IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: AR564/14

In the matter between:

SIPHO RUDOLF CELE **Appellant**

vs

THE STATE **Respondent**

APPEAL JUDGMENT

Delivered: 09 June 2016

MBATHA, J

[1] The appellant was convicted of attempted murder in the Regional Court, Durban and was sentenced to ten (10) years imprisonment of which five (5) years was suspended for a period of five (5) years on condition that he is not found guilty of attempted murder or murder committed during the period of suspension.

[2] With leave of the court *a quo* the appellant appeals against both conviction and sentence.

[3] Counsel for the appellant in respect of the conviction has made the following submissions:

(a) That the state bears the onus of proof in establishing the guilt of the accused person beyond a reasonable doubt, which will be so only if there is no reasonable possibility that an innocent explanation, which has been put forward, might be true. Further that this test must be considered upon the consideration of all the evidence before court:

(b) That a person can be guilty of an attempt to commit a crime only if he has the necessary intention to commit the crime. In this regard the court *a quo's* findings were on the basis of the seriousness of the injury to the eye and that death could follow if someone is hit with a knobrierrie.

(c) That the court erred in finding that the appellant was guilty of attempted murder, when the evidence before it was that of an assault and the injuries suffered by the complainant. He submits that it was not the intention of the accused to deliver a fatal blow to the complainant as the complainant was his friend.

[4] The respondent is opposing the appeal on the basis:

(a) That the appellant had admitted that he had assaulted the complainant with a knobkierrie. A person using such a weapon, it was submitted, could have no any other intention save to kill his victim.

(b) That the appellant's initial claim that he was injured by the palm leaf was not reasonably possibly true and was nullified by the later version

of the appellant that he did not see how the complainant sustained his eye injury.

(c) That the appellant assaulted the complainant repeatedly. This was the testimony of Mazibuko and Zwane and hence should be accepted;

(d) That the court correctly rejected the appellant's version as it could not have been reasonably possibly true.

(e) That the state proved that the accused had intention in the form of *dolus eventualis*. The appellant had foreseen that if he assaulted the complainant with a knobkierrie, death could result but was reckless to these consequences.

[5] In our law a person is guilty of attempting to commit a crime if, intending to commit that crime, and he unlawfully engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intented crime, shall be guilty of attempting to commit such crime. In *S v Agliotti*[1] the court stated as follows:

> 'Attempted murder is an attempt to do or commit the [crime of murder]. A person is guilty of attempting to commit a crime if, he/she intending to do so, unlawfully engages in conduct that is not merely preparatory but has also reached at least the commencement of the execution of the intended crime. A person is equally guilty of attempting to commit a crime even though the commission of the crime is impossible, if it would have been possible in the factual circumstances which he/she believes exist or will exist at the relevant

[1] 2011 (2) SACR 437 (GSJ) para 10.2

time. A person will also be guilty of an attempt even when he/she voluntarily withdraws from its commission after his/her conduct has reached the commencement of the execution of the intended crime. The stage of commencement of execution is also called the stage of consummation. Once this stage is reached, "*attempt*" as a crime is complete.'

[6] There are two approaches in establishing the intention of the perpetrator. The intention could be subjective or objective. These can be established from the facts of the case.

[7] The respondent submits that intention in the form of *dolus eventualis* was proved in this matter. *Dolus eventualis* is applicable where a person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused and he reconciles himself to that possibility.

[8] It is common cause that the appellant assaulted the complainant with a knobkierrie, and as a result the complainant was injured on his right eye, and had to undergo surgery and his eye had to be removed and replaced with a glass eye.

[9] The complainant's evidence was that the appellant struck him all over his body, on the legs, ribs, lower legs and on the head, whereas the appellant 's version is that he only assaulted the complainant on the lower part of the body.

In Summary

[10] The facts of the case are as follows:

(a) The complainant's evidence was that he was at the residence of Winile Mazibuko on the day in question.

(b) A child who had been sent to buy alcohol from the tavern reported that the appellant, who was wearing an overcoat and a balaclava, was seated outside the gate of the Mazibuko residence.

(c) Having finished the drinks the complainant left for home. As soon as he set foot outside the house, the appellant had come rushing to him and started assaulting him all over his body with a knobkierie; which had a head bigger than the size of a cricket ball. The complainant was hit all over his body including on his head, as a result of the beating his eye was injured.

(d) He screamed, and his screams brought out Winile and others who enquired why the appellant was assaulting his friend, the complainant.

(e) Instead the appellant ran out of the gate and said that they must not follow him and they will also get what they are looking for.

(f) The complainant finally received medical attention the following day and had surgery where his eye was removed and replaced with a glass eye.

[11] The evidence of the complainant was corroborated in a material respect by Winile Mazibuko as to the identity of the perpetrator, to the time the incident and that the complainant was assaulted within the premises of her home. Winile informed the

court that though it was dark the place was illuminated by the artificial light outside the house and the street light. She was able to observe the assault as she was standing in close proximity, to the place where the complainant was assaulted. The appellant was facing towards her direction, whilst assaulting the complainant who was lying down. It was also her evidence that the complainant did not fall upon any palm tree, as the tree was far away from where the complainant fell down.

[12] The version of the appellant is that as the complainant went past his home he insulted his dogs and threw stones at his house without any form of provocation. He requested the complainant to stop throwing stones at his house but the complainant insulted and swore at him. He then went inside his house and came out armed with the knobkierrie. He then proceeded to hit the complainant with the knobkierrie on his legs several times. The eye got injured when he fell down on a palm tree. He did not intend to kill the complainant.

