REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A6/2021

[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
[3] REVISED.

12/01/2022
Date:

[redacted]
M.JORDAAN

In the matter between:

ELROY CIERENBERG — APPELLANT

And

THE STATE — RESPONDENT

JUDGMENT

JORDAAN AJ (MUNZHELELE J concurring)

INTRODUCTION

[1] The Appellant was arraigned and convicted in the Regional Court, sitting in Pretoria, on a charge of attempted murder.

[2] On the 06th of August 2020 he was sentenced to 10years imprisonment plus a further five years imprisonment suspended for a period of five years on condition that the accused is not convicted of attempted murder or any offence involving infliction of grievous bodily harm committed during the period of suspension.

[3] Aggrieved with his conviction and sentence, the Appellant lodged an application for leave to appeal his conviction and sentence which leave was granted by the court a quo[1].

GROUNDS OF APPEAL

[4] The gravamen of the Appellants attack against his conviction and sentence as encapsulated in the notice of appeal, is broadly:

AD CONVICTION

4.1 The guilt of the Appellant was not proved beyond a reasonable doubt
4.2 The complainant, Noel Nqira, was not a reliable and credible witness
4.3 There was no corroboration for the complainant as a single witness in the evidence of Dhabi Nqira and Dr Monyane
4.4 The contradictions in the evidence of the complainant were of such serious nature to cause doubt as to the veracity of his evidence and indicative of his unreliability and lack of credibility
4.5 The State's failure to call medical personnel involved in the admission of Noel Nqira to testify on his condition at admission, justified a negative inference
4.6 That Noel Nqira did not comply with the requirements set out in section 208 of the Criminal Procedure Act51 of 1977 as he contradicted himself in regard to the alleged assaults, his injuries were not supported by medical evidence and not substantiated by Dhabi Nqira and Dr Monyane
4.7 The court erred in not finding the evidence of the Appellant credible and reliable
4.8 The court erred in not finding the version of the Appellant reasonably possibly true

AD SENTENCE

4.9 That the sentence is excessive and induces a sense of shock
4.10 That the sentence does not balance the interests and the triad that is normally associated with considering a sentence
4.11 That the sentence does not adhere to the purpose of sentencing

[5] In opposition, counsel for the Respondent submitted that the version of the complainant was correctly accepted as it was corroborated by Dhabi Nqira in regard to the bruises on the face of the complainant; the anger of the Appellant towards the complainant; that the Appellant's vehicle was indeed being fixed and further that the contradictions were not material. It was contended that the Appellant's version was not reasonably possibly true.

[6] Having regard to the notice of appeal, the oral submissions and the heads of argument, it is apposite to succinctly refer to the evidence presented during the trial.

[7] On the 25th of April 2017 at midday, the complainant , Noel Nqira, was walking to the shop outside the boom gate of Rietview in Pretoria, where he stays with his employer whom he works for as a gardener. As the complainant walked, he received

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[1] Transcribed record Page 214 line25 and Page215 line1

a call from his brother, Dhabi Nqira, who asked the complainant to wait outside the boom gate as he will bring food to the complainant.

[8] While the complainant was with his friend Sam Mkandawire waiting outside the boom gate for his brother, Dhabi Nqira, the Appellant arrived in a Suzuki make sedan motor vehicle which had the words "Ubuntu Security" written on it.

[9] On the Appellant's query as to where he was staying and where he was going, the complainant pointed in the direction of his house and stated he was on his way to the shop. The Appellant then grabbed the complainant by his shirt and assaulted the complainant, using his fists and kicking the complainant with his legs[2] in effecting the assault on the complainant. The complainant later corrected this[3] and stated that both Sam and he was so grabbed and assaulted[4]. He further stated the appellant accused them of being thieves[5]. When pointedly asked how they were assaulted on tummy, the complainant answered they were kicked on stomach[6].The complainant's friend Sam Mkandawire, had left for Malawi as his mother had fallen ill. The complainant then got up and ran away on foot. The Appellant got into his motor vehicle and pursued the complainant, who ran from the tar road to the bush, with the motor vehicle.

[10] The Appellant got into his motor vehicle and persued the complainant then bumped the complainant on his waist with his motor vehicle causing the complainant to fall down. The complainant got up and ran again; however the Appellant again chased after the complainant with his motor vehicle and knocked the complainant with his motor vehicle from the back on his waist causing the complainant to fall to the ground for a second time.

