REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
(GAUTENG DIVISION, PRETORIA)

CASE NO: A29/2021

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
DATE: 18/11/2021

In the matter between:

ANDRIE FOUCHE Appellant

and

THE STATE Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 18 NOVEMBER 2021

JUDGMENT

MATSHITSE, AJ:

[1] The appellant was convicted in the Regional Court, Hatfield, on 02 December 2019 on Count of Driving under influence of liquor or drugs and count two of assault. In respect of Count one he was sentenced to a fine of R10 000,00 (ten thousand rand) or 10 Months direct imprisonment of which half of it was been suspended for a period of 5 years on conditions that appellant is not found guilty of contravening the provisions of sections 65(1)(a) and (b) or section 65(2)(a) or (b) of Act 93 of 1996 during the period of suspension, and in respect of Count 2 he was sentenced to a fine of R1 000,00 (One Thousand Rand) or 30 days direct imprisonment

[2] He now appeals against his conviction only with the leave of the court below. In the application for leave to appeal, which is part of the appeal papers before us, through his attorney, he has raised several issues of which shall not be repeated herein. and it is noted that the same issues (points of appeal) (see page 173-183 of the record) were raised in the Regional Court and argued there

[3] The facts of the case were thoroughly summarized by the learned Magistrate at the time he was giving judgement. However, the brief background facts giving rise to the conviction and sentence are summarised as follows:

> [3.1] the state alleged that the two police officers were patrolling around Serene Street at Garsfontein when they saw a motor vehicle, Toyota Fortuner driving in a zig zag way, it was not driving straight
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> [3.2] they put on the blue light and siren, following the said Toyota Fortuner, indicating that it should stop, instate it increased speed, however they manged to overtake it and stop it at a circle of Emmie Harmann Street;
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> [3.3] One of the police officers, Constable Moabelo, then requested the driver, being the appellant before court, to step out of the motor vehicle, when he alighted from the motor vehicle, he was not able to stand straight he learned against his motor vehicle for support.

[3.4] As they were talking, Constable Moabelo then (realised) smelled he smelled of liquor. Upon which he told him that he is going to arrest him for driving under the influence of liquor (alcohol), appellant then told him that he could not arrest him without evidence and also that he is black also he is a "kaffer", and further that he is uneducated;

[3.5] as he was busy explaining to him, the police procedure, appellant then punched him on the forehead, as he was stepping back then appellant, he followed in attacking him by hitting him on his chick, appellant then went back inside his motor vehicle trying to drive off, Constable Moabelo then took the car keys;

[3.6] as he was with a lady crew member, she then called back up, upon arrival of back up police, they pepper sprayed him, in order to subdue him. He was then thrown on the ground in order to arrest him. ;

[3.7] they then took him to the Tshwane district hospital in order that blood can be taken from hi, he then refused that blood be taken from him;

[3.8] the defence case was to the affect that appellant denied that he was driving while he was under the influence of liquor, he only drunk one glass of wine, as they were celebration, together with his wife.

[3.9] he never drove in a zig zag way; at the spot he was stopped by the police, it was not very far from his place of residence. During the altercation with the police his wife to a video off which the lady police officer then deleted it

[3.10] he did not refuse that blood be taken from him, he only stated that blood can not be taken from him without the presences of his lawyer.

[4] Counsel for the applicant on his heads of argument submitted, among others that the court a quo erred in convicting the appellant:

[4.1] in that the conviction is based on the evidence of the two policemen who stopped the Appellant's vehicle on the relevant night. Other police

officers were called to the scene but did not testify

[4.2] that upon analysis of the evidence of the state case appellant wishes to show that there were serious problems with the evidence and credibility of the two state witnesses- to the extent that theier evidence should not have been accepted as good enough to bear a conviction beyond reasonable doubt. The state also failed to lead important evidence- leading to a negative inference.

[4.3] on the other side the evidence of the appellant was not such that the court a quo could have rejected it beyond reasonable doubt-. on its own- but here it was corroborated also by the evidence of his wife. Her evidence was barely challenged at all and should therefore be accepted.

