OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: A266/20

In the matter between:

THABO MASEBENI **First Appellant**

THOBELA PUKWANA **Second Appellant**

And

THE STATE **Respondent**

Bench: Samela, J and Lekhuleni, AJ.
Heard: On the papers on 23 April 2021
Delivered: 05 May 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII. The date and time for hand-down is deemed to be 05 May 2021 at 10h00

JUDGMENT

LEKHULENI AJ

INTRODUCTION

[1] This matter came before us as an appeal against conviction only. The two appellants were arraigned in the Magistrates Court, Vredenburg on a charge of assault with intent to do grievous bodily harm. The appellants were legally

represented throughout the trial. They pleaded not guilty to the charge however despite their plea, they were convicted by the trial court on 27 July 2020 and subsequently sentenced on the 02 September 2020 to a fine of R2000 or 24 months' imprisonment.

[2] Aggrieved by this result and immediately upon sentence, the appellants through their legal representative applied for leave to appeal against their conviction in terms of section 309B(1)(a) of the Criminal Procedure Act 51 of 1977 (*"the CPA"*) and their application was duly granted by the magistrate. The appellants' grounds of appeal can succinctly be summarized as follows:

2.1 In the main the appellants contend that the Magistrate erred in finding that the State proved the case against them beyond any reasonable doubt;

2.2 The Magistrate erred in finding that the complainant was a credible witness;

2.3 The trial court erred in not applying the cautionary rule with regard to the evidence of a single witness;

2.4 The magistrate erred in accepting the testimony of the complainant, and a single witness notwithstanding that there were material differences in his testimony during his evidence in chief and during cross-examination;

2.5 The trial court erred in finding that the contradictions between the testimony of the complainant and that of his brother – Elliot Ncokazi (witness for the appellants) were not material and did not provide the necessary attention to such testimony;

2.6 The magistrate erred in finding that the version of both appellants cannot be reasonably possibly true and that the evidence of both appellants should be rejected as false without any reasonable doubt.

SUMMARY OF EVIDENCE LED AT THE TRIAL

[3] This appeal is based mainly on the facts and it is instructive to briefly give a summary of the relevant evidence adduced at the trial. The State presented evidence of two witnesses and also handed in a J88 medical report as well as the clinical records (file notes), the contents of which were undisputed. The two appellants testified and called a witness in support of their defence. The evidence of the complainant was to the effect that on 30 June 2018 and at around 07h00 and 08h00, he travelled with the second appellant from Strand to Saldanha to attend a braai. The braai took place at Thotho Sambuka's place in Laaiplek near Saldanha. The second appellant who is the complainant's cousin drove the parties in his vehicle to Saldanha. The parties arrived in Saldanha between 11h00 and 12h00 midday. The complainant's brother Elliot Ncokazi and the first appellant were also in attendance at Thotho's place. It was the complainant's evidence that they drank alcohol and had fun at the braai. He drank approximately seven beers and a lot of whiskey.

[4] At approximately 20h30 that evening, the complainant and the two appellants left Saldanha in the second appellant's vehicle with the intention of returning to their respective residences in Strand. The complainant testified that the first appellant with whom the complainant apparently worked with drove the vehicle. The reason the first appellant drove the vehicle was because the second appellant was too drunk to

drive. The second appellant was sitting on the left passenger seat. According to the complainant, he was sitting at the back seat.

[5] After travelling a distance of about one and half kilometres from Saldanha, the first appellant pulled over the vehicle to the side of the road. The two appellants proceeded to exit the vehicle and instructed the complainant to get out of the car. The complainant refused to get out of the car as he told them that he did not want to relieve himself. The second appellant told him to get out of the car so that they can take what they wanted from the complainant and they will leave him alone. The second appellant also told the complainant that they wanted to get rich. The complainant persistently refused to get out of the car and the second appellant pulled him out of the car by grabbing the complainant's legs. At that time, the first appellant helped the second appellant by assaulting the complainant to get out of the vehicle. The first appellant opened the window of the door behind the driver's seat and assaulted the complainant. While the second appellant pulled him, the complainant's shoes were removed. This happened at the time the second appellant was pulling the complainant out of the vehicle. The complainant testified that the first appellant assaulted him on his face as the two appellants were dragging him out of the vehicle. As a result of the assault, the complainant testified that his eyes were red and his face was swollen.

