the premises. He then saw the appellant enter the premises. The appellant said to him '*You are the one I want.*' The firearm was pointed at Ngobese's head. Fortunately, the shot did not go off. He heard a 'click' sound and jumped onto the appellant, grabbing the hand with the firearm. Nkosi came to his assistance and they tied the appellant's hands.

[12] Ngobese took the firearm after it had fallen to the ground and checked it. He saw that there were two live rounds in it. He later handed the firearm to Constable Mavis Moshai Moloto. The version of the appellant was put to him and he also denied it. Ngobese stated that he did not know the appellant and saw him for the first time on that night. He did not know why the appellant said '*You are the one I want.*'

[13] Constable Moloto (Moloto) testified that she was in the South African Police Service (SAPS) and that Nkosi and Ngobese had come to the police station to report an incident. A firearm was handed to her which Ngobese said he had retrieved from the appellant. She entered all the exhibits in the SAP13 register and sealed them. The exhibits were examined by forensic experts. From the forensic report, it is clear that the firearm is one as described in the Firearms Control Act 60 of 2000.[3]

[14] The appellant testified that he was drinking at Nkosi's house. He had gone to a smoking area next to a toilet where he bumped into a male whom he knows by sight.

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[3] Section 1 of the Firearms Control Act 60 of 2000 provides that a *"firearm"* means any—
(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);
(b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;
(c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);
(d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or
(e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d), but does not include a muzzle loading firearm or any device contemplated in section 5.

They pushed each other and he fell against the wall, as did this other person. He then went inside and proceeded to drink further. Whilst inside, he noticed a group of people pushing to enter the house, and someone said there was a person outside with a firearm. He then realised that the person who he had met at the toilet was Ngobese, who informed him that there was someone outside with a firearm. For some reason unknown to him, Ngobese and Nkosi then took him to the police station.

[15] The Magistrate found that the evidence of the state witnesses was credible and that they corroborated each other in all material respects. More particularly, they both testified that the appellant was the person who was in possession of the firearm, and the person who fired the shot at Ngobese. Nkosi testified that the appellant was the person who fired the shots outside. The appellant's version that there was some conspiracy between Nkosi and Ngobese to falsely incriminate him was rejected by the Court *a quo*. It found that there were no improbabilities in their evidence and that, to the contrary, the appellant's version was improbable.

[16] The State argues that even if the version of the appellant is reasonably possibly true, it does not have to be accepted by the Court if the evidence presented by the State is overwhelmingly true. The true test is whether, on a consideration of the totality of the evidence, the guilt of an accused is proved beyond reasonable doubt. This involves an analysis and consideration of the testimony of the accused, the witnesses, and the versions of the State and the accused. When they are in conflict, the probabilities play an important role.[4]

[17] The appellant contends that the Court *a quo* did not evaluate the State's evidence and the evidence of the appellant properly. He contends that:

17.1 Nkosi testified that he did not see Ngobese arrive as he was in the kitchen.

17.2 Ngobese testified that he was consuming alcohol in the kitchen but Nkosi was unaware of this.

17.3 The State failed to call Tebogo as a witness.

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[4] See *S v Bengu* 1998 (2) SACR 231 (N) at 235F-236B.

17.4 The Court accepted Ngobese's evidence that he had disarmed the appellant and checked whether the firearm was working, when Ngobese had stated that he knew nothing about firearms.

17.5 There was a contradiction in the evidence of Nkosi and Ngobese in that Nkosi testified that he used the words '*Here is the dog that I want*' whereas Ngobese testified that the appellant said '*Here is the person I want.*'

17.6 Nkosi's evidence was contradictory. The appellant relies on the apparent 'concession' by Nkosi that the appellant was drinking at Nkosi's house.

17.7 The magazine of the firearm was not examined by the forensic expert and the expert could not definitively say that the bullets fired were from the firearm which was examined.

[18] Having regard to the totality of the evidence, these are not material contradictions in the State witnesses' evidence. Nkosi was busy in the kitchen. He did not have sight at all times of every person that entered or exited his premises. When viewed against the totality of the evidence, Nkosi's single 'concession' cannot be regarded as being a material contradiction. The evidence of this witness and, more particularly, his version, never changed in any manner whatsoever, either in his evidence in chief or under cross-examination. Furthermore, his evidence is corroborated, in all material respects, by the evidence of Ngobese (despite both of them giving evidence with the aid of an interpreter and the inherent difficulties associated therewith).