[4.4] assessment of the two state witnesses' contradictions in general terms and specifically in respect of each charge.

[5] Counsel for the Respondent on his heads of argument submitted,

[5.1] that the learned magistrate did indicate in his reasons for conviction that he took into account the following: - the Nature of the State's and defence case - The probabilities, improbabilities, contradictions and corroboration of the witnesses.

[5.2] There is no onus on a doctor to write clinical findings on forms when blood must be withdrawn from a accused for blood analysis pertaining to drunken driving

[5.3] that the following are common facts:-

[5.3.1] the motor vehicle (Toyota Fortuner with registration no [....]) was driven on Serene and Emmie Hartman Street on the evening of 27 September 2018

[5.3.2] the appellant did drink a glass of wine at a restaurant on the evening when he was arrested.

[5.3.3] Cnst Mabelo and Cnst Mantsela did stop him

[5.3.3] the witnesses did use their sirens and blue lights to stop him,

[5.3.4] the blood of the appellant was not drawn

[5.3.6] the appellant knew that he was to be stopped for under the influence of liquor.

[6] As I have indicated above that, applicant is repeating, in his current heads of argument, all the points that he raised at the court a quo and I belief that since the Learned Magistrate dealt with them individually and in full.

[7] I belief that in his judgment the magistrate correctly pointed out that the State bore the onus to prove its case beyond reasonable doubt. Furthermore, he was aware that no duty lies on the accused person to prove his innocence.

[8] In reaching its conclusion the court aquo relied in several decided cases and correctly followed the principles that were stated in those cases, and I do not find any misdirection's or fault in applying those principles as sated in those case that the court aquo relied upon.

[9] In my view, in his judgment, the Magistrate gave an excellent summation of the facts of the matter. am therefore satisfied that he summarised the whole evidence correctly. It is clear though that the magistrate accepted the evidence of the State witnesses and the submissions by the State that the case against the appellant and the aforementioned accused had been proved beyond reasonable doubt. In accepting the evidence of the State and the State's submissions, the court *a quo* stated the following in its judgment[1]:

[10] "Die hof bevind die volgende as onwaarskynlik:

[10.1] Dit is hoogs onwaarskynlik dat u normal bestuur het hiierde

besondere aan;

[10.2] As u normal bestuur het was daar geen rede vir die polise gewees om u af trek hierde besondere aan nie;

[10.3] U moes anders bestuur het as normal om die aandag op u te vestig;

[10.4] Dit is ook onwaarkynlik dat die SAP sou sien om u van die pad aft e druk as u nie vir hulle weggejaag het nie;

[10.5] Hoekom so hulle so drasties optree as u net sommer dadelik gestop het;

[10.6] U getuienis is duidelk: u wou nie hulle werkswyseaanvaar nie;

[10.7] U se vir hulle daar is geen getuienis nie, u se hoe hulle te werk meet gaan en wat hulle moet doen hulle pligte uit te oefen

[10.8] Dit is the hof om te besluit of SAP daar getuienis is ofnie.

(10.9] Dit is vir n hof om te besluit of SAP se opgrede die aand geregverdig was

[10.10] U word...u was weerspanning die aand en wou nie saamwerk nie.

[10.11] As u samewerking die aand gegee het sou hierdie arrestasie uitgeloop soos hy inderdaad uitgeloop het die aan nie. En versterkings sou nie nodig gewees het om ontbied te word

[10.12] Die Hof verwerp u weergawe as a versinsel en onwaarskynlik en verwerp u weergawe dat dit nie redelik moontlik waar is nie. Die Hof bevind dat u inderdaad zigzag die aand bestuur het.

