

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

CASE NO: AR65/2019

In the matter between:

PHILANI COLLIN NZUZA

First Appellant

QINISO WELLINGTON NZUZA

Second Appellant

BHEKI AURALIAN NZUZA

Third Appellant

and

THE STATE

Respondent

JUDGMENT

HENRIQUES J (Kruger J concurring)

Introduction

[1] On 13 June 2016, the appellants who were legally represented at trial were convicted as follows. In respect of the first and second appellants four counts being:

Count 1: Robbery with aggravating circumstances of a Nokia cell phone;

Count 2: Robbery with aggravating circumstances of R100,00;

Count 3: Kidnapping; and

Count 4: Assault with intent to cause grievous bodily harm.

The third appellant was convicted of counts 3 and 4 only being kidnapping and assault with intent to cause grievous bodily harm.

[2] On 8 September 2016, the appellants were sentenced as follows. The first appellant was sentenced to eight [8] years imprisonment, wholly suspended for a period of five [5] years in respect of counts 1 and 2, taken as one for purposes of sentencing, which were the convictions of robbery with aggravating circumstances, five [5] years imprisonment, wholly suspended on count 3 which is kidnapping and five [5] years wholly imprisonment suspended on count 4 for assault with intent to cause grievous bodily harm. The same sentences were imposed in respect of the second appellant.

[3] In respect of the third appellant, he was sentenced to five [5] years imprisonment, wholly suspended, in respect of count 3, kidnapping and five [5] years imprisonment, wholly suspended on count 4 which was assault with intent to cause grievous bodily harm. In addition, all three appellants were further sentenced to three [3] years correctional supervision in terms of s 276 (1) (h) of the Criminal Procedure Act (CPA) in respect of counts 3 and 4. On 21 April 2017, all the appellants were granted leave to appeal their convictions and it is this appeal which serves before us.

Grounds of Appeal

[4] In the written heads of argument, Mr Arnott, who appeared for the appellants, submitted various grounds on which he challenged the convictions. I do not propose to repeat them for purposes of this judgment. In summary he submitted that the fair trial rights of the appellants were violated specifically as the learned magistrate rejected the versions of the appellants. I will return to these later on in the judgment.

The conviction

[5] In support of the convictions, the respondent led the evidence of eight witnesses. The three appellants testified in their defence and the third appellant called an alibi witness, Mr D M Zilosi. A summary of the evidence follows.

Sikhulile Cele (Cele) testified that at approximately 20h30 on 2 January 2014, he was in his bedroom in Flat [...] in the company of Mawanda Mbebe (Mawanda), Mxolisi Mbuyisa (Mxolisi), and Mphumelelo Shangase (Shangase) watching television. He testified that the door to the flat and gate were not locked but were closed. After a while he noticed Philani, the first appellant, inside the flat. He knew both the first and second appellants for approximately a year as they resided in Sydenham Heights.

[6] When he observed the first appellant in the bedroom, he stood up as he did not know how he gained entry into the flat. The room was lit by a globe in the bedroom. As he approached the first appellant, he observed him walk toward Mxolisi and grab him. The first appellant was followed by the second appellant and approximately 7 to 9 men some of whom were armed. Most of them crowded the bedroom and he observed other persons standing in the passage carrying firearms.

[7] After the first and second appellants had entered the bedroom, he and Mawanda were made to lie on the bed whilst being pointed at with firearms. The second appellant started searching them and going through their pockets and asked them for their cell phones. Cele had his nokia cell phone taken from his pocket and he observed a hundred rand been taken from Mawanda's pocket. He had given Mawanda the R100,00 to go and buy bread from the rent money of R1700.00, the balance of which he had left on top of the speaker.

[8] He confirmed that the second appellant was the one who took the hundred rand from Mawanda. Thereafter, the first and second appellant and the others in the room and those who stood outside the passage left with Mxolisi whilst pointing a firearm at him.

[9] After the appellants and others had left with Mxolisi, he and the other occupants of the room, Mawanda and Shangase ran out toward the lift and noticed that the lady who normally mans the lift was not there. After making enquiries they were told that he left with persons in a red Toyota corolla. They then went to the Sydenham Police Station to report what had occurred specifically the kidnapping of Mxolisi. The policeman were not helpful and ignored them and they then made a decision to go out and look for Mxolisi.

