REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: A131/2021
DOH: 5 May 2022

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

SIGNATURE DATE 2022/07/05

In the matter of:

MARTIN PRETORIUS APPELLANT

And

THE STATE RESPONDENT

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 5 JULY 2022

Bam J

A. Introduction

1. The appellant and his co-accused, Jacques van Deventer, (van Deventer) were convicted of assault with intent to cause grievous bodily harm, in the Magistrates Court for the District of Emfuleni held in Vereeniging, in January 2020. The appellant was sentenced to a fine of R6000 or a period of imprisonment of twelve months.

2. The state's case was led through the evidence of the complainant, Mr Vusumuzi Dlamini, and one Mr Mokoena, an eye witness who was present at the time. The medical report (J88) of Dr Ongai, including her oral testimony also served before the court. The record suggests that at the close of the defence's case, the magistrate found that the state had proved its case beyond reasonable doubt and convicted the appellant and van Deventer. The present appeal is only against conviction and is with leave of the trial court. The state is opposing the appeal. Van Deventer is not participating in this appeal.

B. Background

3. Evidence accepted by the trial court suggests that at some point in time, the complainant, van Deventer, and a lady by the name Chevon Montgommery, (Chevon), had all lived in the same house in Vereeniging, where the incident took place. At the time of the incident, Van Deventer and Chevon had moved out. There is reference in the record to failure to pay rentals and the owner having issued the instruction that they should not be allowed in the property, however, that is not germane to the present proceedings. What is important is that the pair knew they were not welcome at the residence. I shall henceforth refer to the place where the incident happened as the residence. The complainant was the caretaker.

4. On the evening of 17 July 2020, at about 19h00, the complainant, a lady by the name Ms Marie, and Mr Mokoena were standing outside the residence, near the gate, but still inside the premises. The complainant testified that he had spotted van Deventer and Chevon at a neighbour's premises. In no time, they were in the same premises as the complainant. A remark made by the complainant to Ms Marie about van Deventer and Chevon not being welcome at the residence led to van Deventer stabbing the complainant with an unknown object on his left cheek. The force of the attack was said to have been weakened by Mr Mokoena's quick intervention of holding van Deventer's arm as he lifted it upwards. Mokoena was trying to stop van Deventer. The complainant was still stabbed. He retaliated by striking van Deventer on his left arm with a metal rod he had been holding before the assault began. This caused Van Deventer and Chevon to flee. The complainant later went to secure the gate after the two had left.

5. Later that same evening and while the complainant and Mokoena were standing near the gate, van Deventer and Chevon returned in a grey Jeep driven by the appellant. All three alighted. There is indication that Chevon worked as an informer and the appellant, a member of the South African Police Service, (SAPS), was her handler. Nonetheless, for the three to gain access, the appellant shook the gate until it came off the rails. The appellant and the complainant knew each but upon entering the premises, the appellant asked the question, 'who is Vusi Mokoena?' The appellant then began assaulting the complainant with an open hand on his left cheek. Eventually, the complainant, the appellant and van Deventer ended up inside the house. It was after the appellant and van Deventer had exited the house that Mokoena found the complainant inside, wounded with his clothes bloody. The court accepted the complainant's version of what had happened inside the house, that the appellant assaulted him by stabbing him several times on his torso while his co-accused, van Deventer, had successfully wrestled the

iron rod from the complainant and used it to assault him on his knees. Medical evidence led in court concluded that the complainant had suffered a fracture of the patellar with haemotoma. He had lacerations in the abdomen and on the chest which could have been caused by a sharp object and lacerations on the left cheek. Dr Ongai's evidence was that falling on the ground or even being kicked on the knee would not cause a fracture of the patellar and only blunt force would do so.

6. At the close of the defence case, and after a careful consideration of all the evidence, the court accepted the version of the state and rejected that of the defence. Evaluating the state witnesses and their evidence, the magistrate concluded that they were competent witnesses. The complainant had been cross examined extensively on the question of him being the aggressor and the magistrate found that he answered the questions candidly and admitted retaliating by hitting van Deventer with an iron rod and even chasing him out of the yard. As to Mokoena, the second state witness, the magistrate found that he testified truthfully and did not exaggerate or try to add facts. With regard to the three witnesses for the defence and their evidence, both the appellant and van Deventer conceded during cross examination that after van Deventer and Chevon had fled the residence, the assault was over. Thus, there was no reason for them to go back to the residence. The magistrate rejected their defence of private defence. She also rejected the claims by the appellant and van Deventer that the complainant had sworn at them. They had both confirmed they do not understand isiZulu, the language spoken by the complainant at the time. To sum up, all three defence witnesses were found wanting. As for Chevon, in addition to rejecting her evidence and her claims of having been assaulted by the complainant, which was also rejected, the court found that whenever she could not answer a question, she would look at the appellant and van Deventer, to the extent that the court reprimanded her. The

magistrate was particularly critical[1] of the appellant's conduct of taking down Chevon's and van Deventer's statements, in a matter where he is himself was implicated and knew he could be charged. As an experienced officer, the court found, he should not have put himself in a position where he could be seen as meddling in a police investigation and trying to cover up his tracks by obtaining statements favourable to his case. That in a nutshell is the background to the conviction and sentence.