[10.13] U het wyn gedrink op eie weergawe. In S Pitijane 1976(2) SA 334 (N) se die Hof dat " Intocicating liquor refers to an alcohol beverage"

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[1] See record page 137-139

[10.14] Dit is alles aanduidende dat u bestuurwyse aangetas was soos deur die staatsgetuise dat u in 'n zigzag manier bestuur het"

[11] Beyond reasonable doubt is not intended to mean beyond a shadow of doubt as it was stated in the case of S v Ntsele[2]:

> *"Die bewyslas wat in 'n strafsaak op die Staat rus is om die skuld van die aangeklaagde bo redelike twyfel te bewys - nie bo elke sweempie van twyfel nie. In* Miller v Minister of Pensions (1947] 2 All ER 372 op 373H - *stel Denning R (soos hy toe was) dit* soos *volg:*
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> *'It need not reach certainty, but it must carry* a *high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of* a *doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case*is *proved beyond reasonable doubt.'*
>
> *Ons reg vereis insgelyks nie dat 'n hof slegs op absolute sekerheid sal handel nie, maar we/ op geregverdigde en redelike oorluigings - niks meer en niks minder nie."*

[12] A Court of Appeal will not disturb the factual findings of a trial court unless the trial court committed a misdirection or, where there has been no misdirection on the facts by the trial judge, the presumption is that the conclusion is correct. As it was stated in S v Francis[3] - 199 Smalberger JA summarize the approach of an appeal court to findings of fact by a trial court as follows: "The powers of a court to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the

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[2] 1998 (2) SASV 178 at page 182 A-E

witness's evidence. A reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony..."

[13] In S v Sauls and Others[4] the court had the following to say:

> *"There is no rule of thumb test or formula to apply when it comes to* a *consideration of* a *credibility of the witness ... the trial judge will weigh his evidence, will consider its merits and demerits, and, having done* so, *will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in her testimony, he is satisfied that the truth had been told. The cautionary rule referred to by de Villiers JP in 1972 may be a guide to a right decision but it does not mean*
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> > *"that the appeal must succeed if any criticism, however slender, of the witness's evidence were well founded."*

We have approached this appeal from the premises that in the absence of demonstrable and material misdirection's by the trial court, its findings of fact are presumed to be correct and that such findings of fact will only be disregarded if the evidence on record shows them to be clearly wrong. We have looked in vain for such misdirection's. In our view the court a *quo* summarised in its judgment the evidence given during the trial fairly and accurately. The court a *quo* paid attention to the detailed criticism of the evidence of all the witnesses who testified for both the State on the one hand and the defence on the other hand. The court evaluated the witness's evidence in the context of the whole *corpus* of the evidence on record. Where caution was needed it was exercised. In this respect we take guidance from

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[3] 1991 (1) SACR 198 (A) at 198
[4] 1981 (3) SA 172 at 180 E- F

the case of the famous case of R v. Dhlumayo and Another[5] 1 wherein the court held that:-

> *"3. The trial judge has advantages - which the Appellate Court cannot have - in seeing and hearing the witnesses, in being steeped in the atmosphere of the trial court. Not only has he had the opportunity of observing their demeanour but also their appearances and whole personality. This should never be overlooked.*
>
> *6. Even in drawing inferences the trial judge may be in a better position than the Appellate Court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.*
>
> *8. Where there has been no misdirection on fact by the trial judge, the presumption is that his own conclusion is correct; the Appellate Court will only reverse it where it is convinced that it is wrong.*
>
> *12. An Appellate Court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, and it does not necessary follow that, because something* has *not been mentioned, therefore it has not been considered."*

It is my considered view that the appellant was correctly convicted and furthermore, that there is no merit in his appeal against conviction.

[15] Accordingly, I propose that the following order be made:

ORDER

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[5] 948 (2) SA 678 AD at pages 705-6

The appeal against conviction is dismissed.

O K MATSHITSE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

SELBY BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE APPELLANT	Mr C TAUTE
INSTRUCTED BY	TAUTE BOUWERS & CILLIERS INC
FOR THE RESPONDENT	ADV C PRIUS
INSTRUCTED BY	THE DIRECTOR OF PUBLIC PROSECUTIONS
HEARD ON	17 NOVEMBER 2021
HANDED DOWN ON	18 NOVEMBER 2021