However, whilst they were at the police station, one of them received a telephone call and reported to them that he had found Mxolisi. They reported this to the police and a police vehicle was then despatched to Burnwood Park where Mxolisi was found. They remained at the police station and thereafter the police vehicle returned with Mxolisi.

[10] When Mxolisi was brought to the police station, he noticed that he had an open wound on the back of his head, his feet were injured and he was bleeding and blood was oozing from his right shoulder. Mxolisi was also walking very slowly and limping. Because the police indicated they would not transport Mxolisi to hospital, Mxolisi was taken to King George V Hospital in a private vehicle. They did not open a charge on the same night as the police would not listen to them. On the following morning, 3 January 2014, they received a telephone call from the station commander of the Sydenham Police Station who indicated they should attend at the police station and open a charge. Whilst at the police station, they observed the third appellant arrive with the first and second appellant, in the same vehicle that was used the previous night, a red Toyota corolla. At that stage, it was then that the first and second appellant were arrested.

[11] He confirmed that on 1 January 2014, an incident had taken place between Mxolisi and the first appellant during which incident the first appellant had been injured. He testified that the incident on the 2 January 2014 took place because the first and second appellants arrived at his flat looking for Mxolisi to *'pay revenge'*.

[12] Mxolisi Mbuyisa, the complainant in counts 3 and 4 corroborated the evidence of the first state witness, Cele. He knew the first and second appellants for approximately 10 to 15 years, from the area. He did not know the other persons who had entered the room and stood behind the first and second appellants.

[13] When they walked into the room, the first appellant said that he wanted him and told him to stand up. That is when Cele tried to stop him and then two of the others who had accompanied the first and second appellant into the room, pulled out firearms and told Cele to keep quiet. He observed Cele and Mawanda being made to lie on the bed and second appellant searching then, all the while a

firearm was being pointed at them. He observed a cell phone being removed from Cele. After this, the first appellant told him to stand up and he was escorted out of the room by him, accompanied by the other persons and a gun was pressed to his side by his waist.

[14] It was the first appellant who led the way and they were being followed by the second appellant and the males who had entered the room, who he did not know. They took the lift to the bottom and all the while the gun was still pointed to his side and they informed him that if he made a noise, they would shoot him. He was scared and thus complied with their instructions when they told him not to make a noise. They led him out of the premises through the gate and into a red Toyota Corolla which was outside the gate. He observed that the third appellant, the father of the first and second appellant was the driver of the vehicle.

[15] When they got to the vehicle, the first and third appellant had a discussion with the unknown men as to whether he should be put into the boot of the vehicle or into the vehicle itself. After some discussion, he was seated in the centre of the back seat with two unknown males on either side of him, the third appellant was driving the vehicle and the first appellant was seated in the front passenger seat. The second appellant had run away with the other persons who had entered the flat.

[16] The third appellant then drove to Burnwood Park. On their arrival there, the third appellant alighted from the vehicle, opened the boot and the other two men on either side of him also alighted and made him get out of the vehicle onto his knees. He testified that whilst travelling to Burnwood Park from Sydenham Heights, there was a discussion taking place in the vehicle and they indicated they were going to kill him. This was the first appellant and the unknown males.

[17] He confirmed that when he was first asked to kneel down, he refused and was struck on the side of his head with the butt of a firearm. After he was hit on the side of his head with the butt of a firearm, the first appellant then started assaulting him continuously with a stick, which looked like a hockey stick. He observed the third appellant exit the vehicle and open the boot together with the first appellant and he assumed that they removed the hockey stick from the boot. He described the place where he was taken to, as a bushy area and where you

could kill someone and leave them there and no one would ever know.

[18] The first appellant then told him to remove his takkies where after, the first appellant started striking him on his ankles and knees with the hockey stick. At the time, the third appellant was continually striking him on him on his head with a knobkierie. He testified that whilst the assault by the first and third appellant took place, he was on the ground, bleeding and crying.

[19] Whilst this assault continued, he attempted to use his hands to shield himself from blows and that is when the first appellant struck him and broke his finger. He testified that during the course of the assault, the second appellant arrived with some other males who he did not know, asking where he was. The first appellant in response to this question, answered and said, *'there he is. We are finished with him now'*. They then left him there for dead. After they had left, he managed to walk to a house to seek help.