[11] While the complainant was lying on the ground, the Appellant then drove over the complainant's legs with the motor vehicle and the complainant then noticed that the left wheel of the appellant's motor vehicle was damaged. The appellant then got out of his vehicle and assaulted the complaint who was lying on the ground by punching him on his face and stomach[7].

[12] Appellant then left the complainant lying on the ground crying for help. The complainant later noticed the appellant talking on his phone. An ubuntu security bakkie arrived; when the complainant's brother later arrived the complainant was placed in an Ubuntu security bakkie and dropped at the hospital gate.

[13] Complainant testified that he was unable to stand as his legs were broken, he was in hospital for a month where steel pins were inserted in his legs and he is still unable to stand for five minutes and go to hospital monthly for treatment after discharge.

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[2] Transcribed record Page 6 lines 6-7 and lines 9-10
[3] Transcribed record Page11 line9
[4] Transcribed record Page11 lines 8-17
[5] Transcribed record Page 11 lines 13-20 and lines 22-24
[6] Transcribed record Page12 lines 19-20
[7] Transcribed record Page16 lines 20-22

[14] During cross examination, the complainant stated that they told the appellant where he lives, they were waiting for his uncle and they were coming from the shop[8]. It was complainants evidence during cross examination that the appellant was angry as he was shouting as he asked the questions[9]. The appellant grabbed and assaulted both Sam and the complainant simultaneously by punching them on their faces and on the tummy and kicking them on the tummy while accusing them of being thieves after they told him they were waiting for the complainant's brother and were on their way to the shop. This assault occurred while Sam and the complainant denied being thieves.

[15] The complainant later testified during cross examination that the assault on him and Sam consisted in being slapped.

[16] The complainant testified that he was twenty metres away from where he was bumped the first time, when he was bumped for the second time[10].He further testified the vehicle bumped his legs , he fell down and the vehicle then drove over both his legs causing boh legs to break.[11] The complainant further testified that the appellant was driving fast over his legs while he was lying on the ground as there was dust, the vehicle tyres broke at that same time and the vehicle stopped approximately four meters away.[12]

[17] It was the complainant's evidence that after the motor vehicle drove over his legs, he only bled on his legs, but after the complainant kicked and punched him while lying on the ground his mouth and nose bled. During cross examination that his evidence was there was blood on his legs, that he was then assaulted when asked how, he testified that he was kicked on his face and body and his mouth and nose bled. The complainant later during cross-examination testified that he was not hit after the appellant drove over his legs, just kicked all over his body and his nose and mouth bled.[13] He further testified that Mr Dhabi Nqira washed his face.

[18] It was the evidence of Mr Dhabi Nqira that he indeed phoned the complainant and made arrangements with the complainant that the complainant should wait for him next to the road. On his arrival next to the road about twenty minutes later, Dhabi Nqira found two Ubuntu vehicles, one was damaged its left wheel was busy being fixed. Next to the vehicles he saw an unknown white man and the appellant who was wearing a white shirt, a trouser and ankle boots. Whilst he observed this he heard the complainant crying in the bush about 80metres away. He went to the complainant and observed that the complainant's left leg the bone was sticking out through his flesh, his right leg was not normal it was weak and very soft and the complainant had dust on his face. He went to the two people inside the road to enquire what happened, when the appellant answered that the person lying there is a thief.[14] He requested the appellant to show what he found on the complainant to which there was no reply. On his query on whether they phoned the police and an

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[8] Transcribed record Page 34 lines 15-25
[9] Transcribed record Page 35 lines 24-25 and Page 36 lines 1-3
[10] Transcribed record Page56 lines 1-13
[11] Transcribed record Page 56 lines 14-18
[12] Transcribed record Page60 lines 1-19
[13] Transcribed record Page63 lines5-20
[14] Transcribed record Page98 lines3-4

ambulance, the unknown man and the appellant told him they will make a plan, he ran home to report the incident and on his return found an additional Ubuntu vehicle and they were busy lifting the complainant inside to take him to hospital and he got into the same vehicle. At the hospital, Dhabi Nqira at the request of the doctor at admissions helped to lift the complainant onto the bed for x-ray to be taken in the process when the complainant's pants was removed, he noticed the skin was off on the complainant's thigh. The complainant was hospitalised for a month.