[19] The State's failure to call Tebogo as a witness is not fatal to its case. The Court may draw an adverse inference from the failure by a party to call an available witness. However, this principle does not amount to a rule requiring a party to call all available witnesses. It ultimately depends on the circumstances of a particular case, and it is only in exceptional circumstances that an adverse inference can be drawn from the failure to call such a witness.[5]

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[5] For a discussion on the failure to call available witnesses, see P J Schwikkard et al *The Principles of Evidence* (2012) 3 ed at 546.

[20] An adverse inference was drawn by the Court in the case of *S v Teixeira*.[6] In that case, the State relied on a single witness whose testimony was uncorroborated, and whose version was deemed to be 'improbable' by the Court. The inference that Wessels JA drew from the State's failure to call an available witness, was that counsel was wary of the possibility of the witness's evidence contradicting the testimony of the single witness, and impacting negatively on her credibility and reliability.[7]

[21] In the present case, there is sufficient corroboratory evidence before the Court. Not every witness to an event is required to testify, particularly in circumstances where the Court is not relying on the evidence of a single witness, where the cautionary rule might otherwise apply. The State adduced sufficient evidence to prove the case against the appellant, even without the testimony of Tebogo.

[22] The appellant relies on an alleged conspiracy between Nkosi and Ngobese. He bases this solely on the fact that Nkosi told the appellant that he did not want trouble, and that he and Ngobese had pushed each other at the toilet.

[23] In my view, the testimony of the State witnesses was, as the Court *a quo* found, credible and probable. The Court correctly analysed the versions of the State and the appellant and, upon such analysis, correctly found that the appellant's version was improbable and not reasonably possibly true. No other witnesses were called by the appellant in order to corroborate his version. Viewed against the totality of the evidence, it must be accepted that the firearm in question is that which was discharged outside and inside the tavern. This is so, in light of the probabilities and the circumstantial evidence (including the ballistic report) which corroborates the direct evidence of the State witnesses. It is highly improbable that the two State witnesses would have, for no apparent reason whatsoever, not only concocted a version to implicate the appellant but would have gone to the lengths of obtaining a firearm and 'planting' it upon him.

[24] The issue as to whether the firearm that was tested was the same one that was fired on the night in question was not challenged by the appellant's legal representative in cross-examination in the Court *a quo*. It was also not raised in argument. Whilst it

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[6] *S v Teixeira* 1980 (3) SA 755 (A) at 764A-C.
[7] Ibid.

may be permissible to raise this issue on appeal, it is nevertheless the first occasion that this has become an issue. The ballistics report supports the evidence of Ngobese, in that there was a cartridge jammed in the firearm. This corroborates the evidence that this was the firearm used as it misfired before the appellant was 'apprehended' by the State witnesses. The fact that the magazine has gone missing in the 'chain of evidence', whilst not satisfactory, has no real bearing on the matter. This is because, when the firearm was tested, it was capable of being fired.

Section 186 of the Criminal Procedure Act, 51 of 1977 (the CPA)

[25] The appellant's counsel raised an argument in the appeal which was not raised at the trial, the application for leave to appeal, or in the heads of argument. It is that the Court *a quo* should have exercised its powers in terms of section 186 of the Criminal Procedure Act 51 of 1977 (the CPA) which provides:

'The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.'

[26] The discretion vested in the trial court in terms of this section should be used 'sparingly' and only where such evidence is essential to enable that court to reach a just decision. In considering section 186 of the CPA, the High Court in *S v Anthony*[8] stated as follows:

'*Section 186 of the Criminal Procedure Act provides that the court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such criminal proceedings if the evidence of such a witness appears to the Court essential to the just decision of the case. Having referred to Curlewis JA's remarks in* R v Hepworth *supra, I hasten to add that whilst the inquisitional role of the Court is to be understood and welcomed, presiding officers must resort to exercising their powers under section 186 rather sparingly... Of course the section has both discretionary and*

