REPUBLIC OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A114/2015
DATE: ~~25~~ February 2016
26

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

26/02/16
DATE

SIGNATURE

In the matter between:

EGYPT THOMAS MANZINI	1ST Appellant
JOHANNES THOMAS MOTAU	2nd Appellant
JURRY HEROLDT MASHEGO	3rd Appellant
VUSIMUZI PETRUS MAPHANGA	4th Appellant
LEHLABANDA GIVEN MAHLOKO	5th Appellant
VUMA ERNEST MGWAMBE	6th Appellant

And

THE STATE	Respondent

JUDGMENT

SWARTZ AJ:

1. This is an appeal against conviction and sentence handed down by the Regional Court, Lydenburg, on 20 November 2013, on a competent verdict of assault with the intent to cause grievous bodily harm. The six appellants, all police officers stationed at the Lydenburg police station, were initially charged of attempted murder. They pleaded not guilty and were legally represented at the trial. The regional magistrate sentenced appellants one and five to three years imprisonment. Appellants two and six were sentenced to serve two years imprisonment. Appellants three and four were sentenced to pay a fine of R20 000.00 or twelve months imprisonment, as well as a further two years imprisonment, suspended for five years, on condition that they were not convicted of any offence involving violence. Appellants one, two, five and six were granted leave to appeal against conviction and sentence. Appellants three and four, on application, were granted leave to appeal against their conviction only.

2. On 25 April 2009, the complainant was arrested and held in detention on a charge of armed robbery. During his arrest he sustained some injuries and was treated for this by one Dr Kayembe. He had on a previous occasion been arrested, also for armed robbery, by appellant number one. On 29 April 2009, the first appellant received information that the complainant, who was in custody in the police holding cells, illegally had a cellular phone in his possession. The police investigated this. The complainant, when approached to surrender the cellular phone, refused to hand it over and denied all knowledge. A cellular phone was indeed found in the police holding cells where the complainant was held together with other inmates. A struggle ensued when the police officers attempted to remove the complainant from the holding cells. In the process, some police officers as well as the complainant were injured. On 30 April 2009 he received treatment, again administered by the very Dr Kayembe. He complained of pain to his scrotum. During a subsequent operation, his right testis was removed.

3. It was in dispute, when exactly the injury to the right testis occurred, that is, whether it was during the injuries sustained on the date of his arrest, 25 April 2009, or at the incident of 29 April 2009. This issue occupied the mind of the magistrate who eventually convicted the appellants on the competent verdict of assault with the intent to cause grievous bodily harm, as opposed to a conviction of common assault.

4. The main issue for determination before us is, whether the injury that led to the removal of the right testicle was sustained on 25 or 29 April 2009. If so, if all the accused before the magistrate were guilty of assault with intent to cause grievous bodily harm either through the existence of a common purpose, active participation, a legal duty to act or, if they were accessories after the fact.

5. Counsel who appeared for the appellants set out in great detail the timeline from the date of the incident until the date when the appellants eventually pleaded, being a delay of 677 days. Appellant one eventually testified on 19 October 2012, being 1 269 days after the incident occurred. The argument was that, the magistrate erred in

criticizing the appellants for contradictions in their evidence, when regard is had to the inordinate delay in proceedings. The same can be said of the complainant and his witnesses' evidence. Over and above this, counsel for the complainants argued that the events happened rapidly and unexpectedly. The incident turned into a brawl impeding the opportunity for detailed and accurate observation. She argued that the contradictions amongst the State witnesses were not material, but a guarantee of a lack of conspiracy to falsely implicate the appellants.

6. The test on appeal is whether the trial court misdirected itself on the law when applying it to the facts of this matter, justifying this court's interference with the conviction.

7. Regarding the injury suffered to the right testicle, there remains uncertainty as to when exactly this injury was suffered. The complainant is adamant that he suffered the injury during the events of 29 April 2009, when the police officers assaulted him. The State's expert medical witness, Dr Kayembe on the other hand, testified that, his findings on examination are consistent with the injuries having been suffered on the day of his arrest, 25 April 2009. The record of proceedings clearly demonstrates uncertainty surrounding this issue at the trial proceedings. After giving evidence, Dr Kayembe was requested to return with hospital records to clarify the magistrate's concerns. The record is silent thereafter. Dr Kayembe did not give any further evidence. The magistrate's reasons for judgment are that:

> 'The evidence of the doctor is also clear in this regard. He testified that the injury to the testicles of the complainant was probably suffered on the 29th or the 30th. By doing so he excludes the 25th. According to him he did see the complainant on the 25th as well as on the 30th. According to him the complainant did not suffer new injuries on the 29th since the injuries were the old ones from the previous assault'.

