IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A385/2012

DATE: 26 OCTOBER 2012

In the matter between:

MBULELO MAXWELL JACK Appellant

and

THE STATE Respondent

J U D G M E N T

DAVIS, AJ:

The appellant was convicted in the Regional Court for the Cape sitting at Mossel Bay of three counts of pointing a firearm in contravention of section 120(6)(a) of the Firearms Control Act, 60 of 2000. All three counts were taken together for purposes of sentence and the appellant was sentenced to 24 months direct imprisonment. The appellant appeals with the leave of the magistrate against both his sentence and conviction.

The appellant pleaded not guilty to the charges and was

legally represented throughout his trial. In explanation of plea, appellant's attorney volunteered that appellant admitted that he had been involved in an argument with one Stanley Josephs on the night in question but denied that there had been anything other than a verbal altercation between them.

It is common cause that the incident which gave rise to the charges, took place in the early hours of the morning on 25 December 2011, in the vicinity of a tavern where alcohol was served and consumed. A quarrel broke out between the appellant and Stanley Josephs when the latter forcibly dispossessed the appellant's drinking companion, Elzane Josephs, of beer which the appellant had bought for her. Stanley Josephs is the cousin of Elzane Josephs.

The State presented the evidence of four witnesses: Plaatjies Smith ("Smith"), Stanley Josephs ("Stanley"), Elzane Josephs ("Elzane") and a police officer, Constable Andrew Khane ("Khane"). Appellant was the sole witness for the defence.

The evidence presented by the State may be summarised as follows:

1. Appellant and Elzane had been drinking together at a tavern together with Stanley's sister Margaret and her

husband Jacobus ("the Group"). Appellant had bought and paid for the beer which Elzane was drinking.

2. While the group was standing outside the gate in front of the tavern, Stanley approached them and grabbed the beer out of Elzane's hand. Appellant was incensed by this conduct and an argument ensued between Stanley and the appellant.

3. During the course of this argument appellant pulled out a gun, pointed it at Stanley and threatened to shoot him. Stanley was shocked and ran away home.

4. The group then left the tavern and walked to Moonie Street. Meanwhile Stanley rushed home and announced that someone had tried to shoot him which awoke Smith, his father.

5. Stanley then left home and went to fetch his sister. He met up with the group in Moonie Street where the argument between Stanley and the appellant continued. Appellant again pointed the gun at Stanley and threatened to shoot him.

6. A few minutes later, Smith arrived on the scene in his car to fetch his son. Appellant threatened to shoot Smith and pointed the gun at him. Smith jumped into his car and drove off to fetch the police. He found a police van on patrol nearby.

7. Constable Khane was one of two police officers on patrol

who were hailed by Smith. When the police approached the group, the appellant ran away. The police gave chase and arrested the appellant but no gun was found on him at that time.

8. The weapon was not found.

The appellant's version essentially boiled down to a denial that he had had a gun on him on the night in question. During the course of cross-examination important elements emerged which had not been put to state witnesses, such as the allegation that Smith and the person who was with him in his car were carrying pangas. In short, the appellant's answers to the prosecutor's questions were riddled with inconsistencies and conveyed the distinct impression that he was fabricating the answers as he went along.

The magistrate rejected the version of the appellant on the basis that the version which unfolded during his cross-examination was not even a distant cousin to the version put up in his evidence in chief and had not been put to State witnesses.

Stanley Joseph also failed to make a good impression on the magistrate, who felt that he had been more under the influence of alcohol than he was prepared to admit. Elzane Josephs,

Smith and Khane, on the other hand, all created a favourable impression on the magistrate. As regards the question of contradictions between the police statements of Elzane Josephs and Plaatjies Smith and their oral evidence, the magistrate found that these contradictions were not material and did not impair their credibility.

It was argued on behalf of the appellant that the magistrate had misdirected herself by failing to attach due weight to the appellant's evidence that he did not point a gun at the complainants and the fact that no gun was found. The magistrate was also criticized for not having due regard to the contradictions in the evidence of the various state witnesses and for failing to approach with caution the evidence of Smith, Stanley and Elzane, on the grounds that they were family.

In my view these contentions are without merit. The fact that no gun was found does not in any way derogate from the overwhelming evidence presented by the State that appellant had a gun which he pointed at Stanley and Smith.

The incident took place at night and the appellant fled from the police through various yards, giving him an opportunity to dispose of any firearm in his possession.

Such contradictions as there were in the State's evidence related to peripheral issues and details which were irrelevant in the greater scheme of things. The approach which the magistrate took to the contradictions between the oral testimony and the witness statements was entirely correct and in accordance with what was prescribed in S v Mafaladiso & Andere 2003 (1) SACR 538 (SCA) at 593e-h and S v Govender & Others 2006 (1) SACR 322 (E) at 325f-326c.

It is well established that an appellant court should be slow to upset the factual findings of the trial court which has enjoyed an advantage in seeing and hearing the witnesses and being steeped in the atmosphere of the trial. It is also trite that where there has been no misdirection on fact by the trial court, the presumption is that its conclusion is correct.

An appellate court will only interfere when it is convinced that the trial court is wrong. As was re-affirmed by Marais, JA in S v Hadebe & Others 1997 (2) SACR 641 (SCA) at e-f:

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

In short, I can find no indication of a misdirection of any nature such as to warrant interference with the factual findings of the magistrate. Having regard to the totality of the evidence presented by the State, I am satisfied that the appellant's guilt was proved beyond a reasonable doubt. Thus, in my view, the appeal against conviction must fail.

In arriving at the sentence the magistrate had regard to the appellant's previous convictions, to the *ex parte* submissions made by the appellant's attorney and to the aggravating circumstances raised by the State, namely that the accused had previously been declared unfit to possess a firearm, that he had committed the offences while out on parole and that he had violated the conditions of his parole by being at a tavern and consuming alcohol.

The State argued that a custodial sentence was the only appropriate sentence given the appellant's apparent contempt for the law. Sentencing is a matter for the discretion of the trial court. A pithy summary of the approach to appeals against sentence may be found in the following words of Scott, JA in S v Van Eck 2003 (2) SACR 563 (SCA) 568e:

> "As has been said time without measure, the power of a court of appeal to interfere with the sentence imposed by

> the trial court is limited. It may do so only when the exercise of the trial court's discretion is vitiated by misdirection or the sentence imposed is so inappropriate as to indicate that the discretion was not properly exercised."

In order to qualify as a misdirection which is sufficient to vitiate the exercise of the sentencing discretion, the misdirection 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 improperly or unreasonably". (S v Pillay 1977 (4) SA 531 (A) at 535E-G.)

The Firearms Control Act, 60 of 2000, provides for a fine or imprisonment not exceeding 10 years for the offences with which the appellant was convicted. Furthermore, appellant's counsel did not refer to any cases suggesting that the sentence imposed was in any way out of kilter with sentences imposed in similar matters. I can find no indication that the magistrate misdirected herself in regard to the sentence imposed on the appellant, nor do I consider then sentence imposed was in any way unreasonable or excessive having

regard to the appellant's previous convictions and the relevant aggravating circumstances.

There exists no basis, therefore, for interfering with the sentence imposed by the magistrate on appellant. It follows in my view that the appeal against sentence must therefore also fail.

I would therefore **dismiss the appeal** for the reasons given.

DAVIS, AJ

I agree. The appeal against conviction and sentence is dismissed.

BOZALEK, J