[19] During cross examination he testified that he did not see the appellant wearing a moon boot to keep his foot straight. It was put to Mr Dhabi Nqira that the appellant's instruction is that the appellant told Mr Dhabi Nqira that the incident occurred while the appellant was looking for people who tried to steal his cattle, to which Dhabi Nqira answered he does not know but he had not seen any cattle that day.

[20] It was Mr Dhabi Nqira's evidence that he observed no injuries on the complainants face, but he was bruised on his face, he observed bruises on the complainant's two cheeks.[15] When asked whether he noticed any bleeding on the complainant's face, the witness testified that he did not notice any bleeding on the complainant's face. He further testified that there was no bleeding on the complainant's nose and he did not clean the complainant up. It was further his evidence that he did not in evidence in chief mention the bruises because the prosecutor did not ask in such detail as the court asked, he noticed the bruises at hospital when the hospital staff cleaned the complainant and that iss when he noticed the skin was off on the complainant's thigh.

[21] Dr Danny Monyane, the orthopaedic surgeon testified, that the notes which were recorded in casualty on admission by the first doctor who saw the complainant were not with him as he could not trace them at the hospital.[16] He further clarified that he saw the complainant after admission on the 2nd of May 2017.[17] He corroborated the evidence of the complainant that both his left and right legs, between the knee and ankle, were broken and operated, that rods were inserted in his legs and that the complainant was in the hospital for a month. He further corroborated the complainant that he returned for treatment. It was the doctor evidence further that the fractures that were sustained were life threatening as a fat embolism might cause blockage of the arteries in the lungs, hence oxygen is administered.[18] During cross examination in response to the question whether the complainant had facial injuries to the nose and down the face the doctor testified that the notes did not disclose any facial injuries and patients with such injuries would not be referred to orthopaedics instantly.[19] The doctor was further cross examined on whether there would be injuries sustained by the complainant on the rump above the buttocks if he was bumped in that part of his body by a fast moving car, to which the doctor anwered any injury can happen depending on how you are going to fall.[20] When asked if he

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[15] Transcribed record Page106 lines4-11
[16] Transcribed record Page 91F lines 24-25 and Page 91G lines1-2
[17] Transcribed record Page 91O lines21-25 and Page 91Plines1-4
[18] Transcribed record Page91N lines 5-25 and Page 91O lines 1-21
[19] Transcribed record Page 91J lines1-9
[20] Transcribed record Page 91K line25 to Page 91L lines1-8

did not find pelvic injury the doctor replied that in the file no pelvic injury was documented.[21]

[22] The appellant testified that on the date of the incident he was working from home, as his foot was operated as a result of which he wore a moonboot, when he heard a call on the community radio of cattle being illegally removed at a specific area. The area does not have a name it is just an open veld area, as he also had cattle in that area he got into his fiancé's Suzuki motor vehicle and drove to the area where cattle might have been removed in the Rietvlei view area. He drove on the gravel road looking for anyone to give him information, but there was no one, he did not speak to Promise who look after his cattle and he could not see that any of his cattle was missing. The appellant then drove on the footpath and then into the field with the 1.2meter long grass to see if he can see any persons and cattle being moved and found nothing, but when he turned his motor vehicle around to go back to the gravel road and footpath, hi motor vehicle made a move as if it went over a speed bump and then heard a scream. The appellant stopped jumped on his foot to inspect and found the complainant covered in grass, lying on his back in the long grass, screaming with pain. He then got into his motor vehicle and phoned for his reaction vehicles to come assist and take the man to the hospital. He denies that he saw the complainant prior to that as he never saw any person prior to that as he drove around. He confirmed that the complainant is the person who was injured. He denied seeing Mr Dhabi Nqira on the scene afterward, only his reaction people arrived on the scene. The appellant denied seeing, knowing, hitting, kicking, intention to hurt or kill the complainant prior to the incident. It was his view that the complainant was implicating him because he want to make quick money as he received a summons for pain and injury for twenty one million rand.

