IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBERS: A135/2019

DELETE WHICHEVER IS NOT APPLICABLE

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

In the appeal of:

G, **A**

Appellant

and

THE **STATE**

Respondent

Coram: Wepener et Mudau JJ

Heard: 30 January 2020

Delivered: 30 January 2020

JUDGMENT

Wepener et Mudau JJ:

[1] The appellant was convicted on a charge of attempted murder and sentenced to 12 years imprisonment of which four years were conditionally suspended for a period of five years. Further orders were also issued. Although a portion of the regional magistrate's judgment on conviction is not in the record the full record of the evidence upon which the conviction and sentence were based, is before this court. In S v Chabedi[1] it was said:

> 'The contention on behalf of the appellant that the shortcomings in the record rendered a proper consideration of the appeal impossible, was based on the submission that we are dependent on the magistrate's judgment on conviction to assess his evaluation of the evidence. I do not agree with this submission. As indicated the matter can, in my view, be decided on the inherent probabilities, which can in turn be determined on the record as it stands. If the magistrate based any credibility findings on the demeanour of the respective witnesses, those findings could, in the circumstances, only have been adverse to the appellant. Logic therefore dictates that the appellant could suffer no prejudice through this Court's lack of knowledge whether demeanour findings were indeed made by the trial court.'

[2] The first aspect to be dealt with is the conviction of the appellant. Despite the heads of argument on behalf of the appellant dealing with the evaluation of the evidence in para 23-32, regard must be had to the appellant's notice of appeal. Regarding conviction, it reads[2]:

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[1] 2005 (1) SACR 415 (SCA) para 13.
[2] See page 311 of the Notice of Appeal in terms of section 84 of the Child Justice Act read with section 309*B) of the Criminal Procedure Act 51 of 1977.

‘1. The learned Magistrate erred in finding that the State proved its case beyond reasonable doubt.

2. The learned Magistrate had not properly evaluated or analyse the evidence of the witnesses.

3. The learned Magistrate erred in finding that the appellant was not acting in self-defence when he stabbed the complainant.

4. The learned Magistrate erred in rejecting the evidence of the defence that the complainant was the aggressor when he was stabbed by the appellant.’

[3] It has long been established practice that a notice of appeal should not be generally framed but that it should contain such detail as to enable the magistrate to respond properly to the grounds and alert the State to the issues on appeal. Grounds of appeal will be bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling made by the court a quo or if they are too vague to be of no value or if they are general and fail to specify clearly and unambiguously the exact case which it makes. The grounds set out above are so vague and generalised that it is not possible to determine the precise ambit of the notice of appeal. It, in my view, is a nullity and this court should not entertain any argument regarding the conviction of the appellant. Nevertheless, I regard is had to the heads of argument not much more is said than that which is contained in the notice of appeal. On this basis alone the appeal against conviction should be dismissed.

[4] If I am wrong in this approach I am prepared to look at the evidence as a whole. The appellant relied on private defence, and more particularly a defence necessary to avert an attack. A person relying on such a defence must not only show that the force was necessary but also that the gravity of the attack and the style and extent of the defence against the attack was more or less proportional. See ‘Grigor v S [2012] ZASCA 95 para 10 where the Supreme Court of Appeal dealing with a road rage in situation held that there was an imbalance (or disproportion) between the alleged attack and the defence. It was held that in this case the appellant had exceeded the bounds of self-defence by inflicting severe injuries (amounting to attempted murder) on the

complainant with a knife. See also A Ashworth 'Self Defence and the Right to life' [1975] Camb LJ 282 at 296 and the remarks of the Royal Commission (n 47):

We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty and property . . . this is subject to the restriction that . . . the mischief done by . . . the force used is not disproportionate to the injury or mischief which it is intended to prevent'.[3] Also in *S v Steyn,*[4] Leach AJA said:

> '. . . every case must be determined in the light of its own particular circumstances and it is impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence. However, there should be a reasonable balance between the attack and the defensive act as one may not shoot to kill another who attacks you with a flyswatter'.