[6] After the complainant's shoes were removed during the strife, the two appellants pulled the complainant by his trouser until the trouser was out or removed from his body. The two appellants eventually managed to pull him out of the vehicle. While he was outside he sat on his buttocks in a lying position and the first appellant grabbed the complainant by his arms and caused him to lay down. The second appellant pulled the complainant's underwear and took out a knife. The knife was

about 10 centimetres long excluding the blade. The second appellant pulled the complainant's underwear and eventually managed to get hold of the complainant's penis. The second appellant got the penis out of complainant's underwear and cut it with the knife. The complainant testified that the penis was almost cut off and only a small piece was left. The cut was deep such that the doctor had to make use of eight medical stiches to treat the wound.

[7] Whilst on the ground, he kicked the second appellant and the latter fell and he managed to get up and ran towards the side of the road and jumped over the fence which was next to the road. The two appellants chased him but they could not jump over the fence. He went to a farm nearby during that night and slept outside the farm. Later in the early morning he was assisted by a certain white man in the farm who called the police.

[8] During cross examination, he confirmed that the second appellant fetched him that morning from Thotho's place and took him back to Strand where he lives. He later went to Somerset Hospital to receive medical treatment.

[9] The doctor who treated the complainant Dr Martha Bronkhorst *("Dr Bronkhorst")* testified that she examined the complainant and that he sustained a single laceration to the left side of his penis. The cut was through the skin and not cutting into the deep tissue. The rest of the genital area was not harmed. There was only a laceration at the base of the shaft of the penis. Her conclusion was that the injury was in keeping with injury with a sharp object.

[10] During cross-examination, her evidence was that she did not observe any other injuries other than the cut on the complainant's penis. She admitted that the injury on the complainant's penis could have been caused by any sharp object other than a knife.

[11] The appellants' version was that on 30 June 2018 the second appellant and the complainant went to visit Thoto in Laaiplek Saldanha. The second appellant asked permission from the complainant's wife to travel with the complainant to Saldanha. They left Strand at 08h00 in the morning and arrived at Saldanha around 11h00. Upon arrival at Thoto's place, they then went to fetch the first appellant at his place in Laaiplek. After fetching the first appellant, they went back to the Thoto's house and they had a braai and drank alcohol. They both testified that the complainant drank a lot of alcohol. The complainant drank whiskey and poured too much on his glass. He did not dilute the said alcohol and his brother Thembalethu warned him not to drink alcohol in such a manner.

[12] They left Thoto's house around 21h00 that night to return home. When they left Thoto's house, the complainant was so drunk in such a way that they helped him to get into the vehicle. The complainant was sitting on the front passenger seat and the second appellant drove the vehicle. Whilst they were driving and at the turn off between Hopefield and Cape Town, the second appellant pulled off the road as he was feeling drunk and asked the first appellant to drive the vehicle. From there, the second appellant went to sleep at the back seat of the vehicle and first appellant replaced him as a driver. After they had driven a distance from where the first appellant took over, the complainant woke up and told the second appellant that he dreamed that second appellant wanted to kill him. The second appellant thought that the complainant was making a joke and even asked the complainant why he would

want to kill him. The complainant then asked who was driving the vehicle. The complainant grabbed the first appellant who was driving the car with his throat and the vehicle veered off the road. They continued driving and the complainant again pulled the steering wheel and they decided to remove the complainant from the front seat to the back seat to avoid him disturbing the driver. They stopped the vehicle and told the complainant to get out of the car but the complainant refused. They decided to pull him out of the car. They grabbed the complainant and tried to put him in the back seat of the car and the complainant resisted and even kicked them. The second appellant grabbed the complainant by the pants and the complainant's pants got off and the complainant ran to the side of the road and jumped over a fence and disappeared into the dark. They called him to come back and he did not answer. They called Thoto and the latter did not respond and they then decided to go fetch the complainant's wife as she knew that the complainant was with them. They went to Strand and found complainant's wife who told them that the complainant called and told her that she was at the police station and that he did not have clothing with him. It was around 05h00 in the morning at that time. She gave them clean clothing and they went with another friend to collect the complainant from the police station. Indeed, they found the complainant and brought him back home in Strand.

