IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A197/15

In the matter between:

24/6/2016

JACQUES JOSEPH GOUWS **APPELLANT**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

And

24 June 2016 DATE SIGNATURE

THE STATE **RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The appellant appeals his convictions and sentences. He appeared before the Regional Court at Oberholzer, together with two co- accused on seven charges. The appellant was convicted on four of the seven charges and his co-accused were acquitted of all the charges. He was sentenced to three years imprisonment in respect of each of the following charges : Attempted Murder; two counts of Assault with Intent to do Grievous Bodily Harm and Kidnapping. It was ordered that the sentences run concurrently and he was declared unfit to possess a firearm. The appellant was acquitted of Crimen Iniuria; Discharge of a Firearm in a built up area or public place and Reckless endangerment to person or

property.

BACKGROUND

1 June 2012

[2] Mr Puseletso Sibeko ('complainant'), Mr Silas Sibeko ('Silas') and Mr Thabo Selebalo ('Thabo') were employed by the appellant as farm hands and also as assistants in his sand-blasting business. On this day as was the usual practice, the appellant transported them to town to purchase groceries. On their return the three employees left to pay a visit to one of the neighbouring farms. Silas testified that he decided to return to his residence and he left his two companions behind. The appellant came to him during the night to complain about the noise he was making with his radio. The appellant was in possession of a firearm. After he lowered the volume the appellant left and he went to sleep. The complainant testified that he had intoxicating liquor during the visit to town but he did not drink thereafter because he was going to work the following day.

[3] The complainant testified that on his return and while in the company of Thabo they met the appellant at the entrance gate. The appellant accused them of making noise and when he responded to such accusation the appellant assaulted him on the mouth with the butt of his rifle and fired a shot in the air. In cross examination he testified that he managed to ward off two blows and that it was the third blow that struck him on the mouth. He sustained an injury, he bled and his lips were swollen. The assault and injury were witnessed by Thabo. The appellant denied being in possession of a rifle or that he assaulted the complainant but admitted that he had approached the employees to complain of the noise.

2 June 2012

[4] The complainant did not report for duty in the morning due to the injury to his lips. Silas testified that he saw the injury for the first time in the morning. The appellant came to the residence of the complainant to investigate the reason for his absence from work. The complainant testified that the appellant got angry with him and it seemed as if the appellant was going to assault him and he fled the premises to one of the farms nearby. He returned around mid-day and noticed that the appellant had a visitor, Mr Meyer, the third accused in the matter. Mr Meyer had brought his gate to be sand-blasted and he joined the appellant at the store which was not far from the employee's residence and, they started to braai some meat. The complainant, Silas and Thabo testified that the appellant and Mr Meyer were later joined by Ms Janse van Vuuren, the third accused in the matter. She was employed by the appellant and she lived at his residence. Although she stated that she was not in a relationship with the appellant, she was referred to in the proceedings as his wife.

[5] The complainant testified that he played his music at high volume. The appellant complained about the noise and sent someone to inform him. The complainant refused to reduce the volume. He testified that the appellant had often discouraged them from visiting the surrounding farms when they were off duty and preferred that they enjoy themselves on the premises. It would seem that this person who was sent was Richard although Silas and Thabo denied knowing him. Silas was not certain and testified that maybe if they brought this person for him to see he might know him.

[6] The complainant testified that he joined the other employees after they returned from work. While Silas and Thabo were busy having a hair- cut, the appellant stealthily came from behind. He was chased around the farm and the store by the appellant and Mr Meyer. Ms Janse van Vurren was instructed to fetch the rifle from the house. At the time the appellant

was in possession of a taser (choke). Shots were fired in his direction and one hit him on the right arm. He fell to the ground and was screaming. The appellant electrocuted him with the taser, gagged him and, his hands and feet were bound. The appellant dragged him into a ditch and left him there. Mr Meyer was present and assisted the appellant. Silas and Thabo testified that they saw the complainant for the last time when he was chased by the appellant and them disappearing behind the store. They did not see what happened because their view was obstructed. They thought that he had fled to the neighbouring farms.

