Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: **A322/11**

In the matter between:

ENERST JEVU Appellant

and

THE STATE Respondent

Judgment delivered: Wednesday 22 February 2012

SABA, AJ

[1] This is an appeal against conviction. On 16/3/2011 appellant who was legally represented throughout the proceedings was convicted in the Regional Court, Wynberg on 3 counts namely:-

(i) Attempted Murder
(ii) Murder
(iii) Atempted Murder

[2] He was sentenced to five (5) years imprisonment on each count of attempted murder and ten years (10) imprisonment on the count of murder. The sentence of five (5) years in count three (3) was ordered to run concurrently with the sentence in count two (2). With the leave of the court a quo he now appeals against conviction.

Factual Background

[3] The complainant, Tando Noqha ('Tando) testified that he was with his friends when appellant and his friends approached. His friends ran away leaving him and one other friend behind. When he saw the firearms, he also ran and the appellant chased him while his other friend, Niggerbee, chased Tando's other friends. He heard gunshots and realized that he had been shot at the back. Although he did not actually see who fired a shot at him but he had earlier seen the appellant chasing him carrying a firearm in his hand, shortly before a shot struck him at the back. Shortly thereafter, he saw the appellant standing and looking at him ten (10) metres away. He was adamant that it was the appellant who shot him because he knew him very well as they had been friends before that day. He further stated that it was broad day light when the incident took place.

[4] Complainant further testified that on 21 January 2009, he was playing a pool game at a tavern when the appellant and his friends came inside the tavern and fired shots. He said even though it was at night and the light was not that bright, he could see the appellant and his friend, Shaun, firing shots at the direction of the deceased, himself, and his other friends, Akhona and Andile. He felt something hitting him on the arm and realized that he had been shot. As he was walking out of the tavern, he went past the appellant who was still carrying a firearm. He went to hide outside. He later heard footsteps and on looking, he saw the appellant and his friends walking out of the tavern. He then saw the deceased lying outside with his face down.

[5] Captain Mabhelela Ngxaki testified that the appellant had injuries from being circumcised when he arrested him in his home village in Tsolo on 10 June 2009. He said he took him to a doctor in Umtata and they later travelled to Port Elizabeth. From Port Elizabeth, he and the appellant travelled to Cape Town where he locked him up at Bellvile South police cells.

[6] Constable Franklin Tabisher and Constable Alex Janse Van Rensberg are the police officers who, at the request of the investigating officer, Captain Kotze, fetched the appellant from Bellville South police cells and took him to Superintendant Notisi

in Stellenbosch to make a statement. They both testified that they did not look for injuries on the appellant; they never assaulted him and the appellant never complained of any injuries that he had sustained at the hands of the police while he was with them.

[7] Superintendant Notisi testified that before he took down a statement from the appellant, he asked him if he had any injuries. The appellant showed him marks on both his ankles and wrists and said they were caused by handcuffs and shackles put on him when he was brought to Cape Town from his home in Tsolo. Appellant also told him that he had other injuries on his penis which were as a result of circumcision. He later took a statement from the appellant, the admissibility of which was in dispute. A trial within a trial was held.

[8] The main issue in the trial within a trial was whether the statement had been made by the appellant freely and voluntarily, without any undue influence. The appellant had alleged that he had been assaulted and forced to make the statement. The defence witness, one Bulelani Magadla had not witnessed the assault on the appellant. He testified about what the appellant had said to him about the assault. Four witnesses who testified for the state in the trial within a trial, Tabisher, Van Rensberg, Kotze and Notisi, all denied assaulting the appellant.

[9] The trial magistrate found the evidence of the four state witnesses in a trial within a trial to be satisfactory. She on the other hand found the version of the appellant and his witness, Bulelani Magadla, to be contradictory and rejected it as false. She then ruled the statement to be admissible.

[10] In the statement, the appellant had admitted that he shot Tando (referring to the first incident of the 4th November 2011). Regarding the second incident, the appellant had admitted that he was present at the tavern when Shaun shot the deceased but denied shooting the complainant and the deceased.

[11] The appellant, in the main case, testified that he and the complainant were once friends. He denied shooting the complainant on 4 November 2008 and said he was at home with his brother Makasi that day. He also denied that he was in the company of Shaun when the deceased and the complainant were shot at on 21 January 2008. He and Makasi testified that during the shooting incident on the 21st, they were sitting outside the tavern and were not part of those who were firing shots.