[5] I am of the view that the evidence shows that the complainant was not the aggressor but that the appellant had a score to settle as a result of an incident that occurred the previous night. The complainant had on the state's version the previous day confronted the appellant as he was assaulting his girlfriend. The appellant on the version of the state which the trial court logically must have accepted, held the appellant and the girlfriend managed to escape. The independent evidence of Mr. Silwane was that the complainant's arms were being lifted above his head. This was at the time when the complainant was being stabbed. There are also a number of improbabilities in the version of the evidence of the appellant a highlighted by the State in its heads of argument. More seriously, the stabbing of the complainant, twice with a knife, in my view, far exceeds reasonable defensive action if that had been true. The defence can, in the circumstances, not be upheld. Due to the fact that it is common cause that the appellant stabbed the complainant twice with a knife which could have led to the appellant's death was it not for medical intervention, the charge of attempted murder was proved against the appellant and the appeal against his conviction cannot be upheld and falls to be dismissed.

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[3] Burchell, Principles of Criminal Law (5th Ed) 127 n 48.

[4] 2010 (1) SACR 411 (SCA) at 417d-e.'

[6] As to the appeal against sentence, the appellant, as gathered from his pre-sentencing reports was born on 21 December 1999. He was a little over 17 years when the incident of crime was committed. He was one month shy of 19 years of age, at the time of his sentencing on the 28 November 2018 whilst out on bail. He was doing grade 11, having repeated some grades. The appellant had no records of previous convictions. He had another sibling, an elder sister, albeit by a different father. The appellant is without dependents. The probation officer and the correctional services officer were of the view that the appellant was a candidate for correctional supervision in terms of s 276 (1)(h) of the Criminal Procedure Act[5]. On the other hand the state presented a victim impact report in which the complainant stressed the mental and emotional effect the incident had in his life over and above the physical injuries sustained in his opposition to a noncustodial sentence.

[7] It was contended on behalf of the appellant that the best interest of the child as provided for in s 28 of the Constitution were not taken into consideration when the trial court imposed an effective sentence of eight years imprisonment .The trial court was alive to the relevant provisions of the Child Justice Act[6].The trial court had regard to the presentencing reports. But was of the view that the presentencing reports were skewed and biased, in that the emphasis was on the appellant's personal circumstances without due regard to the other elements of sentencing. The trial court guarded against imposing a warped sentence regard being had to the totality of the facts and referred to *S v Lister*[7].

[8] It is trite that it is important when sentencing, to bear in mind the chief objectives of criminal punishment, namely retribution, the prevention of crime, the deterrence of criminals, and the reformation of the offender. At the same time none of the elements of proper punishment must be over or under emphasised when considering an appellant's personal circumstances, the crime and the interest of society.[8]

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[5] Act 51 of 1977.
[6] Act 76 of 2008.
[7] 1993 (2) SACR 228 (A).
[8] *Tshoga v S* 2017 (1) SACR 420 (SCA) para 28).

[9] It is well established in our law that the introduction of correctional supervision as a sentencing option has ushered in a new phase, which if used in appropriate cases and if applied to those who are likely to respond positively to its regimen, can serve to protect society without destructive impact incarceration can have on a convicted criminal's innocent family members.[9] In *S v M*, in sentencing a primary caregiver, it was reiterated that the Constitution requires that the child's best interests have paramount importance in every matter concerning the child. Sachs J, writing for the majority, noted that:

> 'the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of the relationship to other rights, which might require that their ambit be limited'.[10]

However, there are circumstances where correctional supervision as a sentencing option would be improper and disproportionate to the gravity of the offence.[11]

[10] The trial court in this case was correct in its view that violent related crimes in this country have reached astronomical proportions. Not only was the offence committed very serious, and the injuries life-threatening, the complainant barely survived. His spleen could not be saved. Consequently, his health had been compromised severely. Had it not been for the timeous intervention of medical practitioners the appellant would in all probabilities have faced a murder charge. The offence had been pre-planned in that the appellant carried a knife to school although the incident occurred after ordinary school hours outside the school premises. The complainant had to run for his life as the appellant wanted to kill him.

[11] The sentence imposed can only be described as lenient. No misdirection was seriously alluded to, none exists and there are accordingly no reasons for this court to interfere with the sentence. It accordingly follows that the appeal must fail.

[12] In the result the appeal against conviction and sentence is dismissed.

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[9] *S v M (Centre For Child Law As Amicus Curiae)* 2007 (2) SACR 539 (CC).
[10] At para 26.
[11] See *S v Mngoma* 2009 (1) SACR 435 (E); *S v Maleka* 2001 (2) SACR 366 (SCA).

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Wepener J

I agree.

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Mudau J

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Attorneys for the Respondent: State Attorneys