[8] *S v Anthony* (SHF 27/14) [2015] ZAWCHC 30 (20 March 2015)

mandatory components. It is trite that Courts exercise their discretionary powers judicially and reasonably.'[9] [Emphasis added]

[27] It is for the trial court to decide whether the evidence is essential. In the matter of *S v Gabaatlholwe*,[10] Heher AJA concluded that because the assessment of whether the evidence is essential is left to the judicial officer, a court on appeal will interfere with the exercise of the discretion on very limited grounds.[11] In this regard it stated as follows at paragraph 8:

'...Where, however, a party contends ex post facto *that a witness who was not called was, objectively, essential to a just decision and it is apparent that the trial court did not apply its mind to the question...the exercise of a discretion does not arise. A Court on appeal would then be justified in interfering if it is satisfied that the witness was indeed essential...'*[12]

[28] Referring to section 186, the SCA further stated that the phrase ' "*essential to the just decision of the case" means that a court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done as a result.'*[13]

[29] In the matter of *S v B & Another*[14] it was held that an appeal court would interfere only if it was shown that *no* court could reasonably have failed to call the witness. In that case, no application had been made in the court *a quo* to call the witness. Further, the presiding judicial officer had not applied his mind to whether he should exercise his discretion to call the witness, or whether the evidence of that witness was essential to a just decision of the case. The Court held as follows:

'If it could have been made to appear that his evidence was in fact essential to the just decision of the case, the learned Judge's failure to call him could have constituted an irregularity and it would have been open to appellants to apply for a special entry under s 317 (1) of the Criminal Code whereupon it would have been necessary to follow the

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[9] Ibid para 7.
[10] *S v Gabaatlholwe* 2003 (1) SACR 313 (SCA).
[11] Ibid para 8.
[12] Ibid.
[13] Ibid.
[14] *S v B & Another* 1980 (2) SA 946 (AD) at 953E.

procedure prescribed in that section in order to bring the matter before this Court. Appellants took no steps to do so and it cannot now be claimed that the presiding Judge acted irregularly. Whether the latter should have exercised a discretion as provided in s 186 to call J [the witness] *may well be a matter for debate. The fact that this Court, were it placed in the position of the trial Judge, might well have chosen to do so can however take the matter no further. The exercise of this discretion is entrusted by that section to the trial Judge and this Court could not interfere with its exercise unless it were shown that no Court could reasonably have failed to call J. In such an event the trial Judge by failing to call him would have committed an irregularity. Here again no proceedings to correct the action of the Court* a quo *on the ground of such irregularity have been set in train. In any event, however, there is nothing* ex facie *the record which would lead to the conclusion that it would have been either essential or advantageous to call J. The fact that neither side called him was at least an indication that his evidence would not take the matter much further.*'[15]

[30] In respect of the parties' failure to call a witness, in *S v Gabaatlhlowe*, the SCA stated that—

'*The parties will often possess insights into the contribution which a witness could make not apparent to the Judge or magistrate and their views should always be canvassed before the decision is taken... The best indication to the trial court of the importance that a party attaches to calling a witness is the assiduity which that party applies to ensuring that the witness is available to it...*'[16]

[31] In the present case the Magistrate made no mention of section 186 in his judgment. It can therefore be accepted that the Court *a quo* did not consider whether or not it should, in the exercise of its discretion, subpoena the appellant's friend who, on the appellant's evidence, was drinking with him in the tavern that night.

[32] This is not surprising, given the fact that, in the first instance, the appellant was legally represented throughout the trial. Furthermore, it was never put to any of the State witnesses, when cross-examined, that this witness would be called to testify on behalf of the appellant and what that witness would testify to. Faced with the

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[15] Ibid at 953A-F.
[16] *S v Gabaatlhlowe* (note 11 above) para 7.

aforegoing, it is not possible to fault the presiding Magistrate in the Court *a quo* for not acting in terms of s 186 of the CPA. In order for this court to decide on the matter, it would need to find that *'no Court could reasonably have failed to call* [the witness]' [emphasis added].

