IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Coram: Henney, J *et* Nuku, J)

Case No: A365/18

In the matter between:

RODELIO JACOBS Appellant

And

THE STATE Respondent

JUDGMENT: 11 FEBRUARY 2019

Henney, J

Introduction:

[1] The Appellant was convicted in the Magistrates Court, Malmesbury on a charge of assault with intent to do grievous bodily harm as a result of the incident that happened between him and the complainant, Christiaan Amerika on 31 July 2015 at or near Mimosa Street, Riebeeck Kasteel, where it was alleged that he stabbed the complainant with a broken bottle in his face, causing him grievous bodily harm.

The Section 112(2) Plea Statement

[2] The appellant was legally represented and pleaded guilty to the charge. He

however, in his plea, set out in a statement in terms of the provisions of section 112(2) of the Criminal Procedure Act, 51 of 1977 ("the CPA"), admitted that he assaulted the complainant with the intent to do him grievous bodily harm. He says in his plea statement that on 31 July 2015 at the place as mentioned in the charge sheet, he assaulted the complainant, by hitting him with a beer bottle in the face as a result of which, the complainant sustained serious injuries.

[3] He further states that they were drinking on this particular day, he was in the company of the complainant and his girlfriend. He observed that the complainant was walking with his girlfriend and he wanted to know where they were going to. The complainant did not give him an answer and that resulted in an argument between the two of them. The complainant had a beer bottle in his hand and wanted to hit him with the beer bottle, whereupon he himself, picked up a beer bottle and then proceeded to hit the complainant with this bottle in his face.

[4] He further admitted that he foresaw that through his conduct, that the complainant would sustain serious injuries and that he reconciled him with such a result, but he nonetheless, proceeded with such conduct. Based on his plea and the words used by the Appellant, it clearly indicates that he did not have a direct intention to assault the complainant, but formed an intention in the form of *dolus eventualis*. As a result of this plea, of guilty, he was convicted. The prosecutor thereafter proved, that the accused had one previous conviction also for assault with the intent to do grievous bodily harm that was committed on 19 September 2009, for which he was convicted on 24 March 2010 and sentenced to a period of 12 months correctional supervision in terms of section 276 (1) (h) of the CPA and he was further sentenced to an additional 12 months, imprisonment which was suspended for a period of 5 years on condition that he is not convicted on a charge assault with the

intent to do grievous bodily harm and which is committed during the period of suspension.

Evidence before Sentence

[5] The Appellant was called by his legal representative to testify in mitigation of sentence. In his evidence, he stated that he is 26 years old, a father of one child, who is 4 years old. He works on a farm and earns R700 per week. He expressed his regret about the incident and said that he was under the influence of liquor. In cross-examination by the prosecutor, he stated that he was on top of the complainant and he could not say whether the complainant assaulted him.

[6] He further stated that the complainant did not in any way threaten him. And he admitted that he stabbed the complainant in his face with a broken bottle. Based on this set of facts, it would seem that the appellant formed a direct intention to stab the complainant in the face. During his address in mitigation of sentence, his legal representative requested the court to impose a suspended sentence. He further argued that the court should consider the fact that the Appellant consumed alcohol as a mitigating factor. And he further argued that the appellant and complainant were involved in a love triangle, which spurred him on to commit the offence.

[7] The prosecutor on the other hand, based on the evidence presented, argued that the appellant admitted that his life was not in danger. And that he admitted that the complainant was lying on the ground and that he was on top of him when he assaulted the complainant. After the magistrate has considered all the evidence and arguments, the appellant was sentenced to a period of 3 years imprisonment.

Leave to appeal against his sentence was refused by the magistrate, and with the leave of this court, the appellant now appeals the sentence imposed by the

magistrate.

Grounds for appeal

[8] The grounds against which the appellant appealed the sentence can be summarised as follows:- that the magistrate, did not properly consider the circumstances under which the offence were committed, that the appellant is a productive member of society; that he pleaded guilty by showing true remorse. The Respondent in opposing this appeal, submits the appellant has a previous conviction on the same offence committed on 19 September 2009, for which he was convicted on 24 March 2010 and five years later, the appellant was again convicted of the same offence. The offence constitutes an element of violence.

