IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A518/2015

Date: 31 ~~October 2016~~
1/11/2016

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In the matter between:

GUSTAV KHULEBONA DUBE Appellant

and

THE STATE Respondent

JUDGEMENT

DU PLESSIS, AJ

1.

The appellant was charged with four counts namely: charge 1 and 2: attempted

murder; charge 3: the possession of a firearm without a license; and charge 4: possession of ammunition without a license.

2.

The appellant was convicted in the Regional Court Piet Retief on 20 August 2014 on charge 1 of assault with the intent to do grievous bodily harm and on charge 2 of attempted murder. He was found not guilty on charge 3 and 4 . On charge 1 he was sentenced to 2 (two) years imprisonment and on charge 2 to 5 (five) years imprisonment. Although leave to appeal was denied by the Regional Court Magistrate, leave to appeal was granted on petition against both conviction and sentenced by this Court on 1 June 2015.

3.

The appellant was at all relevant times represented by an attorney.

4.

This unfortunate event occurred on 22 February 2013 at a tavern in the little village known as Dirkiesdorp in the regional district of Mpumalanga.

5.

It is common cause that the appellant is an employed 42 year old assistant to a fitter and turner at a local mine who went to the tavern at 20h00 to buy liquor. On all accounts he was not intoxicated. He at all times had his licensed 9 mm pistol with him. He was never asked nor did he explain why he had his pistol with him that evening. It was never suggested nor was there any evidence that

he went to the tavern armed with the intention to cause trouble or use the firearm.

6.

The first witness was Neli Thela, the complainant in charge 1. Her evidence was that she met the appellant in the tavern. On her own admission she was fairly severely intoxicated and in any event to such an extent that she herself cannot remember exactly what happened there. *"Wat gebeur het daar was 'n rusie gewees Edelagbare maar ek kan nie mooi onthou wat daar gebeur het nie, want ons was besig om te drink."* The appellant says she confronted him for money to buy liquor. The witness herself denies this but is extremely vague as to how the altercation started.

7.

Her evidence was that although she cannot remember what her dispute with the appellant was all about, she does remember that the appellant took out a firearm during the dispute and hit her with the firearm on her shoulder.

8.

The witness never alleged nor was there any evidence presented that the appellant threatened her with the firearm, pointed the firearm at her or fired the firearm in her direction. She sustained no injuries as a result of the blow with the firearm on the shoulder. It transpired later in evidence that she was hit with the back of the firearm on the shoulder.

9.

She herself did not feel threatened, nor was there any evidence from this witness that she experienced any intent from the appellant to either seriously injure her or that he threatened to shoot her.

10.

Her own evidence of the one blow with the firearm on the shoulder remains unchallenged.

11.

Although the appellant denied that he attacked her, she was not challenged on her version. The second state witness Mr Sibusiso Nkosi is also the complainant on the second charge of attempted murder. He did see the altercation with the complainant in the first count but he did not indicate where the blow hit the complainant. It was only in cross-examination that he qualified his observation with the statement: *"ek was dronk maar gesien asof in die gesig gedeelte."* .

12.

This evidence does not correspond with the evidence of Thela nor with the third witness a certain Mr Nkosi (no relation to Sibusiso Nkosi), who confirmed one blow on the shoulder of Thela.

13.

The Court a quo accepted the evidence of one blow with the back of the firearm to the shoulder with no serious consequences, and correctly so.

14.

After this altercation the complainant Thela turned away from the appellant and as she was walking away from him, she heard a shot going off. Apparently the bullet hit the cement floor and pieces of the cement floor where the bullet hit the floor, flew against her leg. She was however not hurt.

15.

It is common cause that the shot was fired from the appellant's pistol and it is furthermore common cause that it was not directed at her and that she actually had nothing to do with the incident that caused the discharge of the firearm.

16.

The conclusion of the Magistrate that the conduct of the appellant constituted assault with the intent to cause grievous bodily harm, is not supported by the evidence.

17.

The verdict of assault with intent to do grievous bodily harm is not a competent

verdict where the acquittal of the Accused on a charge of attempted murder is based on the absence of dolus. The Court a quo found *"ek is nie tevrede dat die Staat bo redelike twyfel bewys het dat die beskuldige die opset gehad het om haar te dood nie."* See-in this regard **S v Joshua 2003 (1) SACR 1 SCA at (32)**.

18.

This Court is mindful of the approach to the findings of fact by the trial Court as summarized in **S v Hadebe and Others, 1997 (2) SACR 64 (SCA) 645 (e – f)**: *"... in the absence of demonstrable and material misdirection by the trial Court, its findings are fact were presumed to be correct and would only be disregarded if the recorded evidence showed them to be clearly wrong. The Court emphasized that it could be useful for the understanding of the evidence as a whole to break it down into its component parts. But the Court should, in assessing whether a trial Court's findings of fact were wrong, be careful not to focus too intently on the separate parts, losing sight of the fact the whole body of evidence might shred valuable light on the evidential value of its component parts."* The Court a quo remarked that *"hy het weliswaar die vuurwapen gespan en dit in 'n stadium op haar gerig..."*. This is however an incorrect summary of the evidence that was submitted. This no doubt convinced the Court a quo that there was some form of intent either in the form of dolus directus or dolus eventualis that led the Court a quo to believe that the Accused had the intent to seriously injure the Complainant.