[20] Regrettably, instead of assisting him, they alerted ADT, the security company, who then arrived at the scene and called the police from Sydenham Police Station. He was then transported in a police van to the Sydenham police station. His friends were there and after a period of time, his friends contacted a taxi to take him to the hospital. He was initially taken to King George V Hospital where he was sutured and then transferred to Addington Hospital where he received treatment in the orthopaedic ward.

[21] He did not immediately make a statement to the police, and after his discharge from Addington hospital and whilst at home, the investigating officer called on him and took a statement from him whilst he was seated in the motor vehicle. He confirmed that he was not present at the arrest of the first and second appellants but was present when the third appellant was arrested. He confirmed that he had an altercation with the first appellant on the day prior to him being kidnapped and during the course of their altercation, he had stabbed the first appellant **with a** bottle . Later that same **day**, the first and second appellants had come to an informal settlement near Sydenham, called Madadeni where they had chased him with firearms but he was able to hide from them. He confirmed that the incident which occurred at Madadeni was not reported by him to the police but that subsequently the first appellant had opened a charge

against him for stabbing him but those charges were withdrawn.

[22] The next witness to testify was Mphumulelo Shangase. He confirmed that on 2 January 2014, he was present at Cele's flat in Sydenham Heights with Mxolisi, and Mawanda. He likewise corroborated Cele and Mxolisi as to what transpired inside the flat. He recognised the first and second appellants from the Sydenham area. He corroborated Mxolisi and Cele that Mxolisi had sustained injuries. They saw him at the Sydenham Police Station when he was brought in, badly injured, by police officers. He described Mxolisi's injuries as a broken finger, a head wound and he was bleeding profusely. Whilst at the police station, he saw the first and second appellant and they were arrested.

[23] Mawanda Mbebe testified that he was present in the room with Mxolisi, Cele and Shangase on 2 January 2014, watching Generations. Whilst they were watching TV, Cele had given him a hundred rand note and informed him that once they had finished watching television, he needed to go and buy bread. After a short while, he heard the door to the flat open and observed the first and second appellant together with other persons in the room. He knew them very well as they had grown up together. He testified that when the first appellant walked into the room, he said, '*I came to you Mxo.*' He was not certain as to the number of people present but estimated them to be between eight and nine.

[24] After the first appellant had uttered those words, Cele stood up and tried to stop them from taking Mxolisi. That is when one of the persons who had entered the room pointed a firearm at Cele and another pointed a firearm at him. While they were being pointed at with firearms, the second appellant gave an instruction that their cell phones be taken. The second appellant came to him and he was the first one to be searched. The second appellant put his hand in his pocket and removed the hundred rand and also removed Cele's cell phone. The first and second appellants, together with the other persons who had entered the room left taking Mxolisi with them. He observed that the first appellant had pulled Mxolisi with his hand and when he had tried to resist, someone hit him on the shoulder and he then left as the firearm was pointed at him.

[25] After a short while, they then went to the lift and went downstairs enquiring from people whether they had seen Mxolisi. They were informed that he had

been taken and they observed a red corolla going out of the gate of the flats. He knew the vehicle as belonging to the third appellant. They then went to the police station to try and lay a charge. The police refused to open a charge. Whilst at the police station they observed Mxolisi being brought in by a police vehicle. Because Mxolisi had been injured, they wanted him to make a statement. He observed injuries to Mxolisi's finger, his feet and thigh and he observed that Mxolisi was limping. He also noticed that he was no longer wearing the takkies that he had been wearing when he left the flat. His clothes were covered in blood. Mxolisi was then taken by one of their friends in a private taxi to the hospital.

[26] He did not see the appellants on the same evening but subsequently, saw them at the police station when they returned for the second time. He confirmed that he did not have any problems with any of the appellants prior to this incident.

[27] Dr Sumeet Baitchu confirmed that on 3 January 2014, he examined Mxolisi in the trauma unit at Addington Hospital and completed the J88. He confirmed that part of the information contained another doctor's handwriting but he is the one that completed the rest of document and treated the patient. He confirmed that the patient was first seen at King George V Hospital before being admitted to Addington Hospital. The medical records indicated that the patient's finger was sutured but he was subsequently transferred to Addington Hospital because he had suffered an orthopaedic injury which was a fracture of the middle phalanx and there was no orthopaedic service at King George V Hospital.

