REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

1/4/14

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED.
(4)	Signature 01/04/2014 Date

CASE NO: A366/13

SIBUSISO MICHAEL NGWENYA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] On 31 October 2010 at Barberton, Mlondolozi Shongwe ("the Complainant"), an 18 year old Grade 10 pupil at Barberton Senior Secondary School was shot and wounded on the head. Appellant was arraigned and convicted in the Barberton Regional Court for attempted murder of the complainant and sentenced on 25 September 2012 to 10 years imprisonment. On petition to this court, having been refused leave by the magistrate, Appellant is appealing against both the conviction and sentence.

[2] His appeal is based on allegations that the learned magistrate erred:

[2.1] in his finding on the evidence of the state witnesses as he did not demonstrate the required degree of analysis in his approach to the inconsistencies and contradictions in the witnesses' evidence; and

[2.2] in placing undue emphasis on the element of deterrence, failing to consider a sentence in terms of s 276 (1) of the Criminal Procedure Act 51 of 1977 ("the Act"), take into account that the participants to the fight were drunk, complainant provoked the accused and was the initiator of the fight and that Appellant reached the age of 34 without committing a crime. As a result the sentence was shockingly inappropriate.

[3] The state opposes the appeal.

BACKGROUND FACTS

[4] Appellant and his friend Thulane Hlophe ("Thulane"), were involved in an argument with the complainant and his sister, Buyisile Shongwe, ("Buyisile) when the complainant was shot on the head. The former duo had earlier on that day clashed with the complainant at a place called Chicago. They blocked the road and prevented the complainant who was in his brother's car from leaving the venue. Complainant left the car and instead walked to his mother's home. In the meanwhile a fight broke out at Chicago involving the complainant's brothers and the Appellant and his friend.

[5] Later Thulane arrived at another drinking spot at Rockerfeller called Dukes Place, looking for the complainant. He confronted Buyisile who was standing outside with a friend, and dragged Buyisile's friend from the back of a bakkie, to the ground. At that time an argument ensued at the scene between the complainant and Appellant. The complainant was shot and Thulane and the Appellant ran away.

[6] Appellant was arrested. At trial he pleaded not guilty and was convicted on the evidence led by Buyisile and the complainant that the court a quo accepted to be reliable. The defence's evidence was rejected as unreliable and improbable.

STATE'S EVIDENCE

[7] According to Buyisile, she was standing outside at Rockerfeller with her friend who was at the back of a bakkie when Appellant and Thulane arrived looking for the complainant whom they alleged was disrespectful. Thulane dragged her friend off the bakkie and she fell to the ground. At that time the complainant was confronted by the Appellant who had a gun in his right hand that he then put in his right pocket. Whilst they were arguing, she tried to pull the complainant away but Appellant pulled him back by his hand. Appellant pointed the gun to the complainant's head, shot him and together with Thulane ran away. The complainant was taken to hospital. Visibility was good and the place had a spotlight and a street light on. She denied that she was drinking that night. On being cross- examined on

her police statement that says the contrary, she persisted to deny that she was drinking her reason being that she was going to a funeral the next day.

[8] The Complainant testified that when he came back to Chicago, from his mother's place, he found his brothers being assaulted and decided to go to Rockerfeller at Dukes place. The Appellant also arrived at Dukes holding a gun in his right hand. Appellant accused him of being disrespectful whilst he asked for forgiveness. As they were still talking his sister Buyisile pulled him away, telling him to walk away. During that time he was shot and he woke up at the hospital with a gun wound on his head. The last time he was conscious of what was happening was when the Appellant was pointing the firearm at him and threatening to shoot him. He did not see or hear the gun go off. Buyisile told him that Appellant shot him.

DEFENCE'S EVIDENCE.

[9] Appellant's testimony in- chief was a bare denial of all the allegations made by the state's witnesses save for admitting to being present at the scene and being next to the complainant when he was shot. He denied that he is the one who shot the complainant and did not proffer any explanation until under cross examination.