19.

The incident could at best be described as common assault and this Court also so finds.

20.

The Complainant in the second charge of attempted murder, Mr Nkosi, then gave evidence. He submitted that shortly after the blow with the back of the pistol on Thela , the appellant was confronted by him, the second complainant in the second charge. On his own admission, Nkosi was similarly fairly seriously under the influence of liquor: *"ek was dronk Edelagbare, ek kan nie alles onthou wat daar gebeur het nie. Dis net die bietjie van die voorval wat ek onthou."*

21.

The witness admits that he confronted the appellant after the incident with the first complainant had ended. He and the appellant pulled one another, the Appellant with the firearm still in his hand. Although the appellant denies it, Nkosi testified that he heard a shot going off. He alleged that the appellant at some stage threatened to shoot him and only after the shot went off the appellant fell on the floor and the firearm also fell on the floor. It was picked up by another witness and taken to the police station.

22.

The witness himself only later realized that the shot that went off went through

the material of his jacket but never hit him. Nobody was hurt.

23.

Everybody, the appellant included, then went to the SAPD where the matter was handled and the SAPD arrested the appellant.

24.

The cross-examination of the witnesses were quite superficial. The Appellant's version was simply that he never fired his firearm.

25.

The ballistic report handed in as an exhibit, however proved that it was the appellant's firearm that was discharged.

26.

The complainant on count two did not actually see the appellant pull the trigger. His evidence was *"die eerste skoot toe hy nou afvuur, die vuurwapen het nie gewerk nie. Ek het omgedraai om te loop, hy skiet weer, dit is nou die ..."* and *"toe draai u weer om en u gryp die beskuldigde ... ja"* and finally *"Edelagbare ek het later verneem dat hy het geskiet toe ek nou my baadjie kyk. Ek was gedrink. Ek sê mos ek was gedrink."*

27.

The actual shooting was described by a third witness, a certain Mr KM Nkosi, (not related to the previous witness and complainant in count 2). His evidence on the shooting itself is extremely inconclusive. He confirms that the appellant pointed the Complainant in charge 2 with the firearm, confirming the complainant's version in that regard. His evidence that no shot went off while they were standing and while he was pointing the firearm at the complainant also confirms the evidence of Nkosi. This witness said: *"Ek het die beskuldigde so vasgehou van agter en ons het toe op die grond beland"* and furthermore *"so 'n skoot het afgegaan net daar. Terwyl ons geval het. Die vuurwapen het gelê daarso naby die beskuldigde se voete."*

28.

Although his evidence in chief could only mean that the shot went off when they fell, in cross-examination he alleged that the shot went off when he grabbed the appellant from behind and either just before they fell or as they were falling. This discrepancy was never resolved and remains unsatisfactory.

29.

No credible evidence exists to support the Court a quo's conclusion that the appellant pulled the trigger intentionally.

30.

To convict the appellant of attempted murder, the appellant had to have the

necessary intent (dolus). Dolus eventualis will be enough and direct intent is not required. It is of course true that the appellant was reckless in using his firearm, albeit using it as a club to fend off the drunk complainants. He had a license and it was never suggested that he did not know of the dangers of a firearm and he knew or at least should have known that should the firearm be discharged in that situation, someone might be injured or possibly killed. The evidence confirms that the appellant failed to measure up to a standard of conduct expected and therefore acted with intent in the vorm of dolus eventualis.

31.

This Court is satisfied the appellant was properly found guilty of attempted murder on count 2.

32.

As far as sentence on count 1 is concerned, the appellant is guilty of common assault, and two years imprisonment is inappropriate. The circumstances in which the assault took place, the consequences for the complainant being negligible and the appellant being a first offender, a suspended sentence is appropriate, and shall be so reflected in the sentence referred to at the end of this judgement.

33.

In considering the sentence of five years imprisonment on count 2, the Court a quo did refer to the crime, the interest of society and the personal circumstances of the appellant. The Court a quo comprehensively referred to the circumstances in which the incident occurred (in a tavern, the appellant surrounded by drunk people, been harassed and irritated by them). The appellant is nevertheless blamed for acting in an irresponsible and reckless manner. No fault can be found with this approach. The emphasis on the prevalence of crimes in which a firearm is used and the callousness in which they occur can similarly not be faulted.

34.

The triad in **S v Zinn 1969 (2) SA 537(A)** however require a more detailed approach. The mere reference to the appellant's personal circumstances without actually balancing the circumstances with the remaining elements to be considered for the purpose of sentence is an incorrect approach.

35.

Although the Court a quo referred to the appellants' age and status of marriage, one has to consider that the appellant is a 42-year-old male with a wife and seven children. He is a contributing employee with an apparently good work record. He has never made himself guilty of any crime, much less a crime involving violence of whatever nature. There was no evidence that he presents a danger to society or any evidence that the incident had involved planning or premeditation.

