

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE: YES/NO  
(2) OF INTEREST TO THE JUDGES: YES/NO  
(3) REVISED.

CASE NO: A99/2016

DATE: 26/10/2017

SIGNATURE: [Signature]

In the matter between:

MAHLATSE PATRIC MONTLE

APPELLANT

And

THE STATE

RESPONDENT

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JUDGEMENT

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**SEMENYA J:**

1. Central to the issues in this appeal is whether the trial court correctly admitted and relied on the evidence of the doctor who treated the complainant, as recorded medical report commonly referred to as form J88. Further, whether the state proved beyond reasonable doubt that it is the complainant was indeed assaulted, and if so, by the appellant.
2. The appellant was convicted on a charge of assault with intent to do grievous bodily harm and was sentenced to twelve (12) months direct imprisonment wholly suspended for three years on condition the he is not convicted of an offence of assault with intent to do grievous bodily harm during period of suspension. The appeal is with leave of the trial court.
3. The evidence tendered by the State during trial was that the complainant and one Kagitso were suspected by the latter's uncle of stealing two televisions. On the date of the incident, Kagitso came to the complainant with his uncle and another person. He was informed that Kagitso admitted that the two have stolen the uncle's television.
4. Both Kagitso and the complainant were subsequently handed over to police officers who took them to the police station. It was at this police station that he met with the appellant. When the complainant maintained his innocence, the appellant assaulted him with a sjambok, open hands and kicked him with booted feet. He also covered his face with a plastic bag.

5. The appellant told the complainant that he will continue to hit and to cover him with a plastic bag and eventually kill him if he continues to deny that he took the televisions. According to him, he, the appellant, hit him more than hundred times. He was injured on his body and private parts and bled from some of the injuries.
6. In the morning, he and Kagitso were taken to the hospital for treatment of the injuries that he sustained. The doctor who treated him completed J88 form on which he had noted the injuries he had observed.
7. Cross-examination of the complainant was mainly on his identification of the appellant. The complainant maintained that although he did not know him by name, he was able to recognize him as he knew him by sight.
8. It transpired that the doctor who treated the complainant and completed J88 form could not testify due to the unavailability of a Spanish speaking interpreter. The court dismissed an application for postponement after the doctor and interpreter failed to attend. Form J88 was handed in and admitted as evidence at the instance of the defence.
9. The appellant testified that he was on duty at the police station on the date of the incident. He interviewed the complainant and Kagitso. Kagitso admitted that he stole the television. The complainant denied the allegations against him. The appellant denied that he assaulted the complainant in any manner.

10. The defence contended that J88, though admitted, has no evidential value in view of the fact that the doctor who examined the complainant is not conversant with the English language. It was submitted that the court ought to have arrived at a conclusion that this J88 form was completed by someone other than the doctor who treated the complainant.
11. In rejecting the defence's contention, the magistrate found that form J88, which was accompanied by affidavit in terms of section 212(4) of the CPA, constitute *prima facie* proof of the facts contained therein. The magistrate stated further that the defence did not object to its admission as evidence. The magistrate concluded that the fact that the doctor could not take an oath in English does not automatically mean that he could not communicate with patients examine them and make a finding.
12. The issue of the probative value of form J88 was raised again on appeal. It was contended that the magistrate's reliance on J88 form constitute a misdirection on her part.
13. Counsel for the respondent submitted that apart from stating what he has observed on the patient in words, the doctor further indicated the position of the injuries on schematic drawings attached to the J88 form. Mr Chidi could not deny that the original J88 form does have these schematic drawings on which such injuries were recorded. The doctor's conclusion is recorded as 'multiple eritomatous marks and bruises on the chest and 4 limbs'.



14. In **S v Kwezi 2007 (2) SACR 612 (C)**, Jones J summed up the legal position with regard to the manner in which courts are supposed to approach the evidence contained in J88 as follows:

*"When the request (for the oral evidence of a doctor) is made by a legal representative, the court is inclined to call the doctor, unless it is clear that the request is frivolous or that no good purpose could possibly be served by calling the doctor. On the other hand, when the request is made by an unrepresented accused, the court should enquire whether the accused is prepared to disclose what it is that he wishes the doctor to deal within evidence. If it appears that the doctor may be able to be of further assistance in the matter, and particularly if the court is contemplating to use what the doctor has recorded in the affidavit or certificate for the purpose of drawing inferences that have not been spelt out in the affidavit or certificate by the doctor, the court should, in terms of section 212(12), either prepare written interrogatories for the doctor, or have the doctor called as a witness."* (my own addition).

15. Counsel for the respondent contended that J88 form was admitted with the appellant's consent and that the legal representative of the respondent did not request the court to invoke the provisions of section 212(12). It is correct, as argued by counsel for the respondent that the record shows that the prosecutor was reluctant to hand in J88 without calling the doctor. It is further evident that Mr Chidi pressurized the prosecutor into handing the document in. He cannot thereafter complain about the magistrate's reliance on the said document.

16. It was held in **S v Veldthuisen 1982 (3) SA 413 (A)** that form J88 that is compliant with the requirement laid down in section 212(4) is *prima facie* proof of the facts contained therein. It is trite law that such evidence, if left unchallenged, becomes conclusive proof.

17. It was further contended on behalf of the appellant that the complainant was charged on the morning following the night of the alleged incident. The police officer who completed a document, on which the complainant's rights were explained, noted that there are no injuries on him. It was submitted that the magistrate should have found this to be evidence that negatively impacted on the complainant's credibility.
18. The evidence presented before the magistrate was that the deceased was assaulted during the night. He was charged with theft of a television in the morning. The evidence that the complainant was thereafter transported to the hospital for medical examination was not disputed. The magistrate's finding that the injuries as recorded on J88 are consistent with the complainant's evidence cannot be faulted. The submission that the magistrate ought to have found that the injuries are not compatible with the severity of the assault as deposed to by the complainant is without basis.
19. The magistrate's finding that the complainant exaggerated the severity of the attack is found to be proper. This exaggeration alone does not justify an inference that the complainant is a liar. The magistrate concluded that what the complainant meant was that he was assaulted several times.
20. It is incorrect that the magistrate failed to apply caution to the evidence of the complainant who was a single witness. The magistrate's findings that the complainant was a credible witness who did not waver during cross-examination is valid and in line with the totality of the evidence presented before her.
21. The guiding principles on an appeal against sentence are the following:
  - a. Punishment is pre-eminently a matter for the discretion of the trial court;

- b. The appeal court should be careful not to erode such discretion;
- c. The sentence should only be altered if the discretion has not been judicially and properly exercised' or where the sentence is vitiated by irregularity or misdirection or is shockingly inappropriate.-**S v Rabie 1975 (4) SA 855 (A).**

22. I am unable to find any misdirection on the part of the trial court. There is no reason for interference.

23. I find that the appeal has no merits and stands to be dismissed.

24. I propose the following order:

24.1 The appeal is dismissed.



M.V SEMENYA

JUDGE OF THE HIGH COURT

I agree



G.C MULLER

JUDGE OF THE HIGH COURT

**APPEARANCES**

Attorneys for the Appellant	: Mammule Chidi Inc.
Counsel for the Appellant	: Adv. Chidi M.P
Attorney for the Respondent	: DPP
Counsel for the Respondent	: Adv. <i>Kotze</i>
Date of hearing	: 08 September 2017
Date of Judgement	: October 2017