[13] The appellants called a witness, Mr Elliot Ncokazi *("Elliot")* to corroborate their evidence. He is the brother of the complainant. He confirmed that he was also at the braai with the appellants and the complainant on the day in question. He confirmed that the complainant was heavily drank on that day so much so that he was shivering. He even reprimanded him that his manner of drinking was unacceptable. The complainant drank whiskey and he never diluted it with anything as other people would use water. He drank it clean as it was. He testified that he assisted them by

holding the complainant on both sides when he was taken into the vehicle. The complainant refused to take the back seat and he was assisted to seat in the front passenger seat.

SUBMISSIONS BY THE PARTIES IN THIS COURT

[14] In order to avoid the spike of Covid-19 infections and with the consent of the parties, this court invoked the provisions of section 19(a) of the Superior Courts Act 10 of 2013 to dispose of the appeal on the written submissions of the parties without the hearing of the oral argument.

[15] Mr Bosman for the appellant argued that the complainant in this matter was a single witness. In these circumstances, before convicting the appellants, the magistrate had to be satisfied that his evidence was clear and satisfactory in every material respect. Counsel contended that the complainant was untruthful regarding the seriousness and the extent of his injuries. It was also contended on behalf of the appellants that the complainant failed to provide any satisfactory explanation regarding his willingness to travel to Strand with the second appellant after such traumatic experience. It was asserted on behalf of the appellants that the magistrate simply ignored the aforementioned objective evidence and failed to properly consider the credibility of the complainant. In light thereof, it was argued that the trial court erred in coming to the conclusion that the state succeeded in proving the guilt of the accused beyond reasonable doubt.

[16] Mr Gontsana who appeared for the respondent conceded that the court a quo erred in accepting that the state discharged its onus of proving the charge against the appellants beyond reasonable doubt. He contended that the contradictions in the

State's case were so material that it was wrong for the trial court to ignore them. Counsel conceded that the trial court was wrong in convicting the accused.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[17] This appeal is based mainly on facts and as alluded to above in the main, the appellants' grounds of appeal can be summed as follows: first, they both argued that there were material contradictions in the evidence of the state and the court should have applied the cautionary rule more especially in that the complainant was a single witness. Second, the appellants contended that the State has failed to pass the well-established threshold of the standard of proof in criminal cases, that of proving the guilt of the accused beyond reasonable doubt.

[18] It is trite law that a court of appeal should be slow to interfere with the findings of fact of the trial court in the absence of material misdirection - See *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706). An appeal court's powers to interfere on appeal with the findings of fact of a trial court are limited - See *S v Francis* 1991 (1) SACR 198 (A) at 204E. In the absence of a demonstrable and material misdirection 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. When an appeal is lodged against the trial court's findings of fact, the appeal court should take into account the fact that the trial court was in a more favourable position than itself to form a judgment because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial – See *S v Monyane and Others* 2008 (1) SACR 543 (SCA).

[19] The basic principles of criminal law and the law of evidence that applies in this matter are trite. The first principle is that in criminal proceedings, the State bears the

onus to prove the accused's guilt beyond reasonable doubt – See *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110D-F; *S v Selebi* 2012 (1) SA 487 (SCA); *S v Jackson* 1998 (1) SACR 470 (SCA) and *S v Schackell* 2001 (4) SACR 279 (SCA). The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt – See *S v* 2000 (1) SACR 453 (SCA) at 455B. The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. Equally trite is that the appellant's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false – See *S v Sithole and Others* 1999 (1) SACR 585 at 590.

[20] It follows from the requirement that the State must prove an accused persons' guilt beyond reasonable doubt that the onus rests on it to prove every element of the crime alleged, including that the accused is the perpetrator of the crime, that he or she had the required intention, that the crime in question was committed and that the act in question was unlawful – See *S v Mdiniso* [2010] ZAECGHC 18 (30 March 2010) at paras 12 and 13. No onus rests on the accused to prove his or her innocence – See *S v Combrinck* 2012 (1) SACR 93 (SCA) at para 15.