C. Grounds of Appeal

7. I have read the appellant's grounds and note that the grounds raised as against the complainant's evidence are repeated word for word in relation to Mr Mokoena's evidence. Owing to the view I take of the substance of the grounds, I have decided to collapse the criticism levelled against the court's acceptance of the complainant evidence with the grounds raised against Mokoena's evidence. I do not aim to address every single point raised by the appellant, most of the grounds are repeated. I summarise the grounds below:

(a) The appellant submits that both the complainant and Mr Mokoena not only contradicted each other in court, their individual evidence as led in court materially contradicted the facts they had deposed to in their individual statements to the police.

(b) Both the complainant and Mokoena in their evidence were unable to give a clear and concise description of how the complainant was initially assaulted by van Deventer and later when he was allegedly assaulted by the appellant and stabbed by van Deventer.

(c) With regard to Mokoena, the appellant submits he had motive to protect the complainant because the complainant had assaulted Chevon. The appellant however does not state the motive.

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[1] Page 647 of the record.

(d) It is improbable in light of the prevailing circumstances that both the complainant and Mokoena would not have been able to describe the object which van Deventer had in his hand when he hit the complainant initially and later when he allegedly stabbed the complainant if it is to be believed that van Deventer was indeed in possession of that object.

(e) The medical doctor Dr Ongai confirmed that the lacerations on the body of the complainant could have been caused by the sharp ends of the iron rod which the complainant had in his possession. The doctor further conceded during cross examination that there is a difference between a laceration and an incised (stab) wound. The complainant had sustained, according to him, various lacerations which could have been caused by the sharp edges of the iron rod which the complainant possessed.

(f) The complainant's version that he did nothing to Chevon is improbable for she testified about the injuries which she had sustained. It is further improbable that she would have requested the assistance of the appellant if she was not assaulted and injured by the complainant.

(g) The complainant and Mokoena also confirmed that the appellant had enquired on his arrival as to why the complainant had assaulted Chevon.

(h) The complainant was the initial aggressor in the matter and assaulted Chevon without any reason.

(i) The complainant was again the aggressor when he swore at the appellant and approached him aggressively whilst having the iron rod in an attacking mode.

(j) The medical doctor Dr Ongai confirmed that the injury sustained by the complainant to his knee could have been caused as per the version of the appellant.

(k) The complainant was arrogant during his testimony, questions directed to him had to be repeated.

(l) The complainant was argumentative to such an extent that he had to be admonished by the learned magistrate.

(m) The court a quo erred in finding that the version of the appellant is false and that he gave evidence in an unsatisfactory manner. It ought to have found that the evidence of the appellant was logical and satisfactory in all material aspects with no contradictions, discrepancies, or improbabilities.

(n) The evidence of the appellant was corroborated by the evidence of Chevon.

(o) The court ought to have found that not every contradiction or inconsistency in the evidence of the appellant and his witness is indicative of guilt.

(p) The court a quo erred in that it did not exercise its discretion judiciously in that it did not adequately apply the necessary test applicable to the version of the accused as was said in van der *Mayden* 1999 (1) SACR 447.

8. The difficulty for the appellant is that the record demonstrates adequately that the court took into account the evidence of each of the witnesses. It took into account the probabilities, and made credibility findings against the appellant, van Deventer and Chevon and resolved to reject their evidence as not reasonably possibly true. By contrast the court found the two state witnesses to have testified truthfully. There was even a trial within a trial, precisely to consider the contradictions in the statements made by the state witnesses to the police and the evidence led in court, and the court still resolved that the truth had been told. As for the inconsistencies between the evidence of the two state witnesses, the record shows that the court carefully considered, *inter alia*, the number of the inconsistencies and their materiality and still resolved that the truth had been told. There is simply no merit to the appellant's grounds.

9. I should further add that the point referencing the evidence of Dr Ongai has no merit. In this regard, the record shows that the court had said:

> 'The evidence of Dr Ongai does not exclude that the lacerations on the complainant could have been caused by a sharp or blunt object. She however also stated that it was highly unlikely that the lacerations on the chest were caused by a blunt object because there was a lot of muscle in that area. This evidence gives credence to the complainant's version of events that he was stabbed with an unknown object. Also, stabbing is different from wrestling and this is just a question of common sense. Dr Ongai further stated that she refers to all tears as lacerations whether or not they are caused by a blunt or sharp object.'[2]

10. It is not clear what the appellant means when he says Dr Ongai confirmed that the injury sustained by the complainant to his knee could have been caused as per the version of the appellant. What is clear though is that regardless of what interpretation the appellant places on Dr Ongai's evidence, it simply does not upset the court a quo's findings on the appellant's vicious assault on the complainant.