[13] The appellant's version was rightfully rejected by the trial court as the complainant could not have been on the streets when there was evidence that he was with Winile. Winile's evidence was that the assault took place inside her home premises and not as suggested by the appellant. Her evidence is also that the palm trees are far away, near the gate.

[14] It is clear to this court that there had been some kind of a disagreement between the complainant and the appellant earlier on when they met at the tavern, even though the complainant's evidence was that he had no knowledge of why the

appellant assaulted him. The complainant was assaulted with a knobkierrie and this is corroborated by Dr Baauod's evidence in that the complainant was hit on the eye with a blunt object. It is common cause that the knobkierrie was used to assault the complainant.

[15] The case revolved around the issue whether the appellant had the requisite intention, to commit the crime of attempted murder. We accept in this case that the appellant had intention in the form of *dolus eventualis*. The appellant assaulted the complainant with the knobkierrie several times on his body and that resulted in the injury to the eye. The question of intention can only be inferred from the facts of the case, the assault, the weapon used, the persistent attack on the complainant and the permanent injury to the complainant.

[16] The submission by the appellant's counsel that he ought to have been convicted of assault with grievous bodily harm has been considered by this court. The crime of assault with intent to do grievous bodily harm requires the court to consider the nature of the weapon used, the degree of violence inflicted, the part of the body where the weapon was aimed at, the persistence of the attack and the nature of the injuries inflicted upon the complainant.

[17] It is clear from the judgment of the trial court that the conviction on attempted murder, was based on the nature of the injury to the eye. The court found that the injury was so bad that it could have resulted in the death of the complainant. The doctor's evidence did not however conclude that the injury suffered by the

complainant, was necessarily fatal. The intention ought to have been inferred from the facts of the case.

[18] The complainant stated that the blows were directed on his ribs, upper legs, lower legs and he also got injured on the eye. He was cross-examined extensively by the defence in the trial, his evidence was still that he was struck first on the ribs, he fell down, was struck repeatedly on his upper body and was hit on the face. There is no evidence before this court which shows that any blows were directed to the head of the complainant, either from the complainant or Winile. There is no evidence of any head injuries to the head of the complainant that would have shown that direct blows were aimed at the head of the complainant. We can therefore equally infer from those facts that there was no intention on the part of the appellant to kill the complainant, but only intention to cause grievous bodily harm. To the extent that there is any doubt, that doubt must be accorded to the appellant. The injury to the eye is an unfortunate consequence. The eye is a very delicate organ that get injured easily in an assault. In the light thereof, the trial court should have accorded the appellant the benefit of any doubt and found him guilty of assault with intent to do grievous bodily harm.

Ad Sentence

[19] It is trite that an Appeal Court will only interfere with the sentence of the trial court if it misdirected itself in passing sentence. Moreover, a misdirection alone does

not suffice for a Court of appeal to interfere, misdirection should be material as expressed by Trollip JA in *S v Pillay*,[2] where he stated as follows:

> 'it must be of such a nature, degree, or seriousness that it shows directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence. That is obviously the kind of misdirection predicated in the [*dictum* of *S v Fazzie and others* 1964 (4) SA 673 (A) at 684A-B which states that] "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh".'

[20] In consideration of sentence the court *a quo* took into account that the appellant was, 60 years old, married and a father of four children, of which one is still a minor and a scholar. That he had been employed as a police officer but was boarded after he had sustained a gunshot wound and that he was a first offender. The court had also taken into account the aggravating factors in the nature of the injuries to the complainant particularly that he suffered permanent loss of sight on his right eye, that this led to the complainant losing his employment and income and is now dependent on a social grant. The court also accepted that he had not shown any form of remorse. The attack with all fatal consequences was unprovoked.

[21] The court misdirected itself in not considering that the appellant had shown remorse. He apologised to the complainant's brother and stated that it was a mistake. The complainant and the appellant had been friends for a long time and

[2] 1977 (4) SA 531 (A) at 353F-G.

there had been a tiff between them when they were at the tavern. However, this does not mean that when you have been provoked in any manner you should retaliate by resulting into violence.

[22] The application for leave to appeal by the appellant was granted on 01 July 2015. On 03 July 2015 he was granted bail pending the appeal. He was sentenced on 07 February 2014. This court takes into account that he has already served part of the sentence, that he showed remorse, that he had been a law abiding citizen and was 60 years old at the time of the commission of the offence, as mitigating factors. He will have to live with the reality that he has caused his friend to become blind in his one eye. Accordingly, we find that the appeal against both conviction and sentence should be upheld.

[23] I propose that the following order should be made:

(1) That the appeals against the conviction and sentence imposed by the trial court are upheld.

(2) That the conviction of attempted murder be set aside and replaced with a conviction of assault with intent to do grievous bodily harm.

(3) That the sentence imposed by the trial court be set aside and replaced with the following:

"The accused is sentenced to three (3) years, of which eighteen (18) months are suspended for a period of five (5) years on condition that the accused is not again found guilty of assault with intent to do

grievous bodily harm or ordinary assault committed during the period of suspension.”

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MBATHA J

I agree:

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KOEN J

Date of Hearing:	02 June 2016
Date of Judgment:	09 June 2016

Appearances

Counsel for the Appellant:	Adv N Mfeka
Instructed by:	Ntobelo Dlamini Attorneys Suite 205/206 Wakefield House 79 Crompton Street Pinetown
Counsel for the Respondent:	Adv K Radyn
Instructed by:	The Director of Public Prosecutions Pietermaritzburg