[10] In the course of cross examination he confirmed that Thulane wrestled with Buyisile's friend in a bakkie, who then fell down and that the first disagreement at Chicago was resolved. He alleged that the complainant confronted Thulane carrying a beer bottle and an altercation followed. He did not hear what they were saying to each other as he was still approaching the scene. The altercation continued in his presence and they retreated for about 20 metres with complainant advancing at a distance of 1,5 metres threatening to assault Thulane with a beer bottle. Buyisile dragged the complainant away telling him to leave them alone. At that time they heard some noise like a cricket or firearm and the next thing the complainant was laying on the ground, his sister, Buyisile next to him. They started running away because there were people chasing them. The place had lights. He gave his age as 34 and Thulane's to be between 32 and 34 years old.

[11] According to Thulane he was there when complainant was shot, but he did not see the person who fired the shot or was holding a firearm and Appellant did not shoot the complainant or have a firearm. Appellant and himself were standing not far from the complainant since they were arguing with him whilst Buyisile was trying to pull the complainant away who had nothing in his hands. The complainant fell down after a bang. There were many people around at the scene. He could see them as the place was lit. He could have seen also if somebody was carrying a firearm. He cannot say he had an altercation but the complainant was the aggressor so he demanded to know from him why he was accusing or quarrelling with him. When he confronted the complainant his friends threw bottles at him. Appellant intervened to try and calm the situation but the quarrel continued that is when the loud bang was heard and they fled the scene. His car was set alight. He admitted being aggressive towards the complainant's sister and pulling her friend

off the bakkie. The Appellant came to assist him adding manpower also by asking them why they were fighting him.

[12] Only under cross examination did he confirm to have dragged the complainant's sister from the bakkie as she was not paying attention to him. He alleged that he was angry after being assaulted so, he lost his temper and his aim was to confront the complainant. He did not dispute that *complainant was actually unarmed*. He further admitted that complainant arrived after he had dragged the sister but denied that the earlier incident at Chicago was resolved as alleged by Appellant. He then again alleged that complainant and his friends pushed him and threw bottles at him and Appellant came to resolve the situation. Immediately after Appellant had asked them why they were fighting him, there was a loud bang and complainant fell. He was standing a metre and a half from the complainant.

[13] The version that was put to the state's witnesses during cross examination and alleged to be the Appellants version was not led by any of the witnesses on behalf of the Appellant. It was about the alleged attack on Thulane and that when complainant came back he confronted them complaining that his mother died because of them blocking him.

[14] From the record it is evident that when assessing the state's evidence, the learned magistrate took into consideration the totality of the evidence to find that Buyisile was impressive as a witness and her facts carefully marshalled, having given a comprehensive and detailed version of what transpired. The court was also mindful that she was a single witness on the firing of the shot, which fact was placed in issue and therefore it was to exercise caution. On the other hand it acknowledged that the complainant was drinking and his evidence was short with minor shortcomings but pointed out that his version was corroborated by Buyisile's clear and structural evidence. After analysing the discrepancies some of them as perceived by the Appellant, the learned magistrate concluded that their evidence was truthful, reliable and bona fide. He recognised that complainant could have lied about the shooting but he was honest. He admitted to not seeing the Appellant when fired the gun.

CONTENTION ON CONVICTION

[15] Appellant contests that the learned magistrate demonstrated the required degree of analysis in his approach to the inconsistencies and contradictions in the witnesses' evidence and he details in his heads of argument each and every specific incident and utterings in the record by the Appellant and Buyisile that it regards as inconsistent, discrepant or in conflict and should have been mentioned and commented upon by the court in its analysis, somehow in exaggerated form. The court is accused of only paying lip service to the applicable approach.