[21] In this case, the complainant was a single witness. The upshot thereof is that before convicting the appellants, the trial court had to be satisfied that the complainant's evidence was clear and satisfactorily in every material respect. It is trite law that a court must be cautious when considering the reliability of evidence provided by a single witness – See *Stevens v S* 2005 (1) All SA 1 (SCA). On the other hand, in terms of section 208 of the CPA, an accused can be convicted of any offence on the single evidence of a competent witness. It is, however, a well-established judicial principle that the evidence of a single witness should be

approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility. In *S v Artman and Another* 1968 (3) SA 339(SCA), Holmes JA, as he then was, observed that the evidence of a single witness should be clear and satisfactory in all material aspects. The exercise of caution however must not be allowed to displace the exercise of common sense.

[22] From the summary of evidence discussed above, it is evident that two mutual destructive versions were submitted before the trial court in the form of testimony by the complainant and that of the appellants on which the Court a quo based its conviction. In *S v* Janse *van Rensburg* 2009 (2) SACR 216 (C) at para 8 the court stated as follows:

> "Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently, the other must be false. However, the dictates of logic do not displace the standard of proof required either in civil or criminal matters. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold - in this case proof beyond reasonable doubt – (See: *S v Saban en 'n Ander* 1992 (1) SACR 199 (A) at 203j to 204a-b; *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449g-j - 450a-b and *S v Trainor 2003 (1)* SACR 35 (SCA) at para 9)."

[23] It is trite that in assessing two conflicting versions all the evidence should be considered and none should be ignored – See *S v Langeberg* [2017] ZAFSHC 49 (16 March 2017) (Unreported). In S *v M* 2006 (1) SACR 135 (SCA) at para

189, Cameron JA, as he then was, succinctly stated that the proper approach to adopt is as follows:

> "The point is that the totality of evidence must be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the state that any reasonable doubt about the accused's guilt is excluded."

[24] In this case, I am of the view that the evidence of the State was riddled with a lot of material contradictions and inconsistencies on the alleged assault and how it happened. Furthermore, the complainant was not frank, honest and candid with the court. He told the court that when he boarded the vehicle, he was seated at the backseat of the car. Both appellants testified that the appellant was sitting in the front passenger seat. The complainant's brother Mr Ncokazi who came to testify for the defence told the court that indeed the complainant was sitting in the front passenger seat when they left Saldanha. He assisted the complainant to climb into the vehicle as the latter was drunk. As explained above, the defence witness Mr Ncokazi is the brother of the complainant. In my view, he had no reason whatsoever to fabricate evidence against the complainant. Furthermore, the complainant was untruthful regarding his level of intoxication. According to him, he was drunk but he does not remember seeing the appellant and his brother Mr Ncokazi taking him into the vehicle. He insisted that he was drunk but he walked to the car.

[25] The evidence of Mr Ncokazi whom I consider an independent witness in this case cannot be faulted. His evidence was forthright and he was frank and candid with the court. The record reveals that when he was asked by the court how the complainant climbed the vehicle, he testified that he physically assisted the

complainant from the house to the car which was parked a distance away from the house. He also testified that the complainant was so drunk and shivering. They held the complainant on both sides and the complainant wanted to occupy the front seat. He testified that as the complainant's brother, he told the appellants to allow the complainant to seat on the front passenger seat rather than at the back seat. In my view this version is consistent with the appellant's version at the trial court. In my opinion, Mr Ncokazi corroborated the evidence of the appellants in all material respect.

[26] More importantly, on 19 November 2019 when the cross-examination of the complainant commenced, the complainant was asked whether Thembalethu, a potential witness who was in court that day during the hearing of the matter and who was told to seat outside as the accused wanted to call him as a witness, attended the braai with them and the complainant denied and told the court that Thembalethu was not at the braai. He vehemently denied that this witness was in attendance even when this question was followed up in cross-examination. When cross examination resumed on the 05 December 2019 and the same question was put to him he confirmed that this witness was present at the braai and that it was for the first time for him to see this witness on the said day.