[28] He treated the patient and he was provided with antibiotics and the patient also complained of pain in the knee and a head injury with no loss of consciousness. The patient narrated to him that he was assaulted with a bat. He confirmed that he did not make any record or any entries relating to the other injuries that the patient had sustained as this would have been recorded at King George V Hospital, but only made notes in relation to the orthopaedic injury.

[29] Mandia Mabhunu, a constable in the South African Polices Services, confirmed that he took over the investigation of this docket from Detective Warrant Officer Rohith. He confirmed that he did not make enquiries in relation to the hospital records from King George V Hospital, but merely assumed that as

the medical records from Addington Hospital were in the docket, so too were those from King George V Hospital.

[30] The initial investigating officer, Warrant Officer Rohith confirmed that when he initially conducted the investigations, it was not possible for him to immediately interview the complainant in Counts 3 and 4, Mxolisi. He had been to the hospital and learnt that Mxolisi had been hospitalised for some serious injuries. He could not comment on the nature of the injuries which the victim had sustained as he had no independent recollection thereof.

[31] He confirmed that on 3 January 2014, the first and second appellant arrived at the police station in a private vehicle. On the day that the first and second appellant had arrived at the police station, the complainant in counts 1 and 2, as well as other witnesses noticed their arrival and attacked the first and second appellant. SAPS members intervened and after calming down the situation, the first and second appellants were arrested. They were positively identified by the complainants in counts 1 and 2 as entering the flat, holding them at gun point and removing Mxolisi.

[32] He confirmed that after Mxolisi was discharged from hospital, the third appellant was identified as the person who drove the motor vehicle and consequently, the third appellant was then arrested toward the end of January 2014. He confirmed that he did not recover any weapons, nor any of the property alleged to have been stolen. He also confirmed that at the time, he was experiencing difficulties in obtaining copies of the J88 and the medical file from King George V Hospital.

[33] Mbalenhle Gumede testified that she was employed at King Dinuz:ulu Hospital, previously known as King George V Hospital, as a finance clerk who opens up files for first time patients. She confirmed that the investigating officer interviewed her regarding the hospital records for Mxolisi Mbuyisa. She confirmed that she had opened the file for Mxolisi during the night shift on 2 January 2014 and this she verified off their computer system.

[34] She confirmed that she was unable to retrieve a copy of the complainant's medical file as these files are kept in the archives on the premises. Everyone who works in the archives has direct access to the files. She could not indicate

what had transpired with the medical file. She testified that she knew the first appellant as they use to reside in the same block of flats and they also worked together. The first appellant worked in the same department as her and his job description also entailed him opening files. She confirmed that if a patient is transferred to another hospital, the hospital file and records like x-rays remained at their hospital.

[35] Subsequent to the close of the state's case, the appellants' legal representative made an application in terms of s 174 of the CPA for their discharge. Such application was refused and the reasons for doing so are evident from the record.

[36] All three of the appellants testified in their defence. The first appellant, Philani Collin Nzuza, testified that he commenced his employment at King George V Hospital as a finance officer from 1 January 2015. In 2014, he was employed in the linen department of the hospital.

[37] He confirmed that he knew Mxolisi, the complainant in counts 3 and 4 as they resided in the same area and attended the same primary school and were friends. He confirmed that prior to 2 January 2014, an incident took place on New Year's Day during which time Mxolisi stabbed him. On the following day, they had an altercation and Mxolisi was injured as he had been assaulted with a stick on his finger. He confirmed that during the first incident, he was stabbed on the head and arm by Mxolisi. After seeking medical assistance at King George V Hospital, his parents took him to Umgababa. When he attempted to report the incident to the police, the police informed him that he needed to find Mxolisi and contact them.

[38] On 2 January 2014, he and the second appellant, his brother, then went to flat 906 in block B, Sydenham Heights. Their elder brother Mfundo drove them there from Umgababa in their father's vehicle. He knew that they would be there as when they were friends they use to visit there. On their arrival at the flat, the door was closed so he knocked on the door. Both the door and the gate were locked, Cele opened the door and expressed surprise that he had been injured. He informed him that Mxolisi had injured him and the police had sent him to look for Mxolisi.

[39] Cele confirmed that Mxolisi was present and asked him not to phone the police but to do so when they were downstairs. Neither he, nor his brother, the second appellant entered the flat at all.