[33] The defence had access to the witness and would have called him if it could assist his case. If the Court *a quo* had called him in terms of section 186 of the CPA, and he did not corroborate the appellant's version, the Court would have been held to have exceeded its powers.[17]

[34] Hence, there is no reason for this Court, sitting as a court of appeal, to interfere and invoke the provisions of s 186. Viewed in the totality of the evidence, the 'failure' of the Magistrate to subpoena this 'potential' witness cannot be said to be an irregularity giving rise to a miscarriage of justice.

[35] In my view, the Court *a quo* did not err when it rejected the appellant's version and accepted the testimony of the State witnesses.

[36] The guilt of the appellant was proved beyond a reasonable doubt and his appeal on the convictions must fail.

AD Sentence

[37] It is trite that the court of appeal will only interfere when the trial court did not exercise its discretion properly when it sentenced an accused.[18]

[38] It is further trite that when imposing a sentence, a court should balance the nature and circumstances of the offence, the circumstances of the offender and the impact the crime has on the community, its welfare and concern.

[39] The personal circumstances of the appellant are that he was 31 years old with two minor children. He was employed at the time of his arrest on 5 September 2010. On 7 September he was released on bail, but failed to appear on 16 March 2011 and a warrant for his arrest was issued. He appeared on 8 April 2011; the warrant was

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[17] In this regard, see *S v Anthony* (note 9 above).
[18] See *S v Sadler* 2000 (1) SACR 331 (SCA) at 334.

cancelled, but he remained in custody until the trial date. Thus he was in custody for 3 months, as a result of his default. The State contends that none of these amount to mitigating circumstances.

[40] Although the reasons for the Magistrate's sentence are not available, this Court is in a position to consider whether the sentences imposed are proper. In *S v Mvambo*[19] the court found that it was entitled to consider the question of sentence afresh as if it were a court of first instance.

[41] It was argued by the appellant's legal representatives at the trial that a suspended sentence be imposed in view of the fact that the two minor children request same. The issue of minor children and the effect that this may have on the sentence was aptly dealt with by Nugent JA in *S v Vilakazi*[20] where it was stated:

'*The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be.....*'[21]

[42] It is common cause that the appellant has fourteen previous convictions. He has been sentenced to imprisonment before, but appears not to have learnt a lesson and continued his life of crime. The convictions date from September 1989 to 2008. He has been convicted of robbery, possession of housebreaking tools, theft, assault, and malicious damage to property.

[43] Many of these convictions are directly relevant to a crime of violence of which the appellant has now been convicted.

[44] The State also contends that there are aggravating factors in that the appellant was in possession of an unlicensed firearm and ammunition, and such offences are prevalent. He fired several shots in a public area where there was risk of injury to

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[19] *S v Mvambo* 2005 (1) SACR 436 (SCA).
[20] *S v Vilakazi* 2009 (1) SACR 552 (SCA).
[21] Ibid para 58.

person and property. He attempted to kill Nkosi; violent crimes are on the increase; and the appellant did not show any remorse for his actions.

[45] The test on appeal of sentence is not whether the sentences imposed were wrong, but whether the trial court exercised its discretion properly or not. As stated above, this Court is not in possession of the trial court's reasoning, but the sentences imposed appear to fit the offences and this Court, as stated above, is entitled to have regard to the factors involved in the sentencing on its own.

[46] Having had regard to the trial record, the offences, the appellant and the interests of society as well as his previous convictions, I am of the view that the sentences imposed by the Court *a quo* were proper and appropriate.

[47] The effective term of imprisonment is 15 years. The Court *a quo* did not allow for the sentences to run concurrently. The appellant's counsel submits that the Court should have allowed this. The issue is whether the sentence of 15 years induces a sense of shock or whether the Magistrate misdirected himself. This Court, as a result of the record of the sentencing being unavailable, cannot ascertain whether the latter occurred. In my view, the sentence does not induce a sense of shock and this Court, acting in terms of its authority to look at the sentence afresh, cannot find that there are grounds to interfere with the sentence imposed by the Court *a quo*.

Accordingly the following order is made:

1. The appeal is dismissed.

S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

B WANLESS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	7 March 2019
Date of judgment:	27 March 2019

Appearances:

Counsel for the Appellant:	Adv. M A Khunou
Instructing Attorneys:	Legal Aid SA
Counsel for the State:	Adv. R Bester