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

**CASE NO. AR162/2019**

In the matter between:

**SIFISO NATHI MTHIMKHULU** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representative by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 18 June 2020.

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**ORDER**

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**The following order is issued:**

The appeal against the conviction is dismissed.

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**JUDGMENT**

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**Steyn J (Chetty J concurring):**

[1] The appellant was convicted and sentenced on one count of attempted murder in the regional division of KwaZulu-Natal, the court sitting at Melmoth. He appeals against his conviction with leave granted by the lower court.

[2] It is submitted on behalf of the appellant that the court a quo was misdirected on the facts and ought to have found that the version tendered by the appellant was reasonably possibly true. Having considered the grounds of appeal, it is fair to say

that the appellant places identity in dispute. The State opposes the appeal and submits that there was no misdirection in the court a quo's approach in the evaluation of the evidence before it, neither was the court misdirected on the law.

[3] The salient facts adduced by the State were that the appellant and the complainant were in a love relationship. The vicious attack on the complainant occurred on 3 June 2016, sometime after the relationship between them had ended. In short, the complainant and the appellant had been drinking together at different places during the course of the day. A quarrel ensued between the appellant and a certain Obled, who was a neighbour to both the complainant and the appellant at one of the taverns.

[4] Later in the evening, Obled accompanied the complainant home from the last tavern they had frequented. The appellant for some reason was aggrieved and followed the complainant to her home where he slapped and strangled her, stabbed her on the breast and slit her throat. According to the complainant, the appellant said to her, 'why are you walking with my enemy'[1] just before he slit her throat.

[5] The appellant's version was one of a bare denial of the allegations against him. According to the appellant, there were no problems between him and the complainant, nor did he have any quarrels with her on the day in question. Whenever he was confronted with a difficult question by the State, he challenged the complainant's state of sobriety. In as much as his defence moved from an entire denial to an alibi defence, he never called on any of the people who were at his home on the evening of the attack to testify and confirm his whereabouts. During cross-examination he suggested that there was a conspiracy to frame him.[2]

[6] During the evaluation of the evidence, the court a quo was mindful of the application of the cautionary rule and actively looked for safeguards against a wrongful conviction.

[7] An analysis of the evidence shows that the complainant's version was simple and straightforward. Despite prolonged cross-examination her testimony emerged unscathed. Furthermore, the criticism directed at the complainant for the perceived

[1] See record at 8 lines 1-2.
[2] See record at 21 lines 10-12.

differences between her testimony and Obled's is without merit. In my view, the court a quo correctly rejected the evidence of the appellant as improbable and not reasonably possibly true. The judgment of the learned magistrate is well reasoned and demonstrates a careful scrutiny of all the evidence as well as a due consideration of the facts and probabilities.

[8] Our duty today is not to consider whether the judgment is beyond criticism but whether there was any misdirection related to the facts or law.[3] In my view, the court a quo cannot be faulted in its finding that it was the appellant that committed the offence. There was no misdirection on the facts or the law.

**Order**

[9] The following order is issued:

The appeal against the conviction is dismissed.

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**Steyn J**

**I agree**

[3] See *S v Robinson & others* 1968 (1) 666 (A) at 675H where the court held:
'Having regard to the re-hearing aspects of an appeal, this Court can interfere with a trial Judge's appraisal of oral testimony, but only in exceptional cases as aptly summarised in a Privy Council decision quoted in *Parkes v Parkes*, 1921 AD 69 at p. 77:
"Of course it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony."'
(My emphasis).

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**Chetty J**

**APPEARANCES**

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| Counsel for the appellant | : | Mr SG Masondo |
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| Date of Hearing | : | 12 June 2020 |
| Date of Judgment | : | 18 June 2020 |