11. Each of the grounds and the points raised in support are an attempt to undermine the credibility findings made by the trial court. In *Pistorius* v *The State*[3], it was said that:

> 'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R* v *Dhlumayo & another* 1948 (2) SA 677 (A) at 706; *Kebana* v *S* 2010 (1) All SA 310 (SCA) para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testifying in his presence in court. As the saying goes he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his finding.'

12. The record proves that all of these points raised by the appellant were properly considered by the court. The court cannot in any way be criticised. What is clear is that all the bases upon which the appellant was convicted including the probabilities, which

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[2] Page 646 of the record.
[3] (253/13) [2014] ZASCA 47at paragraph 30.

weighed heavily against his and his co-accused's evidence, including that of Chevon, remain undisturbed.

13. As to the contradictions between the state witnesses' evidence and their individual evidence as against the statements made to the police, this too is covered in the record. I may add that in *Damgazela* v *The State*[4] it was said that:

> 'The discrepancies between the complainant's oral evidence and her witness statement were subjected to fierce criticism by the appellants' counsel. But those inconsistencies relate mostly to her description of the clothing which the appellants wore. This issue becomes moot where the first appellant was known to the complainant (and to Khuduga) and where the second appellant admits intercourse with the complainant, as discussed in the previous paragraph. In any event this case is a classic illustration of the rationale underlying the caution expressed by Olivier JA in *S* v *Mafaladiso & others 3* against the summary rejection of a witness' contradictory evidence vis-a-vis the witness' police statement, without a careful evaluation of underlying factors, such as language and culture differences between the witness and the author of the statement and the fact that a witness is seldom required to explain his or her statement. In this instance the complainant made her statement in English, although according to her, she spoke to the police officer in Afrikaans and Sesotho. The statement was read back to her by the police officer in Sesotho, a language which she testified she did not know very well. The police officer in turn, informed the complainant that he does not understand Afrikaans, which the complainant testified is her home language. When reading her evidence on the record, it is plain that she is an unsophisticated person of a modest educational level. In these circumstances the contradictions between her oral evidence and her statement are mitigated by the obvious language difficulties outlined above.
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> The isolated incidences of contradictions within the complainant's own evidence and between her and Khuduga are not material, concerning matters such as the first appellant's clothing, what was said on the scene and whether the police were contacted that same evening or the next morning. The proper approach to such contradictions is well-established. The contradictions, of which there are but a few, are of the type which suggest absence of fabrication rather than unreliability.'

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[4] (633/09) [2010] ZASCA 69 (26 May 2010) at paragraphs 10 -11.

14. There is one more matter that must be addressed. The appellant draws the conclusion in his heads that the court did not exercise its discretion judiciously. That criticism however, is without foundation. In *Florence* v *Government of the Republic of South Africa*, the court said of appellate interference with the trial court's exercise of its discretion:

> 'The power of an appellate court to interfere with the exercise of a discretion by a court *a quo* is not without restraint. It is limited by whether the discretion of the court in issue is discretion in the strict sense, sometimes called a strong or true discretion. In a land restitution matter in this Court, Mpati AJ restated the standard for appellate intervention when the Land Claims Court and later the Supreme Court of Appeal had exercised a discretion:
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> "In coming to its decision on whether or not to order the return of the whole of the land claimed, the Supreme Court of Appeal exercised a discretion. The question whether leave should be granted will therefore require consideration of the circumstances in which this Court will interfere with the exercise by the Supreme Court of Appeal of its discretion.
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> The discretion exercised by the Supreme Court of Appeal in this matter is one in the strict sense, or as was said in *S v Basson*, a 'strong 'discretion or 'true 'discretion, in the sense that a range of options was available to it. As such this Court, exercising appellate jurisdiction, will not set aside the decision of the Supreme Court of Appeal merely because it would itself, on the facts of the matter before the Supreme Court of Appeal, have come to a different conclusion. It will only interfere where it is shown that the Supreme Court of Appeal 'had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'"[5]

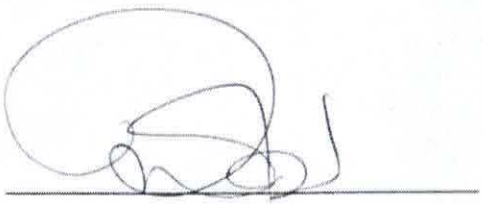
[5] 2014 (10) BCLR 1137 (CC) (26 August 2014) at paragraphs 111 to 112.

D. Conclusion

15. The appellant makes no case whatsoever for its conclusion on the court having improperly exercised its discretion. Overall, we conclude that the appellant was properly convicted and his appeal cannot succeed. The appeal falls to be dismissed.

E. Order

16. The appeal is dismissed.



N.N BAM

JUDGE OF THE HIGH COURT, PRETORIA

I agree, and it is so ordered

N MNGQIBISA - THUSI

JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING:	**5 May 2022**
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