[23] During cross examination he confirmed that the motor vehicle that he drove had Ubuntu Security written on the side of it and that his left front tyre was damaged. It was also his evidence that he never spoke to anyone on the call on the community radio, he does not know who made the call on the community radio and it also did not mention any specific area where cattle was being driven away. His kraal where his cattle graze is 8km away and he saw nobody there, then he drove into the road and field. He denied driving off, he testified that he moved his motor vehicle to the gravel road about 200metres awayso that his reaction unit can see him, he was stuck he could not move. Despite the state assertion that he committed the acts testified to and that the complainant was badly injured that he still came to court on crutches to testify, appellant refuted that he committed the acts testified to and that the complainant is still using crutches as he saw the complainant working at one of the stands.

[24] Court in clarification asked the appellant if he suspected the complainant of theft of cattle, which the appellant denied. He could not give the court a date on which his foot was injured, but later stated it was mid-2016 and he was medically treated, given a boot and his leg was fine thereafter. However his evidence further goes that he in middle March 2017 fell off the stairs in his home and was advised by the doctor to wear his boot till end of May as he had torn off ligaments on the same foot. He was walking with crutches and hopping.

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[21] Transcribed record Page 91L lines 10-13

[25] When evaluating or assessing evidence, it is required that *all* the evidence must be evaluated. As Nugent J (as he then was) in S v Van der Meyden[22] stated:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

[26] The facts found to be proven and the reasons for the judgment of the court a quo must appear in the judgment of the court a quo. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed. As was stated in S v Singh[23]:

"The best indication that a court has applied its mind in the proper manner ...is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses."

[27] It is helpful to restate the approach to be adopted by a court of appeal when it deals with the factual findings of a trial court. It is trite that a trial court's factual findings are presumed to be correct and that an appeal court will only interfere with the trial court's factual findings if such findings are clearly wrong or misdirected.[24] This was restated in the case of S v Hadebe and Others[25] as following:

"It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong"

[28] The limits of the powers of the appeal court to interfere were set out in S v Bailey:[26]

"If there has been no misdirection on the facts, there is a presumption that the trial court's evaluation of the evaluation of the evidence as to the facts is correct, and that a court of appeal will interfere therewith only if it is convinced that that evaluation is wrong. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony. In order to succeed on appeal the appellant must therefore convince us on adequate grounds that the trial court was wrong in accepting the evidence of the State witnesses - a reasonable doubt will not suffice to justify interference with their findings."

[29] In the instant case, the complainant was a single witness in respect of the charge levelled against the appellant. Section 208 of the Criminal Procedure Act, 51 of 1977provides that:

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[22] 1999 (1) SACR 447 (W) at 450
[23] 1975 (1) SA 227 (N) at 228
[24] R v Dhlumayo & Another 1948 (2) SA 677 (A) at 705-706
[25] 1997 (2) SACR 641 (SCA) at 645e- f
[26] 2007 (2) SACR 1 (C)

"An accused may be convicted of any offence on the single evidence of any competent witness."

The court can base its findings on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect[27] or if there is corroboration[28].

[30] The Court finds that the court *a quo* was alive to the cautionary rule[29] to be applied in evaluating the evidence of a single witness and was alive to the contradictions in the evidence of the complainant. The court a quo assessed the evidence of the single that was presented before it, had regard to the intra-contradictions and though the complainant was a single witness, he was to some extent corroborated by Dhabi Nqira, the court *a quo* had regard to the external contradictions, the nature and number of the contradictions having regard to the evidence in its entirety. The court *a quo* found that the contradictions that were present were not material and that the complainant was a steadfast witness in regard to the manner in which the incident unfolded and the attack on him and was indeed telling the court the truth.

[31] As already pointed out, the court *a quo* considered the contradictions and weighed and evaluated the contradictions in the State case, having regard to the evidence holistically found that the contradictions that were present were not material. The court *a quo* found the that Dhabi Nqira evidence to an extent favoured the appellant in that he arranged transportation to the hospital and found that no criticism can be levelled against his evidence, having regard to the time lapse from admission of the complainant to when Dr Monyane treated the complainant and that his honesty was displayed in his rejection of the evidence of the complainant that he washed the complainant's face. Having regard to the fact that Derby testified that he, at the request of the admission doctor assisted in placing the complainant on the bed for xrays and that the complainant's pants was then taken off and he was cleaned, Mr Derby then noticed the bruises, the court found that lent credence to the complainant's assertion of the assault on him causing injuries.