[16] Basically, the Appellant is challenging the court's analysis of the facts and its factual findings. Trite is that the Appeal court's power to interfere with the factual findings of a trial court are limited to instances where the Appellant proves a discernible and material misdirection by the court a quo. The appeal court will therefore only reject the trial court's

assessment of the evidence if it is convinced that the assessment is materially incorrect, not merely on the findings of facts but also in its reasons. It is therefore the duty of the Appeal court, if convinced that a distinct and material misdirection has been proven, to consider the record as a source of insight to the proceedings to ascertain if indeed the findings on facts are supported by the evidence or the probabilities and what is the relevance or materiality of the inconsistent statements to the facts in issue; See *S v Tshoko* 1988 (1) SA 139 (A) at 142F-143A.

[17] In the instance of a court finding a discrepancy between the statement and the evidence of a witness in court, only if the discrepancy is material that the appeal court will reassess. The scholarly approach in *S v Mafaladiso en Andere* [2002] 4 All SA 74 (SCA) referred to by the Respondent short of a citation, articulately sets out the proper approach that:

> "The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. First, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and the precise nature thereof. In this regard, the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross- examination, that they may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation, affects the credibility of a witness. Non material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions-and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial judge, namely to weigh up the previous statement against the viva voce evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite the shortcomings."

[18] The Appellant criticised Buyisile's testimony for its inconsistency with the police statement regarding her drinking. Although she gave an explanation that her friends and everybody there was drinking including the complainant. The statement to the police was made in that perspective but she, personally was not drinking as she was going to a funeral the next day. She maintained that she was sober but her brother was drinking. The explanation, weighed against all evidence and given her clear testimony, is plausible. None of the defence witnesses gave evidence about or challenged her clear-headedness. The incongruence therefore does not cast a doubt on her credibility or the reliability of her evidence.

[19] She was also criticised for first saying that Pops was in possession of the firearm and later saying that the Appellant had the fire arm and that he had it in his right hand and then again that he had it in his pocket. However:

> [19.1] Every time she mentioned Pops, when asked "who?" she always answered that "the Appellant" and at some point it was accepted by Appellant's Counsel that

the name is mentioned in respect of the Appellant. On the one occasion where she mentioned "Pops and Sibusiso" in the record, she was asked, who came? and she stated, clearly, that Sibusiso came. So her evidence in that regard was indisputably in relation to the Appellant. In consideration with the other evidence nothing more could be read from that.

[19.2] during cross examination she clarified that Appellant took out the firearm in front of them, and at the time he was approaching them he was holding it in his hand. Then he put it in his pocket and had his hand always inside his pocket. He took the firearm out again after she pulled the complainant away telling him to leave. She said she saw the Appellant holding it in his right hand and discharged it. There is no material or any discrepancy in that evidence. It is also corroborated by the complainant who saw Appellant holding the gun in his right hand and pointing it at his head.

Therefore there was no discrepancy or inconsistency that called for a special attention and evaluation by the court a quo.

[20] The complainant is criticised for failing to tell the court that Buyisile stood on his right hand side even though he confirmed that she was next to him when he was shot, which is preposterous. The relevance of such information is not stated, if that makes any difference to the facts that were in issue. Only an omission of a fact relevant to proving or disproving the commission of an offence as charged would beaterial to such an extent that it would require the reassessment on Appeal.

[21] The court a quo is also criticised for failing to analyse complainant's evidence on his observation that Appellant held a firearm in his right hand and could not say what colour it was and also that he could not remember if there were lights and later said there were street lights. The Appellant and other witnesses had testified that the place was lit. So although he could see the Appellant he was not sure if there were street lights. Also it was not his evidence that it was dark. He was frank to say he was not sure of the colour of the firearm. That does not mean he could not see the gun held by the Appellant who was in such close proximity as attested to by all the witnesses hence making it probable that he could see if Appellant had a firearm and if he was holding it in his right hand. He also pointed the firearm at him. The colour of the firearm might seem relevant but is immaterial since it was not put in issue nor could it prove or disprove if Appellant shot the complainant. Appellant denies holding the firearm anyway. The learned magistrate did not have to labour the point and the point on the Appellant's handling of the firearm was adequately addressed. The complainant not being sure of the colour shows his honesty.

