IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Appeal Case No: A27/2016

29/11/2016

In the matter between:

LUYANDA PERFECT MSIYA Appellant

And

THE STATE Respondent

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

29/11/16
DATE

SIGNATURE

JUDGMENT

HF JACOBS, AJ:

[1] The appellant was charged with assault with the intent to do grievous bodily harm allegedly committed on 23 March 2014 by hitting one Banele Beshula with an open hand, tripping him and kicking him with booted feet and stabbing him with a knife. The appellant had legal representation when he, on 28 August 2014, pleaded not guilty to the charge. He gave no explanation of

plea. The prosecutor called two witnesses to wit Mr Banele Beshula, the complainant, and Mr Sipho Beshula the complainant's brother. The appellant closed his case without giving evidence or calling any witnesses. The Magistrate postponed the hearing for judgment to 1 September 2014 when the prosecutor and defence attorney addressed him on the conviction. The Magistrate postponed the case to 25 September 2014 for judgment. The full judgment reads as follows:

> *"Judgment in short is as follows. It is clear from the accused's actions that he intended to harm the complainant and that his intention at least took the form of dolus eventualis. The evidence of the state witnesses sufficiently corroborated each other to conclude that the accused did assault the complainant without justifiable reason.*
>
> *Although the witnesses contradicted each other they did not do so in material terms and the charge, in respect of the aspects of the charge and therefore their evidence is accepted as truthful.*
>
> *The finding of the court is that the state proved the charge beyond reasonable doubt and the accused is found guilty as charged."*

[2] Immediately thereafter the prosecutor and defence attorney addressed the Court whereupon the Magistrate sentenced the appellant as follows:

> *"If I take into account the nature of the offence and personal circumstances you are sentenced to a fine of R6 000.00 or three*

month's imprisonment. Wholly suspended for a period of five years on condition not again convicted of the same or similar offence. No order is made in terms of the Firearms Control Act."

[3] The appellant appeals against his conviction with the leave of the trial Magistrate in terms of section 309B(3)(b) of the Criminal Procedure Act 51 of 1977. The appellant's heads of argument were delivered out of time and an application condoning the late filing was brought on the appellant's behalf. I am of the view that it is in the interest of justice that the condonation should be granted. At about 2:30 am on Sunday 23 March 2014 the complainant was at Johannes' Place, a tavern near Daveyton. Patrons of the tavern were gambling and drinking inside. The complainant stood outside with friends. The complainant's friends went inside the tavern but he remained outside. The reason being that the tavern's owners and the complainant's relatives do not have a friendly relationship.

[4] While standing outside the appellant, who the complainant knew since childhood, stood up and said to the complainant: "Ja Son" whereupon the complainant said to the appellant not to refer to him as a son. The complainant and the appellant exchanged words. The appellant struck the complainant on the left temple. The complainant was unsure whether the appellant struck him with a clenched fist or another object. The complainant fell to the ground. Other persons inside the tavern thereupon joined the fight outside. The complainant was inhibriated. He tried to get up but could not manage to do so. He heard a gunshot. The man who fired the gunshot took him home. When the complainant arrived at his home (or actually that of his mother's) he argued with his mother

who reprimanded him. According to the complainant's brother, Sipho Beshula who also testified for the prosecution, the complainant was visibly drunk and angry and his clothes were soiled. From their mother's house the complainant and Sipho went to their aunt's house. On route to their aunt's house the appellant came to the complainant. The appellant produced a knife and stabbed the complainant twice, once on his nose and once on his forehead. The complainant fell to the ground and later managed to run away. Sipho was at the time approximately 9 metres away from the place where the appellant allegedly stabbed the complainant. Sipho, however, did not witness the stabbing but saw that the appellant and the complainant were fighting.

[5] On appeal it was contended on behalf of the appellant that the Trial Court misdirected itself by finding that there was corroboration of the complainant's version in the evidence of his brother Sipho, that the contradictions that appear from the evidence were material (contrary to what the Magistrate found) and that the prosecution failed to prove the guilt of the appellant beyond a reasonable doubt. The evidence shows that the complainant was intoxicated at the time of the incident. The evidence does not show that he was intoxicated to such an extent that no reliance can be placed on his evidence at all. That the appellant attacked the complainant on route to the complainant's aunt appears from the evidence of both the complainant and his brother. The Trial Court's finding that the prosecution proved that the assault on the complainant took place beyond a reasonable doubt can, in my view, not be faulted and the challenge of that Court's finding on appeal is without merit.

[6] The evidence of the complainant and his brother becomes conclusive in the absence of contradicting testimony on behalf of the appellant. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during a trial. Evidence has been presented on behalf of the prosecution calling for an answer. If an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation. In the absence of such an explanation the evidence presented on behalf of the prosecution would be sufficient to prove the guilt of an accused person. Whether a conclusion is justified depends on the weight of the evidence. Once the prosecution has produced sufficient evidence to establish a *prima facie* case, an accused person who fails to produce evidence to rebut that case is at risk that, absent any rebuttal, the *prima facie* evidence presented by the prosecution would be sufficient to prove the elements of the offence alleged in the indictment.

[7] In the present case the appellant chose not to testify. In *Osman*[1] the Constitutional Court stated that *"the fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice".* Similarly, if evidence is presented during the course of the trial that an accused was involved in the commission of a crime, and if the accused then fails to challenge that evidence, a court may be entitled to hold that

---

1 *Osman & Another v Attorney-General Transvaal* 1998 (4) SA 1224 (CC).

in the absence of testimony from the accused in that respect, the evidence is sufficient to prove the crime or part thereof.

[8] Criticism may be levelled against the State witnesses as the Magistrate recorded in his brief judgment. But the evidence of the complainant is corroborated by the evidence of his brother in all material respects. In the absence of evidence refuting the testimony of those witnesses, the conviction of the appellant cannot be faulted.

[9] In my opinion the application for condonation should be granted and the appeal against the conviction should be dismissed and the appellant's conviction confirmed.

H F JACOBS

ACTING JUDGE OF THE HIGH COURT

PRETORIA

I agree, and it is so ordered.

E M KUBUSHI

JUDGE OF THE HIGH COURT

PRETORIA

Date: ___ November 2016