[9] According to the Respondent, the sentencing court properly considered and attached proper weight to the personal circumstances of the appellant. And that the personal circumstances are not the only factors which the court has to take into consideration. The Respondent submits that the further aggravating factors are; that the appellant intentionally stabbed the complainant with a broken bottle in the face.

[10] The Respondent further submitted that according to the medical report the complainant sustained serious injuries in his face which left him with a scar in his face, for life. The attack was unprovoked. That the aggravating factors far outweigh those factors and circumstances presented in mitigation on behalf of the appellant and that the sentence that was imposed was lenient, not disproportionate, nor does it induce a sense of shock.

Issues on appeal

[11] There seems to be two conflicting versions relating to the circumstances

under which the assault took place. The one version was given during the section 112 (2) plea of guilty, and another version was given during his evidence presented in mitigation of sentence. The version given during the session 112 (2) plea was to the effect that the complainant wanted to attack him with a beer bottle, whereupon he also picked up a beer bottle which he used to hit the complainant in the face for which he formed an intention in the form of *dolus eventualis*. That portrays the complainant as the aggressor and who provoked the Appellant. Whereas in evidence during mitigation of sentence, he said, that he is unable to say whether the complainant assaulted him.

[12] He further stated that the complainant did not threaten him. And he further admitted that he was on top of the complainant while he stabbed him in the face with a broken bottle. And based on those facts, it seems that the complainant was not the aggressor who attacked the Appellant first with a beer bottle. The attack on the complainant was not unprovoked and there could also not have been any direct intention to stab him in the face.

[13] The question for consideration in this appeal is whether the factual matrix presented by the appellant during the plea, which was accepted by the prosecution, or the factual matrix presented by the appellant in mitigation of sentence should have been taken into consideration the purposes of sentence.

Discussion

[14] In terms of the provisions of section 112 (3) of the CPA, nothing in this section shall prevent the prosecutor from presenting evidence or the court from hearing evidence, including evidence or a statement made by or on behalf of the accused with regard to sentence, or from questioning the accused on any aspect of the case

for the purpose of determining an appropriate sentence. It was in terms of the provisions of this subsection that the appellant testified under oath, with regard to sentence. The question now to consider was whether the version as put up by the appellant during his evidence should be accepted above the version as set out in his section 112 (2) plea.

[15] The version given by the appellant during the sentencing proceedings as to the circumstances under which he had committed the offences was relied upon by the prosecutor. And it seems that the magistrate also took into consideration and placed great emphasis on the version as proffered by the appellant during evidence with regard to sentence after he had been convicted which I said earlier, proves that the Appellant had formed a direct intention to stab the complainant in the face and that the attack on the complainant by the Appellant was unprovoked.

[16] It must however be remembered, that it was not a version which the prosecutor had placed before the court by evidence which he had presented to the court after conviction, but it was evidence which the appellant had voluntarily given during the sentencing proceedings. It was not evidence put up by the prosecutor to contradict the version given by the appellant during the plea, but evidence given by the appellant himself. In this particular case it was the appellant himself contradicted his version.

[17] The fact, however, remains that the prosecutor full well knowing that the facts upon which the plea of guilty was based was contradicted by the facts and evidence he or she had available. Unfortunately under those circumstances, the prosecutor by accepting the plea was bound by it. It is trite that where the prosecutor does not dispute the facts as proffered by an accused person in a plea of guilty, such prosecutor is bound by it.

[18] In S v Van Der Merwe and Others 2011 (2) SACR 509 (FB), it was held that … "*where an accused person pleaded guilty and handed in a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, detailing the facts on which his plea was premised, and the prosecution accepted the plea, the plea so explained and accepted constituted the essential factual matrix on the strength of which sentence should be considered and imposed. Such an essential factual matrix could not be extended or varied in a manner that adversely impacted on the measure of punishment as regards the offender".*

See also *S v Balepile* 1979 (1) SA 702 (NC)**.**

[19] This court in *S v N 2015 JDR 0112 (WCC)* per Binns-Ward J said the following regarding this aspect in a case where the magistrate as well as the prosecutor relied on the contents of a probation officer's report that was in contradiction with the factual matrix as set out in a section 112 (2) plea that was accepted by the magistrate upon which the conviction of the accused followed.