36.

Attempted murder remains a serious crime. The circumstances in which it was committed do need consideration to determine to what extent the seriousness of the crime should be weighed as against the personal circumstances of the appellant.

37.

When these three elements are balanced this Court is of the opinion the five years' imprisonment without any suspension thereof is inappropriate. This Court is mindful of the fact that a Court of Appeal should be slow to reduce a sentence which was properly imposed unless there are exceptional circumstances and when the interest of justice requires it. In this regard this Court is mindful of the approach in **R v Ramanka 1949 (1) SA 417 (A) 419 – 20**.

38.

The appellant, as father and sole breadwinner of seven children should of course have known better than to conduct himself in the reckless and irresponsible manner in which he did. However one should be mindful that where the offender happens to be primary caregiver of minor children, the principals set out by the Constitutional Court in **S v M (Center for Child Law as Amicuos Curiae) 2007 (2) SACR 539 (CC)** must be followed. Sachs J remarked at [35] that: "*Thus, it is not the sentencing of the primary care giver in and of itself that threatens to violate the interest of the children. It is the*

imposition of the sentence without paying appropriate attention to the need to have special regard for the children's' interests that threatens to do so. The purpose of emphasising the duty of the sentencing Court to acknowledge the interest of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm."

This judgement then at [36] A – F proposes guidelines in sentencing a breadwinner that requires of the Court to consider properly the circumstances of the Accused or convicted.

39.

In **S v Andersen 1964 (3) SA 494 (A) at 495 (D – E)** the approach is described as: *"the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offense, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial Judge had not exercised his discretion properly, or that it was in the interest of justice."* In other circumstances, the fact that the sentence was disturbingly inappropriate or sufficiently disparate has also been accepted by the Courts as sufficient cause to interfere **(S v Mothibe 1997 (3) SA 823 (A 830 D), S v Narker and Another, 1975 (1) SA 583 (A 585 D); 590 (A)**.

40.

This Court agrees that the crime of which the appellant was convicted is serious enough that it justifies imprisonment. The five years imprisonment imposed without considering the suspension of the whole or part of the term, is however out of proportion to the gravity of this particular conviction.

41.

Although this Court is mindful of the approach that the Court a quo's determination of five years imprisonment was arrived at by the exercise of discretionary power, it is after the careful consideration of all the relevant circumstances as to the nature of the offense committed, the manner in which it was committed, the absence of planning and/or premeditation, proper consideration of the appellant as a person, that this Court regards a proper sentence to be of the same term of five years of imprisonment but with a suspension of the sentence.

42.

The Respondent's counsel referred this Court to **S v Rabie 1975 (4) SA 855 (A) at 857 (D – F)** where the principles regarding an appeal against sentence were reiterated. The approach being that the Court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial Court and that the appeal Court should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been *"judicially and properly exercised."* The test under

suspended for two years on condition that the appellant during the time of suspension is not found guilty of a crime of assault or a crime that involves an element of violence;

44.5 The appeal against the conviction of charge 2 is dismissed;

44.6 The appeal against the sentence on charge 2 is upheld.

44.7 The sentence of five years imprisonment on charge 2 is set aside;

44.8 On charge 2 the appellant is sentenced to five years imprisonment suspended for a period of five years on condition that the Accused during the time of suspension is not found guilty of murder, attempted murder or a crime that involves an element of violence or assault, or the use of a firearm or is convicted on a contravention of Section 1 – 0 (6) (a) of the Firearms Control Act 60 of 2000 (pointing of a firearm) or any competent verdict in terms of section 258 (g) of the Criminal Procedure Act, At 51 of 1977, and in terms of section 285 of Act 51 of 1977 such period of suspension is regarded to have commenced on 20 August 2014.

44.9 The court a quo's decision to declare the appellant incompetent to possess a firearm in terms of Section 103 of Act 60 of 2000 is confirmed.

the second principle is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

43.

The limited consideration of the appellant's personal circumstances and the overemphasis of the seriousness of the crime and the interest of society as opposed to the circumstances in which the crime was committed justifies a conclusion that the Court a quo did not exercise the discretion judicially and is a five-year imprisonment without any suspension disturbingly inappropriate. The Court take into consideration that the appellant has already served 2 years of his sentence of 7 years. Taking the above into account the following order is made:

44.

44.1 The appeal against the conviction and sentence on charge 1 is upheld.

44.2 The verdict of guilty on assault with the intent to cause grievous bodily harm is set aside;

44.3 The sentence of two years on charge 1 is set aside;

44.4 On charge 1 the appellant is sentenced to six months imprisonment

DU PLESSIS AJ

PRETORIUS J

I agree

M Jungbluth
Attorney for the Appellant
Instructed by Jungbluth Inc Attorneys

Adv PW Coetzer
Instructed by the Office of the Director of Public Prosecutions, Pretoria for the Respondent

9/11/16
Date of Judgement