[22] On the question of lights, Appellant and other witnesses had testified that the place was lit. Although the complainant was not sure if there were street lights, it was not his evidence that it was dark nor did he deny that there were lights outside, he first could not remember. However after a while in his evidence he confirmed that there were street lights as in accordance with every witness' testimony. His sister in particular had confirmed that there were street lights. The fact that in cross examination his memory was jolted and he could remember does not signify that he was being lying or less credible, especially in the light of the whole evidence. The learned magistrate's acceptance of his version after taking into consideration these factors is defensible.

[23] It is trite that not every error made by a witness will affect his or her credibility. It is the duty of the trier of fact to weigh up and assess all contradictions, discrepancies and other defects in the evidence and, in the end, to decide whether on the totality of the evidence the state has proved the guilt of the accused beyond reasonable doubt. The trier of fact also has to take into account the circumstances under which the observations were made and the different advantage points of witnesses, the reasons for the contradictions and the effect of the contradictions with regard to the reliability and credibility of the witnesses. *S v Sauls* 1981 (3) SA 172 (A) at 180E-F; *S v Mkohle* 1990 (1) SACR 95 (A) at 98f-g; *S v Jochems* 1991 (1) SACR 208 (A) at 211g-j; *S v Mafaladiso* 2003 (1) SACR 583 (SCA) at 593f-594h.

[24] It is trite as well as asserted in R v Dhlumayo and Another 1948 (2) SA 677 (A) at 706 that:

> "an appellate court should not seek anxiously to discover reasons adverse to the conclusion of the trial judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered."

[25] Furthermore, in the light of Appellant's evidence in mitigation that he overreacted to a situation where his friend was the aggressor by firing a shot, there is no doubt that the Appellant is the person who shot the complainant. The tendered evidence is in line with the revelation by Thulane that he was angry and had lost his temper, the manhandling of complainant's sister and her friend and Appellant and Thulane's conduct of confronting the complainant. In Hiemstra's *Criminal Procedure* p30-46; it is stated that what the accused said in mitigation after conviction can be taken into consideration in an appeal on the merits, either against or in favour of the accused; See *S v Mavhungu* 1981 (1) SA 56 (A); such evidence may not be "further evidence" strictly according to the intention of s 316 subsection (5) requiring a formal application and prior notice -it is part of the proceedings in the trial and as such can be taken into consideration. The evidence also negates Appellant's allegation in his appeal that he was provoked.

[26] It follows that Appellant's criticism on the degree of analysis by the learned magistrate is hypocritical. Frankly, there is no reason to disturb the credibility findings of the court a quo regarding the complainant and Buyisile or its rejection of the Appellant and Thulane's evidence. The Appellant has, under the circumstances failed to prove a material misdirection that merits the setting aside of the conviction.

ON SENTENCE

[27] It is trite that pronouncement on sentence is within the trial court's province and the Appeal court is not to interfere with such discretion capriciously, unless if not exercised judiciously. The trial court is to decide each case on its own merits giving proper consideration to personal circumstances of the accused, the nature and the circumstances surrounding the commission of the crime and the interest of society, *S v Zinn* 1969 (2) SA 537 (A), *S v SMM and Others* 2013 SACR 292 (SCA) ([2012] ZASCA 56; Therefore the

appropriate sentence imposed, is to be sensitive to the aim of sentencing with the length of sentence bearing relation to the gravity of the offence, the person of the offender and the interest of society.

[28] The Appeal court will therefore interfere only if the trial court has misdirected itself or if the sentence imposed is disturbingly inappropriate to warrant its setting aside; See *S v Rabie* 1975 (4) SA 855 (A) at 857D-F. A misdirection can occur if the court fails when assessing an appropriate sentence to determine or applying the facts judiciously. A mere misdirection is not by itself sufficient to entitle interference with the sentence on appeal, it must be of such a serious nature or degree that it shows that the court did not exercise its discretion or exercised it improperly or unreasonably; See *S v Pillay* 1977 (4) SA 531 (A) at 535E-F.