"[12] Regrettably, it is also necessary to address the magistrate's misdirections on the evidence with regard to sentence. It appears from the magistrate's response that he saw no reason to be astute to the effect of evidence adduced in respect of the sentence proceedings that was at odds, in respect of the circumstances of the commission of the offence, with that which had been accepted for the purpose of convicting the accused.

And at para [14] *"The facts accepted by the state and the court for the purpose of the conviction thus placed the deceased in the role of the aggressor in the fight in which he was killed. They had the deceased starting the fight by stabbing the second accused and being fatally stabbed himself in the ensuing melee.*

[22] *The magistrate was incorrect in concluding that the accused had agreed to the*

hearsay evidence in contradiction of the version of events given in their plea statements being admitted against them".

And at paragraph 23:

"The magistrate should have raised the issue of the conflict between the probation officer reports and the facts admitted by the accused if he was considering preferring either of the versions in the reports. The prosecutor was certainly not at liberty to lead evidence in aggravation in contradiction of the facts that had been accepted for plea purposes; see e.g. S v Moorcroft 1994 (1) SACR 317 (T) at 320g, S v Nel 2007 (2) SACR 481 (SCA) at para 20 and S v Mnisi 2009 (2) SACR 227 (SCA) at para 33 (p. 238f)."

[20] This subsection may only be used to supplement the version of an accused person and clear up uncertainties and ambiguities in the plea. It cannot be used to contradict the version of an accused person, even under circumstances where such an accused person to his own detriment and aggravation contradicts the version as set out in the plea. Under such circumstances, the prosecutor is obliged before the court pronounces a verdict, based upon the plea to request that the court enters a plea of not guilty in terms of the provisions of Section 113 of the CPA.

[21] The court must also on the other hand, after it had become aware of facts during the sentencing proceedings, which contradicts the version as set out in the plea, enter plea of not guilty in terms of the provisions of section 113. In this regard, it has been said that section 112 (3), cannot be used to avoid a court from applying the provisions of section 113.[1]

[22] The Magistrate therefore clearly in my view misdirected himself by relying on a factual matrix that was inconsistent and contradicted by the factual matrix as set out in the plea upon which he convicted the appellant and which the prosecutor accepted. Even though such factual matrix which contradicted the version in the plea

[1] See in this regard Commentary on the Criminal Procedure Act, Du Toit, Paizes, Skeen and Van Der Merwe at S60, 2018 ch17-p32.

was presented during mitigation of sentence, which ironically were used as aggravating circumstances for the purposes of sentence.

[23] The proper and appropriate cause of action would have been either for the prosecutor to have requested the court to enter plea of not guilty after the accused, had presented the plea or for the magistrate upon becoming aware of the different set of facts to have entered a plea of not guilty in terms of the provisions of section 113 of the CPA.

It is precisely for circumstances such as these, that the provision of Section 113 caters for an order to prevent a miscarriage of justice.

[24] The magistrate was therefore wrong to have regard to the facts that was presented during evidence in mitigation of sentence by the appellant and should have sentenced the appellant on the facts, which was set out in his section 112 (2) plea of guilty. This court therefore, is obliged to interfere with the sentence imposed by the magistrate, based on a set of facts, which was improperly placed before the court.

[25] The fact however remains that the appellant had been convicted of a very serious offence, which calls for a severe sentence. The complainant has suffered a severe injury which left the scar in his face. It seems also that the appellant has not learnt from his mistakes, because five years prior to committing this offence, he was convicted of a similar offence. The appellant in my view still deserves to be sentenced to a period of direct imprisonment. I would therefore uphold the appeal against sentence and substitute it with the following sentence:

> "*That the accused is sentenced to a period of 36 months imprisonment of which 18 months imprisonment is suspended for a period of 5 years on*

condition that he is not convicted of any crime of violence committed to a person, which is committed during the period of suspension."

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R.C.A. Henney

Judge of the High Court

I agree.

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L. G. Nuku

Judge of the High Court