[40] He confirmed that Cele then shouted for Mxolisi and informed him that he should accompany him downstairs and they should try and resolve the matter as it had been handed over to the police. Cele opened the gate for Mxolisi and he came out of the flat and left with them. They travelled down the lift in the company of a lift attendant and when they had exited the lift and entered the parking area, he then took out his phone and informed Mxolisi that he had opened up a charge against him and that he wanted him to be arrested.

[41] He had already taken out his cell phone to contact the police when Mxolisi produced a bread knife and attempted to stab him with it. His brother, the second appellant, warded off Mxolisi and tried to grab his hand in an attempt to take the bread knife away from him. His brother and Mxolisi grappled over the knife and his brother tripped and fell. That is when he noticed a stick on the floor. He picked up the stick and hit Mxolisi's hand which held the bread knife. He hit him with the wooden stick and the bread knife fell out of his hand and that is when Mxolisi ran away. That is the only injury which Mxolisi sustained to his hand. He and the second appellant then returned to the police station to report this incident. The bread knife was left on the ground.

[42] He confirmed that the third appellant was not with him as his father was attending a function at their neighbour's house in Umgababa. On 3 January 2014 he, the second appellant and his father, the third appellant, attended at the police station to report the incident. This was to ensure that Mxolisi would be arrested. On their arrival at the police station, they noticed Mxolisi's friends who attacked them. He noticed Mawanda, Cele and Shangase present at the police station.

[43] The police assisted them to access the police station and they were then informed they were being arrested due to a charge which had been laid against them on 2 January 2014. At the time, only he and the second appellant were arrested. He confirmed that after he had been charged, he withdrew his criminal complaint against the state witnesses.

[44] He testified that he previously had a good relationship with Mxolisi as well

as his brother, the second appellant. However, that relationship soured when they both liked the same girl and he then entered into a relationship with her. He indicated that this is what soured their relationship and caused problems between them and was the reason why they would lie about him, his brother and his father's involvement in the alleged crimes. He denied that his family owned firearms and also denied that a cricket bat or a hockey stick was ever in the boot of the vehicle and that his father possessed a knobkierie.

[45] In light of the evidence which the state introduced in relation to the missing hospital records, he initially testified that when he was employed at King George V Hospital, the procedure was that once a patient file was opened and the information captured on the system, the file is handed back to the patient who keeps it with him. If a patient is transferred to another hospital, the documents are given to the patient for them to take it to another hospital to enable them to get assistance. He confirmed that he commenced his employment at King George V Hospital on 2 January 2015 and he would have access to the files in the archives.

[46] During cross-examination, he confirmed that once a patient is treated and needs to be transferred to another hospital, the patients' files are kept at the hospital and a referral letter is given to them. During cross-examination he confirmed that the relationship with this girl whom they both liked ended in 2012 when she moved back home to Ntuzuma. He did not tell Mxolisi anything about this and did not think that he knew this.

[47] On 1 January 2014, during the incident he alleged he was assaulted in, Mxolisi was drunk and was teasing him. He confirmed that at the time he was not under the influence and it was only during the course of an altercation that Mxolisi broke a bottle and stabbed him. After the stabbing incident, Cele, his brother and Mawanda came to the scene. But the incident was only between him and Mxolisi. He did not retaliate or assault him in any way and attempted to report this incident to the police on 2 January 2014 in the afternoon between 16h00 and 16h15.

[48] The second appellant, Quiniso Wellington Nzuza testified that on 2 January 2014, neither he nor his brother, the first appellant, nor father assaulted

or kidnapped Mxolisi, nor did they rob the complainants, Cele and Mawanda. He confirmed that he and the first appellant walked from B block to C block as the police had informed the first appellant to check and see where Mxolisi was, and to look for him. They walked to B block and used the lift to the 9 floor. On their arrival at room 906, the door was open and his brother knocked and spoke to Cele. He stood to the side and after a short while, Mxolisi came out. They then exited the flat and he overheard Mxolisi apologise to his brother for stabbing him.

[49] They used the lift to go downstairs and at this point, Mxolisi was still apologising to his brother, the first appellant. When they alighted from the lift, his brother, the first appellant, took out his phone and was making a telephone call when he observed Mxolisi panicking and produce a knife. He did not observe where he produced the knife from but noticed that his brother who was attempting to speak on his cell phone had his back to Mxolisi and that is when he caught Mxolisi by the arm. It was then that the first appellant saw him grappling with Mxolisi and he then tripped and landed on the ground.