[33] The court a quo when evaluating the evidence having regard to the appellants evidence, the reasons why he went to Rietvlei veld, found discrepancies on whether he received the report from herdsmen or the radio, discrepancies on whether he accused the complainant of stealing his cattle as this was put to the witness in cross examination by the defence, however the appellant testified he never spoke to the witness while the trial took place in his presence he never corrected his counsel. The court a quo pointed to the appellants reaction after he on his own version accidently caused injury to the complainant, in light of his evidence as compared to that of Dhabi Nqira and the appellants lack of a motive to so attack the complainant as contended compared to the evidence of both Dhabi Nqira and the complainant and the defence own assertion with regard to cattle theft. Contrary to his assertion of shock after the accident, Dhabi Nqira found appellant's car wheel being repaired while the complainant was unattended to crying in pain, not being transported to hospital.

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[27] R v Mokoena 1932 OPD 79 at 80

[28] S v Gentle 2005 (1) SACR 420 (SCA)

[29] Transcribed record Page 178 lines14-25 and page179 lines1-25 and page 180 lines1-13

[34] In its evaluation the court *a quo* had regard to the defence contention that this was an accident and the charge of attempted murder which levelled against the appellant, and applied the evidence before it to the element of intention in its analysis and finding.

[35] The court a quo, steeped in the atmosphere of the trial, made credibility findings and findings of fact having regard to the evidence as a whole, this Court is not convinced on a conspectus of the evidence that the court *a quo* was clearly wrong therefore this Court cannot fault the finding of the court *a quo* in accepting the evidence of the State and rejecting the appellants version, finding the State discharged the onus of proving their case against the appellant. In the circumstances, the appeal against conviction must fail.

[36] As stated earlier, the appeal is also directed against the sentence, an aspect I now turn to. It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court.

[37] The jurisdiction of a court of appeal to interfere with the sentence imposed by a trial court is limited. In S v Bogaards[30] Khampepe J stated:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[38] Having regard to the sentencing judgment the court *a quo* considered the triadic principals which have to be balanced as stated in the case of S v Zinn[31] as well as the aims of punishment as stated in the case of Rabie.[32]

[39] The court *a quo* had regard to the personal circumstances of the appellant, the circumstances under which the offence was committed and the interest of society and considered the submissions in mitigation and aggravation of sentence as well as the impact the offence had on the complainant. In this regard the court had a victim impact report before it which was compiled after based on consultation, qualification and experience by a qualified social worker in the employ of the State Department of Social Development accompanied by the social worker's Section 212(4) of the Criminal Procedure Act51 of 1977 affidavit and accepted as Exhibit "I" by the court. There is no indication that there was any objection to the report, tendered by the defence to the report in the court a quo. This Court finds no misdirection in the court *a quo* accepting the victim impact report.

[40] I can detect no misdirection in the court *a quo* approach to sentence. The offence, for the reasons cited above, is a particularly serious one. The personal circumstances of the appellant have been properly weighed against the seriousness of the offence and the interests of society. Far from inducing a sense of shock, the

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[30] [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41

[31] Transcribed record page197 lines16 -22 S v Zinn 1969(2) SA at 537A

[32] Transcribed record page 197 line 15-22 S v Rabie 1975(4) SA at 855 (A)

carefully considered sentence imposed by the court *a quo* strikes me as being one that is proportionate to the crime, the criminal and the interests of society.

[41] In the circumstances, no basis has been established for this court to interfere with the sentence imposed by the court *a quo*. The appeal against sentence must therefore fail.

ORDER:

[42] 1. The appeal against both conviction and sentence is dismissed.

2. The appellant's bail is revoked and he is ordered to present and surrender himself to the Clerk of the Pretoria Magistrate's Court, where his trial was conducted, within 48hours after being notified of this order to commence serving his sentence.

M.T. Jordaan

Acting Judge of the High Court Gauteng Division, Pretoria

APPEARANCES:

For the Appellant: Adv S J Coetzee

Instructed by: Mr van Heerden

For the Respondent: Adv Annalie Coetzee

Instructed by: Director of Public Prosecutions, Pretoria

Date heard: 13 October 2021

Date delivered: 13 January 2022