[12] The magistrate, in her well-reasoned judgment, critically analyzed the evidence in its totality and convicted the appellant on all three counts.

[13] The main ground of appeal is that the magistrate erred in not applying the necessary caution applicable to singe witness evidence.

[14] Mr Caiger for the appellant submitted that in view of the fact that there was limited lighting inside the tavern, the evidence of the single witness regarding the identity of the appellant should have not have been accepted by the trial court.. He submitted that the trial magistrate was therefore wrong in finding that the appellant acted in common purpose with Shaun, in causing the death of the deceased and attempting to kill the complainant. Counsel did not take issue with the conviction in count 1.

[15] Mr Sebelebele on the other hand submitted that the trial magistrate was correct in finding that the appellant and Shaun acted with common purpose in causing the death of the deceased and attempting to kill the complainant. He argued that there was no possibility of a mistaken identity because the appellant knew the complainant very well and also went past him during the shooting incident at the tavern on 21 November 2008.

[16] The general approach in an appeal is that the trial court's findings of fact are presumed to be correct, because the trial court has had the advantage of seeing and hearing the witnesses and is in a better position to determine where the truth lies.

(See **S v Dhlumayo and Another** 1948 (2) SA 677 (A). In **S v Hadebe** 1997 (2) SACR 641 (SCA) 645e-f, the following was stated:

> *"In the absence of a demonstrable and material misdirection by the trial court, its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".*

[17] Section 208 of the Criminal Procedure Act 51 of 1977 provides that 'an *accused may be convicted on any offence on the single evidence of any competent witness'.*

[18] In **S v Sauls** 1981 (3) SA 172 (A) at 180 the following was stated about the evidence of a single witness:

> *"There is no rule-of-thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and should decide whether it is satisfied that the truth has been told despite the shortcomings or defects or contradictions in the evidence."*

[19] In her judgment, the magistrate carefully cautioned herself about the dangers of accepting the evidence of a single witness. She correctly found that there was other evidence linking the appellant to the commission of the offences, for an example, the admission contained in a statement he made to police; that he shot the complainant and the fact that he was present when Shaun shot fired a shot at the deceased. The following extract from the judgment in the trial court is also evidence to the fact that the magistrate applied her mind to the evidence of the complainant:

> *"In assessing the evidence of the state witness the court must say he stood up to cross-examination and adhered to his version as to what occurred on both occasions. There was no indication that he was fabricating the evidence to strengthen the case against the accused; in fact the court found him to be an honest witness...."*

[20] Mr Caiger, in his heads of arguments sets out the requirements of common purpose, as enunciated in **S v Mgedezi and Others** 1989 (1) SA 687 (A), as follows:

20.1 The accused must be present where the violence is committed;

20.2 Must have been aware of the assault on the victim;

20.3 Must have intended to make common cause with those perpetrating the assault;

20.4 Must have manifested his sharing of the common purpose with the perpetrator of the assault by himself performing some act of association with the conduct of the others;

20.5 Must have had the requisite *mens rea*.

[21] I was persuaded by Mr Sebelebele's submission that in view of the common cause fact that the appellants' group (which also consisted of Shaun), was at loggerheads with the complainant's group because the latter had earlier killed one of their friends, Nhoto, therefore the only reasonable inference the trial magistrate could have drawn was that Shaun and the appellant both came to the tavern on 21 November 2009 to avenge the death of their friend.

[22] In my view, the magistrate correctly assessed the evidence of the complainant and found it to be credible and trustworthy. With regard to the common purpose she correctly found that the appellant was known to the complainant as a former friend; as such' he could not have made a mistake about his identity. Having regard to the fact that the complainant walked next to the appellant when he was getting out of the tavern on 21 January 2011, I am of view that he could not have missed his face and the firearm he was allegedly carrying.

[23] In the light of what has been stated above, I am satisfied that the trial court was correct in finding the appellant guilty of murder as he had associated himself with the shooting at the tavern. In my view, the appellant foresaw the possibility that the actions of Shaun, with whom he had associated himself with, might have resulted in the death of the deceased and reconciled himself to that possibility. The challenge to the trial court assessment of the evidence of the single witness can therefore not succeed.

[24] In the result, I propose the following order:

24.1 The appeal against conviction is dismissed.

N SABA

Acting Judge of the High Court

I agree and it is so ordered.

A P BLIGNAULT

Judge of the High Court