[50] When he fell to the ground the knife fell and Mxolisi was now at a distance from him and he observed the first appellant holding a stick in his hand. He observed Mxolisi run away. They then walked back to C block and spoke to their brother, Mfundo and explained to him as to what had transpired. They then went to the police station. Their father was in Umgababa at the time. They returned on 3 January 2014 with their father.

[51] On the same day, 2 January 2014, they went to report this matter at the police station and returned to Sydenham Police Station on 3 January 2014. On their arrival at the police station there were a number of people from Sydenham Heights who were Mxolisi's friends. After the police managed to get them to safety and led them inside the police station, he and the first appellant were arrested. They did not arrest his father. He denied that he and the first appellant were accompanied by males to Cele's room or that they robbed them and threatened them. He testified that he was closer to Mxolisi because they were in the same age group. He did not personally know of a problem between the first appellant and Mxolisi over a girl they both liked.

[52] Bheki Nzuza, the third appellant, confirmed that he was the father of the

first and second appellant and resided in Sydenham for some 20 odd years. He testified that on 2 January 2014, he was in Umgababa on holiday. He testified that he travelled to Umgababa using his red vehicle with the first and second appellant. He had gone with Mr Zilosi to his home in Umgababa for a traditional feast. He then saw the first and second appellant on the 3rd when they went to Sydenham Police Station.

[53] He confirmed that on 2 January 2014, he had attended a traditional feast and consumed beer and alcohol at Zilosi's house from approximately 14h00 until 21h00. Although he acknowledged that he could have left the house at any time and travelled back to Sydenham, he denied doing so. He confirmed that women did not attend the traditional ceremony and that his wife did not attend.

[54] Daniel Zilosi confirmed that he knew the third appellant as his neighbour in Umgababa. On 2 January 2014, he held a traditional ceremony for his children and he had invited close neighbours, including their wives. He corroborated the third appellant's version that he had arrived between 14h00 and left at 21h00. He indicated that he was certain of the time as he used his cell phone and as it was late and he had asked the third appellant to leave as he wanted to go to sleep.

[55] He confirmed that it was possible that the third appellant could have left the function. In addition, he confirmed that women were invited to the function but would sit in another building together with his wife and enjoy the festivities. He confirmed that he was not in the third appellants company all the time as he was moving around in different parts of the property. That then was the evidence.

Judgment of the court a quo

[56] Dealing now with the grounds of appeal which Mr *Arnott* submits warrant this court setting aside the convictions.

[57] The court a quo assessed the evidence of the respondent as well as that of the appellants and considered it as a whole before rejecting the versions proffered by the appellants. In so doing, in her judgment, the court remarked that there were serious submissions and argument raised by the defence which were never canvassed during the course of evidence and which were '*wholly*

unsupported by the evidence'. This finding is supported by the record of proceedings.

[58] The court had regard to the fact that the state witnesses, specifically Cele and Mxolisi were subjected to lengthy cross-examination. However, their evidence remained largely unchallenged.

[59] The court *a quo* dealt with the fact that there were differences between the statements these witnesses made to the police and their evidence in court. However, was of the view that these differences were not material and did not change the '*substance and integrity*' of their versions. The court was alive to the fact that often police statements are taken down in a way which differs largely from the evidence in court and it is intended merely to be a summary thereof.

[60] Although the court *a quo* did not specifically refer to the decisions in *S v Mkhole* and *S v Mafaladiso*, it is clear from the record that the court was aware of such decisions when coming to the conclusion it did. This finding by the court *a quo*, in my view, does not constitute a misdirection and I agree that the differences were not material or affect the veracity of the evidence of the state witnesses. The complainants and the state witnesses corroborate each other in material respects. The discrepancies in their evidence in court and their statements was explained .

[61] The court commented on the demeanour of these witnesses and found it to be '*excellent*'. The court was impressed by their '*open and uninhibited manner of responding*'. The court was of the view of the applicable test in relation to the onus which the state bore and was mindful that in the event of the defence version being reasonably possibly true, the appellants ought to be acquitted.

[62] The court cannot be faulted for expressing the view that the first and second appellants made a poor impression as witnesses. The record reveals that the court *a quo* was correct in finding that certain aspects of their defence were not canvassed at all with the state witnesses and only emanated during the course of their evidence.