[7] The appellant testified that during the night the appellant and Ms Janse van Vuuren removed him from the ditch. He was taken to the store where his right hand was cuffed to an iron pole, his left hand was tied to his back, his feet were bound and additional material was used to fortify the gag around his mouth. He sat on the floor with nothing underneath, it was cold and he could not sleep in that position.

The appellant, Mr Meyer and Ms Janse van Vuuren denied the version of the complainant. Ms Janse van Vuuren testified that she was told to book the complainant off duty because he was drunk. She went to town and on her return she saw Mr Meyer with the appellant . She retired to the house. She denied seeing a taser or that she had brought the rifle to the appellant. According to the appellant, Mr Meyer and Richard, the complainant was drunk and making noise. The appellant sent Richard to tell the complainant that he was making noise. The complainant got involved in a fight with Richard and struck him with a stone on his abdomen. The complainant admitted to such assault on Richard and explained that Richard was holding him tight for the appellant, he broke loose and fled. This happened before the shooting incident.

3 July 2012

[8] The complainant testified that the appellant arrived in the morning accompanied by

Ms Janse van Vuuren. The handcuffs were released and left hanging on the iron pole. The blood had dried up, his injuries were cleaned and he was un-cuffed.

[9] The appellant testified that during the early hours he heard the dogs barking next to the sheep kraal. He peeped through the window and when he did not see anything, he then took his rifle and fired a shot from the window. In the morning he left to meet his employees to begin their daily duties and to open the kraal to let the goats and sheep out. He enquired about the whereabouts of the complainant. They told him that he had not returned to the farm. Richard was not feeling well and he did not report for duty.

[10] The appellant testified that he returned to the house to fetch the keys. When he opened the store he saw the complainant sitting upright on the floor. The complainant was still drunk and he enquired from the complainant what he was doing there, he ordered him to stand up and the complainant was unable to do so. He summoned Silas and Thabo to assist the complainant. Silas and Thabo testified that they found the complainant on the floor in the store. They noticed blood next to where he was and a set of handcuffs hanging from a pole. It was evident to them that the complainant had been handcuffed and he confirmed such fact to them. They used a wheel burrow to take him to his room because he could not walk on his own. Ms Janse van Vuuren testified that she saw them taking the complainant away. The appellant testified that he noticed that the complainant had sustained a fracture to his hand. He provided things to clean the injury and to bandage the complainant.

THE LAW

[11] It is trite that the powers of a court of appeal to interfere with the factual and credibility findings of a trial court are limited. The salutary principles are stated in Dlumayo and Another 1948 (2) SA 677 (A) at 705 and 706 and S v Hadebe and Others 1997 (2) SACR 641 AT 645 e-f. A court of appeal may only interfere where there was a misdirection

on the part of the trial court otherwise, the findings of fact of a trial court are presumed to be correct. In my view, where there is a lack of adequate articulation by a presiding officer in the judgement of the facts or reasons it does not mean that the conclusion reached is incorrect. It is therefore important to look first at the judgment and the evaluation the facts as a whole by the trial court, in order to establish that the state had discharged its onus of proving beyond a reasonable doubt the guilt of the appellant. Going hand in hand with this trite principle is another which states that the accused would be entitled to an acquittal if his version was reasonably possibly true, S v Van der Meyden 1999 (1) SACR 447 (W) at 448 F-G.

In S v Mlambo 1957 (4) SA 727 at 738A-B Malan JA stated that it was not expected of the State "*to close every avenue of escape which may be said to be open to an accused*" what was required to secure a conviction was to (*produce evidence by means of which a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime chargeds.....An accused' claim to the benefit of a doubt when it may be said to exist must not be derived from speculation, but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by the proved facts of the case*"

[12] It was contended in the grounds of appeal that the appellant's evidence was reliable and that the State witnesses had failed to controvert. It was further submitted in the heads of argument that because the learned Magistrate referred to motive in the judgment, there was no finding made that there was intention on the part of the appellant to commit the offences.