[29] I therefore in turn consider the alleged misdirection of the trial court:

[30] The trial court took into consideration the personal circumstances of the Appellant, that is his age, unmarried status, his 5 minor children that he said he was contributing towards their support and that he had a monthly income. It is important to mention that he did not allege to be totally responsible or the primary care giver of the children, which could have compelled the court to reconsider if the custodial sentence would be appropriate notwithstanding the seriousness of the crime committed, *S v Piater* 2013 (2) SACR 254 at 262; His evidence was instead that they are all assisting to support the children and he only makes a contribution. His incarceration will therefore in reality have no serious impact on the children. He did not mention the children when asked what is it that he requests from court but just wanted to be kept away from prison.

[31] The fact that he was outright not remorseful and that he, notwithstanding agreeing to compensate the complainant, proceeded to plead not guilty and insisted that the complainants were untruthful was properly considered by the court to be aggravating. It is also a fact that his evidence was not that he was provoked or Thulane the aggressor as it is now noted in his appeal. He actually denied that he shot the complainant, whilst the proven evidence confirmed that Appellant and his friend, 34 and 32 years old, sought out the complainant (a school boy), who was unarmed, defenseless and not posing any threat and shot him on the head (execution style) for a trivial reason that he was disrespectful, an irrational and repugnant behavior deservedly considered aggravating by the court. The penalty must be consistent with the gravity of the offence. Appellant also admitted that his friend was the aggressor and he lost his temper. Under the circumstances the court fittingly deemed Appellant a candidate for long imprisonment; See *S v Pillay* 1977 (4) SA 531 (A) at 535E-F. In *S v Karolia* 2006 (2) SACR 75, the sentence of correctional supervision was found to be startlingly inappropriate and grossly lenient and a sentence of imprisonment warranted when accused deliberately and at close range shot the victim whilst he was escaping. The conduct was regarded as a serious aggravating feature to be taken into consideration when determining the appropriate period.

[32] The issue of Appellant's drinking or its extent did not arise as part of the Appellant's evidence or in mitigation. Instead only the complainant admitted to drinking that night but denied that he was drunk. Therefore no drunkenness was considered in attenuation or mitigation of the Appellant's moral blameworthiness.

[33] Appellant's insistence that a non- custodial sentence in terms of s 276 (1) should have been imposed indicates his failure to understand the gravity of his criminal action. Such gravity and the circumstances under which the offence was committed with total disregard of the young life and the legitimate interest and protection of society together with his display of an uncaring attitude far outweighs the appellant's interest and those of his family who will not be at their worst without him. Consequently Imposing a non-custodial sentence of correctional supervision as envisaged in s 276 (1) is not only disproportionate to the offence committed but would result in the travesty of justice. Under the circumstances the direct imprisonment of the Appellant for a substantial period serves completely the purpose of punishment, (rehabilitation, deterrence, retribution and prevention) given the aggravating circumstances as considered in respect of the nature and seriousness of the crime, his lack of remorse, the surrounding circumstances, the victim, the interests of society that outweigh his personal circumstances.

[34] It is interesting that Appellant denies committing the offence and at the same time justifies it on appeal by alleging provocation that was not pleaded nor proven during trial. The defence was also not raised in mitigation and therefore consists of new evidence. Nevertheless as there was no evidence led or proven of Appellant alleged provocation the court a quo did not misdirect itself when it did not consider such a defence or its mitigating factor. The plea is mentioned for the first time on appeal. The learned magistrate found him guilty following on his guilt being proven beyond reasonable doubt and imposed a sentence after proper consideration of the sentencing factors proven to exist.

[35] Under the circumstances and considering all the conspectus of this matter, I could not find any evidence of the trial court's misdirection or disproportionality in the sentence imposed or a sentence vitiated by irregularity justifying interference.

[36] I therefore make the following order:

[35.1] The appeal is dismissed.

For the Appellant:

Instructed by: Coert Jordaan Inc Attorneys

Nelspruit

For the Respondent: Adv S Mahomed

Instructed by The Director of Public Prosecutions

North Guateng: Pretoria

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

I concur

MUSHASHA AJ
ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION: PRETORIA