[63] In my view, the court, rightly rejected the defence version that these charges were fabricated. Apart from the state witnesses corroborating each other in relation to the events which occurred on the night in question, there is also the

medical evidence which served as some corroboration for Mxolisi's evidence. I accept that certain records were missing from King George V Hospital and that the state attempted to show that the first appellant may have been involved, or may have been complicit in the disappearance of these medical files.

[64] However, this does not detract from the evidence of doctor Baitchu who testified that the third complainant had reported to him what had transpired on the night in question and the injuries he sustained. The evidence by the doctor regarding the injuries sustained by the complainant was that the complainant was struck either with a stick or a bat and further that he could not dispute that the complainant had sustained injuries other than those for which he treated him.

[65] His focus however, was on the orthopaedic injuries which the complainant had suffered. In my view, the unavailability of these records does not detract from the veracity of his evidence and that of the other state witnesses and complainants in other counts. Apart from Mxolisi testifying regarding the manner of the assault, the state witnesses observed his condition when he arrived at the police station. Mxolisi testified that he was made to remove his takkies and when he arrived at the police station, Mawanda confirmed that when he saw him at the police station he was not wearing his takkies. The doctor's evidence was that the injury which Mxolisi sustained could have been caused by either a stick or a bat. In addition, Mxolisi complained of headaches and knee pain which ties in with the evidence he gave regarding being assaulted on the head and legs.

[66] As regards the reasons advanced by the appellants for wanting to falsely implicate them, this in my view, the magistrate correctly found, fell to be rejected. The state witnesses as well as the third appellant indicated that there was no bad relationship between them. There would be no reason for them to falsely implicate the third appellant in the offence. In fact, it would have made more sense, given the fact that they indicated their elder brother, Mfundo, was on the scene, to have implicated him as one of the attackers.

[67] In addition, the fact that they all finished school and were gainfully employed is not sufficient enough explanation as to why they would falsely implicate them. The court *a quo* was correct in finding that the relationship between the first appellant and the girl whom he and Mxolisi both liked had

petered out by the time this incident occurred. The only logical explanation for the incident on 2 January 2014 was, as the state witnesses said, that the appellants came there to '*pay revenge*' for the incident which occurred on 1 January 2014. This is in addition borne out by the fact that the first appellant only returned to report the incident and lay criminal charges on 3 January 2014, a day after the incident which occurred on 2 January 2014.

[68] The court was faced with the evidence of the state witnesses and the medical evidence. The state witnesses corroborated each other in material respects. Cele and Mawanda have no reason to falsely implicate the appellants in the commission of the crimes. If anyone had a motive it would be Mxolisi. His version is corroborated by Cele, Mawanda and Ntshangase as to what transpired in the bedroom of Flat 906. In addition although he is a single witness in respect of the actual assault, the medical evidence also served to corroborate Mxolisi's injuries and the nature of the assault. Jurla posed against this is the evidence of the defence which is tantamount to a bare denial and an alibi.

[69] The court a quo correctly rejected the alibi defence. The witness Zilosi conceded that it was possible that the third appellant could have left his home and he would not have known. In addition, the state witness Mxolisi testified he was the driver of the vehicle and he was the one whom assaulted him with the knobkierie. Also, on the appellants versions only the third appellant had a drivers licence at the time. What also does not make sense about the appellant's versions is that if they returned to Umgababa for their safety and as their family were visiting, why would they then leave and return on 2 January 2014. Given the nature of the evidence of the appellants the court a quo rightly rejected their version which was tantamount to a bare denial.

[70] As regards the submission, the learned magistrate committed a misdirection and infringed upon the appellants' rights to a fair trial as she refused to allow the appellants' legal representative to cross-examine certain state witnesses, it is not clear from the heads of argument exactly which witnesses are being referred to. The record reveals that during the course of the trial, the magistrate did not allow both representatives to raise irrelevant matter during cross-examination.

[71] In relation to the submission that she refused to allow questions concerning the details of and whereabouts of one of the state witness's cell phone, there is no merit in the submission that the appellants' legal representative was unable to test the veracity of the evidence of the state witnesses fully. The record shows the magistrate correctly pointed out to the representative of the appellants that cellular phone numbers are not permanently attached to a single cellular phone and therefore ownership cannot be imputed based on the retention of a cellular number. In fact a reading of the record reveals that the magistrate allowed the appellants legal representative to continue with his line of questioning relating to the cell phone provided it was relevant to the trial.