It is impossible to follow the reasoning of the magistrate as his comments are contradictory. Apart therefrom, his conclusions are not in line with the factual evidence he was presented with. Apart from the complainant's evidence, the independent medical expert opinion of the State's own witness, Dr Kayembe, which cannot be simply ignored, was to the effect that he treated the complainant after the assault of 25 April 2009. He came back to the hospital on 30 April 2009. The reason for this was related to the pain experienced in his scrotum as a result of injuries suffered during the assault of 25 April 2009. The only logical conclusion to be drawn, having regard to the independent expert medical opinion, based on the medical history and findings of Dr Kayembe, is that the injury to the scrotum and the subsequent removal of his right testes relates to injuries suffered on 25 April 2009. This has nothing to do with the injuries suffered on 29 April 2009. The appellants were charged for events that had occurred on 29 April 2009, not 25 April 2009.

8. The complainant's evidence was that appellants one, two, five and six respectively, assaulted him by slapping, punching, kicking, throttling and beating him with a plank. Appellants three and four did not actively participate in the assault. Appellants one, two and five entered the cell and removed him from the cell. The evidence of the

Appellants was that he resisted and in the process they fell onto a table where the complainant suffered an injury to his head. The Appellants were charged of attempted murder following this incident. The conviction of appellants three and four resulted from their legal duty as police officers to protect persons from an assault and to take action against the perpetrator.
The appellants deny that they had illegally assaulted the complainant. He was aggressive towards them when confronted with the issue of illegally being in possession of a cellular phone. The cellular phone was eventually found after the search by the police. He was injured when, after a struggle, they fell onto a table when attempting to remove him from the holding cell.

The trial court found that, although there were minor contradictions between the complainant and his eyewitnesses, their evidence was credible and acceptable. He rejected the version adduced by the appellants as false and unreliable.

Counsel for the respondent argued that the totality of the evidence is indicative of the fact that there was active association in the commission of the offence. She argued that the appellants are guilty as perpetrators, regardless of the degree of participation. She argued, rather unconvincingly, that, although appellants three and four did not actively participate in the assault, they associated themselves with the assault and omitted to prevent it.

A very difficult reading of the record clearly demonstrates that the magistrate entered the arena, asked leading questions and, his active involvement was to such an extent, that he could not differentiate the woods from the trees. He misdirected himself by incorrectly applying the law to the facts, justifying this court's interference with the convictions. Although there were minor contradictions between the appellants, other than what the magistrate found, their evidence was not riddled with contradictions justifying a rejection of their evidence as false beyond reasonable doubt. The question to be considered is, whether the evidence of the appellants can be rejected as false beyond reasonable doubt. The evidence overwhelmingly supports their version that, reacting on information received and, after attempting to remove the aggressive complainant from the cell, a struggle ensued. In the process they fell, whereupon the complainant suffered an injury to his head. I cannot find that this version is not reasonably possibly true. Towards the end of her argument, counsel for the respondent correctly conceded that, in her words, the prosecution of this matter was imperfect. This is so, especially when regard is had to the difficulties relating to the scrotum injury, dealt with above, and the involvement of appellants three and four.

It is trite that there is no obligation on the appellants to convince the court of their innocence. Their version is reasonably possibly true and for this reason alone, they are entitled to their acquittal.

See: **S v Van der Meyden 1999 (1) SACR 447 (W) at 448 F-G:**

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent...These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.'

See: **S v Kubeka 1982 (1) SA 534 (W) at 537 F-H:**

'Whether I subjectively believe (the accused) is not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true.

Although appellants three and four did not lodge an appeal against their sentences, this court has the discretion to interfere with a sentence imposed by a lower court. This is further necessitated by the interference with the conviction itself.

Accordingly, I propose the following order:

1. The appeal against conviction and sentence by appellants 1 to 6 succeeds;
2. The order of the trial court is set aside and replaced with the following order: 'The accused are found not guilty and discharged'.

ACTING JUDGE OF THE HIGH COURT
E SWARTZ

I agree,

JUDGE OF THE HIGH COURT
M J TEFFO

FOR THE APPELLANT
ADVOCATE: PF DE NECKER

FOR THE STATE
ADVOCATE: KM RENSBURG