[13] I do not agree with these submissions because the learned Magistrate having

summarized the evidence made the following findings:

> *"daar is stawende getuienis van die Staats getuie.....dat die klaer se lip seer was"* (page 270 of the record)
>
> I do not find fault in such finding. In my view such evidence is to be found in examining the evidence of the witnesses as a whole. Besides the evidence of the complainant, Thabo witnessed the assault on 1 June 2012. The appellant admitted that he had gone to Silas's room and that he had met the other employees that night and complained of the noise but he denied being in possession of a rifle. Silas who had not been present during the alleged assault testified that he noticed the injury on the complainant's lips the following morning. It was argued that the medical report does not mention the injury to the lips. While this is true, the assault occurred on a Friday and the complainant was only seen by a doctor two days later and in between the complainant had been gagged while he was held captive in the ditch and later in the store. It is my view that the contradictions are not such that they discredit the complainant regarding the assault on 1 June 2012.

[14] The complainant was a single witness in as far as the injuries he sustained were concerned. He alleged that he was electrocuted with a taser; suffered an injury caused by a gun- shot; dragged into a ditch, gagged and his hands and feet bound, and finally locked up in the store and handcuffed to an iron pole. It is trite that such evidence is to be treated with caution especially in light of the version of the appellant and his co-accused. The court had to be satisfied that the State had proved beyond a reasonable doubt that that the injuries sustained by the complainant were caused by the appellant.

Page 271 of the record

"Die hof moet ook let of die waarskynlikhede, die eertse beskuldigde het wel 'n motief gehad om klaer aan te vaal, die klaer was parmantig gewees".....
....."die hof vind dit ook onwaarskynlik dat beskuldigde 1 nie die beserings sou sien toe hy gelaai word op die kruiwa. Die hof moet ook kyk dat die Staats getuie moes op een of ander manier uitgevind het dat die eerste beskuldgde 'n geweer gehad het, en kon skiet" (page 271 of the record)

In my view the use of the word 'motive' was a by the way comment on the apparent insolent utterances of the complainant and I see nothing wrong in the magistrate expressing a view that such conduct may have prompted the commission of the offences. The appellant's intention to commit the offences is to be deduced from his conduct and not from what the magistrate thought was the reason for the assault. There was evidence that:

1 the appellant was seen in possession of a rifle on 1 and 2 June 2012;

2 that on 1 June 2012 he fired a shot into the air in the presence of the complainant and Thabo;

3 Silas heard the appellant instructing Ms Janse van Vuuren to fetch the rifle from the house and he was seen in hot pursuit of the complainant with the rifle in his possession; Silas testified that although he heard shots being fired as the complainant fled when he and Thabo were having a hair- cut, he did not believe that the appellant would shoot the complainant. That was the reason why he never went to look for the complainant after they disappeared behind the store;

4 Richard the appellant's witness does corroborated the evidence of the complainant that they were involved in a fight and that complainant hit him with a stone. Although the appellant and his co-accused deny that any shots were fired on 2 June 2012. On the other hand Richard appellant's witness contradicted himself. In his evidence in chief he testified that on the Sunday morning, Silas and Thabo informed him that "this guy" (complainant) had been injured. He enquired from them what had happened and complainant informed him that he did not know what happened to him at Gugulethu's Farm because he was drunk. During cross examination at page 239 from lines 17 onwards when responding to a question whether or not the appellant owned a firearm he responded:

"He does have a firearm your worship, but I will not be able to say what he has in his house, but it is the one that he shot with.....Shot at what or shot what – It is the one that hit him on the hand Hit him on the hand – Pikanien" (the complainant)

There is in my view no merit in the argument of a conspiracy to concoct evidence against the appellant. The complainant testified that he sustained injuries to his mouth, a mark to his buttock even though these were not reflected in the medical report. Then there was the injury to his hand. There was medical evidence that proved that the fracture to the wrist was caused by a gunshot, that there were two lacerations which in the finding of the medical doctor were the entrance and exit wounds of the bullet. The appellant disputed these finding because he believed that the bullet should have lodged in the hand. Contrary to the finding in the judgement that the evidence of the laceration is not mentioned in the J88 form, I find that in his conclusion

in the form the doctor does mention that there were lacerations caused by a gunshot. At page 372 of the record he further substantiates his conclusions. The diagram does show the lacerations representing the entrance and exit wounds measuring 1 cm on the right side of the right hand wrist and 4 cm on the left side of the right hand wrist as testified in his evidence.