[72] Some criticism has also been levelled that the magistrate descended into the arena and assisted the respondent in relation to the medical evidence. I agree with the submission of Mr MacDonald , that the evidence of Dr S Baitchu must be assessed against the following backdrop. The complainant Mbuyisa was seen at Addington Hospital on 3 January 2014 and the record (Exhibit "F") thereon prepared at that time. The J88 (Exhibit "E") was completed by the aforementioned witness on or about the 13 February 2014 over a month later. The doctor confirms (Page 333 line 25 to Page 334 lines 1 to 3) that the J88 was completed from the notes. It is submitted that Exhibit "F" does not indicate the condition of the clothing worn by the complainant.

[73] The lack of blood on his clothing was canvassed by both representatives, and he indicated that it was possible that Mxolisi could have changed his clothing before being admitted to Addington, thus explaining why his clothing was clean and absent any blood.

[74] The record also indicates that the court in questioning the doctor sought clarification on certain aspects of his evidence, ironically which arose from cross-examination. In addition as is the practice both legal representatives were given an opportunity to ask questions arising from the questions posed by the learned magistrate. The record indicates that the appellants legal representative did not confine himself to questions arising from the questions posed by the learned

magistrate, and hence was not allowed to raise new matters.

[75] In addition the notes which formed part of the exhibits were handed in without objection and both legal representatives canvassed the contents thereof during the course of the trial.

[76] The assertion by the appellants that the magistrate portrayed a combative demeanour toward them and their legal representative is unfounded. The record reflects that in fact she sought to curtail irrelevant questioning from both the respondent and the appellants' legal representative. She went further to reprimand the offending parties as at times they acted inappropriately during proceedings.

[77] This also extended to certain of the appellants when they behaved inappropriately and disrupted the proceedings. In any event the record shows that this was not canvassed on the record with the magistrate to give her an opportunity to deal with same. In addition the magistrate is not a passive participant in proceedings.

[78] This was also done in the context of the often extended cross examination and the fact that the trial took longer than expected and the complaint over the lack of funds by the appellants' legal representative.

[79] The appellants assert that by handing down an *ex temporae* judgment, the court a *quo* failed to adequately, properly assess and evaluate the evidence and the appellants were deprived of a right to a fair trial, and a proper, fair and independent assessment of all the admissible evidence.

[80] I agree with the submission of Mr MacDonald, that the assertion by the appellants that the presiding magistrate in delivering an *ex tempore* judgement rendered the trial unfair and the conviction incorrect is tenuous at best. The record shows that the final witness for the appellants, Mr Zilosi, testified on 28 April 2016 whereafter the matter was adjourned to 25 May 2016 for address. It was further adjourned to 13 June 2016 which gave the presiding officer adequate time to analyse the evidence presented by the respondent and the appellants.

[81] Furthermore, some of the submissions at judgement stage on the assessment of the case for the State was covered during the application in terms

of Section 174 of Act 51 of 1977, specifically the contradictions in the evidence of the state witnesses and their credibility. The magistrate was also aware of the fact that the appellants wished to have their matter finalised without delay.

[82] In addition, the administration of justice would grind to a halt if presiding officers were not permitted to deliver *ex temporae* judgments. This has been the practice in all courts specifically the lower courts given the daily workload.

[83] I have considered the remaining grounds of appeal in the written heads of argument and the additional submissions of the appellants' legal representative advanced at the hearing of the appeal.

[84] It is trite that in circumstances where there has been no misdirection of fact a court of appeal will assume that the court a *quo*'s findings are correct and will accept these findings unless it is convinced that the trial court is wrong. *R v Ohlumayo and Others* 1948 (2) SA 677 AD at 705 - 706. This approach was approved of by Marais

[85] JA in *S v Naidoo* 2003 (1) SACR 347 (SCA) at paragraph 26 where the court held the following 'In the final analysis, a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirections or are shown by the record to be wrong.'

[86] In the result, I am of the view that there is no merit in the appeals against the convictions. In the result the following order will issue:

The appellants appeal against their convictions is dismissed and the convictions are confirmed.

HENRIQUES J

KRUGER J

Case Information

Date of Set Down : 28 August 2020
Date of Judgment : 28 August 2020

Appearances

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This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 13h00 on 28 August 2020.