[27] The complainant was also untruthful regarding the seriousness and extent of his injuries. In his testimony, he informed the court that the cut on his penis was very serious and according to him, the penis was almost dismembered. The complainant testified in chief and in cross-examination that only a small piece was left. He also

alluded to the fact that he received eight stiches when he attended at Somerset Hospital. In fact, he testified that he was brutally assaulted in the face by the appellants. As a result of the assault, his face was swollen and his eyes were red. However, Dr Bronkhorst who examined him contradicted his evidence. She informed the court that the wound on the complainant's penis was superficial and the complainant did not sustain any facial injuries. According to the evidence of Dr Bronkhorst, the wound was not serious. She also told the court that if there were any other injuries that the complainant suffered, she would have recorded them in her medical report. She did not observe any other injuries sustained by the complainant.

[28] In addition, the complainant testified that he jumped over one fence from the place where the alleged assault occurred but later in cross-examination, the complainant contradicted himself and stated that he cannot remember how many fences he crossed before he was collected by Hopefield Police.

[29] I also find the version of the complainant strange, unusual and surprising. Notwithstanding the fact that the appellants wanted to cut off his penis for *muti* purposes as he wanted the court *a quo* to believe, the complainant was willing to travel with the first appellant the following day in the morning back to Strand. It should be borne in mind that his evidence was that he ran away from the appellants the previous evening as they wanted to cut off his penis. He spent a night in the cold. It is very strange that some few hours thereafter, he was willing to travel with the second appellant from Saldanha to Strand. He could not provide any satisfactory explanation of his willingness to travel to Strand with the first appellant after such an alleged traumatic experience. In my judgement, this anomaly and the contradictions

highlighted above were so material so much so that they affected the overall credibility of the complainant.

[30] It is the duty of the trier of fact in criminal matters to weigh up all the elements of the evidence which point to the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides. Thereafter, the court must decide whether the balance weighs so heavily in favour of the State so as to exclude any reasonable doubt about the accused's guilt – See *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.). Unfortunately, the trial court's approach in evaluating the evidence before it in this case was incorrect. The record does not show that the trial court considered the contradictions in the State's case when it evaluated the evidence.

[31] In my view, the trial court adopted a skewed approach in analysing the evidence in that it solely concentrated on the short comings of the defence evidence. The court did not extend the same kindness and generosity to the evidence of the appellants. This approach was in conflict with the well settled principle of our law that evidence must be looked at holistically – See *S v Van der Meyden* 1999 (1) SA 447 (w) at 448F-I. In my view, the presiding magistrate failed to heed this judicial injunction and therefore committed a material misdirection which demands interference by this court.

[32] The version that was presented by the appellants was in my view plausible and reasonably possibly true. They travelled with the complainant to Laaiplek, Saldanah where they had a braai and drank alcohol. In the evening when they returned home, the complainant who was seated in the front seat grabbed the first

appellant with his throat. They stopped and decided to take the complainant from the front passenger seat to the back seat so that he does not disturb the first appellant as he was driving. He refused to exit the car and they dragged him out of the vehicle. He came out and escape into the wild. He jumped the fence and in all probabilities got hurt. The doctor confirmed that the injury that the complainant suffered could have been caused by other objects other than a knife. Thus, a fence wire cannot be excluded.

[33] In the light of the evidence presented to the trial court, I am satisfied that on the conspectus of the evidence, this court is entitled to interfere with the factual findings made by the trial court. The magistrate erred in finding that the State proved beyond reasonable doubt that the appellants' assaulted the complainant as alleged or at all. I find that based on the facts accepted by the trial court, the version of the appellants is reasonably possibly true.

[34] Having made the aforesaid findings, it follows that the sentence meted by the court *a quo* on the appellants has to be set aside.

[35] In the result, I would propose the following order:

35.1 The appeal is upheld and the conviction and sentence are set aside.

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LEKHULENI AJ
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered:

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SAMELA J
JUDGE OF THE HIGH COURT