5 It was argued that the J88 was not completed by Dr Mentjies who testified at the trial. This issue was not taken up with him during cross-examination however there is evidence that the complainant was first admitted to the Carletonville Hospital on 4 June 2012, where he was seen by Dr Mentjies. The complainant testified that he was transferred to the Leratong Hospital where he stayed for about three weeks. In the exhibits handed in to the court the discharge form stated that he was admitted there on 6 June 2012 and discharged 18 June 2012. In both the J88 and discharge form the clinical findings were that of a gun-shot injury.

[15] It is my view that the evidence of all the police officers relate to their investigation after the incident had occurred and that their evidence could be relevant as to what their observations were. However, their evidence does not take the matter any further.

I am satisfied that the above establishes proof beyond a reasonable doubt as was determined by the court *a quo* and I find the convictions on all three counts to be in order.

[16] In as far as sentence was concerned I do not agree with the submission for the appellant that all the offences were not of a serious nature. It was argued for the respondent that aggravating factors were present which by far outweigh the mitigatory factors presented on behalf of the appellant. Sometimes the personal circumstances of an accused could have minimal importance in the face of a serious crime. The

assault by employers on employees should be viewed in serious light and should be discouraged and condemned in the strongest of terms. This is demanded by our communities. Our law provides for procedures of discipline and punishment in the work environment which are available to employers and should be utilized by them at all times. Having said this, if one has regard to the personal circumstances of the appellant and to the factors which are trite and which should be taken into account by the court when considering sentence, I am of the view that the sentences of three (3) years imprisonment for counts 2 and 3 were harsh and excessive and that they should be interfered with. The attempted murder and kidnapping charges were serious and they should be considered against the aggravating factors of how the complainant was handled after being assaulted by the appellant, especially after having sustained a gunshot wound and the fact that he spent several days in hospital and that he had to be operated upon. I suggest that the sentences given in respect of counts 1 and 4 be confirmed.

[17] In the circumstances the following order is given:

1. The appeal against conviction of the appellant is dismissed.
2. The appeal against sentence imposed on the appellant in respect of counts: 1 and 4 is dismissed and sentence of three (3) years in respect of each one of these counts is confirmed
3. The appeal against sentence imposed on the appellant in respect of counts: 2 and 3 is upheld and the sentences are set aside and substituted with the following:

   Count 2 : 6 months imprisonment;

   Count 3 : 6 months imprisonment;
4. It is ordered that the sentences imposed in respect of counts: 2, 3 and 4 run concurrently with the sentence imposed in respect of count 1;

5. The sentences are antedated to 12 February 2015.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

I agree,

VUKEYA L (see attached emailed doc)

(ACTING JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	25 FEBRUARY 2016
JUDGMENT RESERVED	:	25 FEBRUARY 2016
ATTORNEYS FOR THE APPELLANT	:	MATT LARKINS ATT.
ATTORNEYS FOR THE RESPONDENT	:	THE DIRECTOR OF PUBLIC PROSECUTIONS

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TLHAPI VV

(JUDGE OF THE HIGH COURT)

I agree,

VUKEYA L

(ACTING JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**25 FEBRUARY 2016**
JUDGMENT RESERVED	:	**26 FEBRUARY 2016**
ATTORNEYS FOR THE APPELLANT	:	**MATT LARKINS ATT.**
ATTORNEYS FOR THE RESPONDENT	:	**THE DIRECTOR OF PUBLIC PROSECUTIONS**