



HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

The High Court Case No: A2/20
Lower Court Case No: OSH11/18
DPP Ref No:10/2/5/1/3-42/20

SHANE VAN DER SCHYFF

APPELLANT

and

THE STATE

RESPONDENT

Coram: Goliath DJP and Rogers J

Heard: 14 August 2020

Delivered: 20 August 2020

JUDGMENT

Rogers J (Goliath DJP concurring):

[1] The appellant was convicted in the court *a quo* on two counts of assault with intent to cause grievous bodily harm and one count of malicious damage to property. The magistrate took the two counts of assault together for purposes of sentence, and sentenced the appellant to five years' imprisonment suspended for a period of five years on appropriate conditions and to 24 months' correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977. On the count of malicious damage to property the magistrate sentenced the appellant to four months' imprisonment suspended for five years on appropriate conditions.

[2] With the leave of the court *a quo* the appellant appeals against his conviction on the second of the two assaults and against sentence.

[3] In order to explain the decision to which I have come, it is necessary briefly to describe the way the trial unfolded. The trial got underway on 14 January 2019 when the evidence of the victim of the first alleged assault, Jestiny Booysen, was heard. The victim of the second alleged assault was his cousin Ruad Booysen. Both victims were allegedly stabbed by the appellant on the same occasion, and Jestiny in his evidence described the way that the appellant stabbed both of them. Jestiny's cross examination by the appellant's attorney foreshadowed a defence of private defence (self defence).

[4] After Jestiny's evidence was completed, the prosecutor was ready to call Ruad Booysen as the State's next witness. However, since it appeared that his evidence would not be completed on that day, it was decided instead to postpone the case to 12 April 2019. On 12 April, and following discussions between the prosecutor and the appellant's attorney, the appellant made

admissions in respect of the first assault and the charge of malicious damage to property. These admissions effectively amounted to an acknowledgment of guilt on those charges, the understanding being that the prosecutor would not seek a conviction in respect of the second assault – this notwithstanding the fact that Ruad was present and available to testify and that the prosecutor was in possession of the J88 relating to Ruad's injury.

[5] The admissions having been made, the prosecutor closed the State's case, the appellant closed his case without adducing evidence, and submissions on conviction were made. The prosecutor stated that in the absence of evidence presented by the victim of the second alleged assault, the State would not be asking for a conviction on that count. The appellant's attorney addressed the merits of the first and third counts and simply asked that his client be acquitted on the second count.

[6] The case was postponed for judgment, which was delivered on 17 April 2019. The magistrate convicted the appellant on all three counts. Enquiries by the respondent's counsel in the present appeal, made at the court's request, have confirmed that both the prosecutor and the defence attorney were surprised when the magistrate convicted the appellant on the second count.

[7] In an affidavit accompanying the appellant's application for leave to appeal, he stated that he had been told by his attorney that the State 'would stay their prosecution on count two if formal admissions were made in regard to counts one and three'. He had been advised that if he made the admissions in question, the State would close its case, that he would not have to testify, and that the State would seek convictions on counts one and three only.

[8] Although the above events featured in the appellant's application for leave to appeal, the written submissions filed on his behalf advanced the

argument that the State had not proved its case on the second count beyond reasonable doubt, having regard to the fact that Ruad Booysen did not testify, that the J88 medical form in respect of his injuries was not handed in, and that the defence of private defence might reasonably possibly have been true. The appellant's counsel accepted during oral argument that there is no rule of law requiring the victim of an assault to testify. Furthermore, in the absence of evidence from the appellant, there was nothing before the court *a quo* to leave private defence open as a reasonable possibility. Such a possibility was wholly at odds with the only evidence before the court, namely the testimony of Jestiny Booysen, a witness who made a favourable impression on the magistrate.

[9] Accordingly, and subject to questions of fairness, the judgment of the court *a quo* on conviction cannot be faulted. However, the circumstances I have summarised show in my view that the appellant's right to a fair trial was compromised. There appears to have been something in the nature of an informal plea agreement, and the prosecutor and the defence attorney thereafter conducted themselves in accordance with that agreement.

[10] I accept that the magistrate was not told of the existence of an agreement and was not in any event bound by the understanding reached between the prosecutor and the appellant's attorney (cf *S v Brown* [2015] 1 All SA 452 (SCA) para 100), though the prosecutor would have been entitled, subject to the requisite senior authorisation, to withdraw the prosecution on the second count (see s 6(b) of the Criminal Procedure Act). However, the magistrate was told by the prosecutor that the State was not asking for a conviction on the second count, and the prosecutor made no submissions on the merits of that count. Similarly, the appellant's attorney made no submissions on the merits of the second count, simply asking for an acquittal thereon. The magistrate knew that the case had been postponed in order to hear the evidence of Ruad Booysen.

The magistrate also knew that instead of the State leading such evidence, the appellant made admissions of guilt in respect of the first and third counts, and that both sides then closed their cases.

[11] In these circumstances, fundamental fairness required, at the very least, that the magistrate should have alerted the appellant's attorney to the fact that he was contemplating the possibility of a conviction on the second count, notwithstanding the prosecutor's stance and notwithstanding the absence of evidence from the victim of the second assault. Had this been done, the appellant's attorney might well have told the court about the circumstances which led to the making of the admissions and have contended that the appellant made those admissions and closed his case under a misapprehension. The appellant would have had the option of applying to reopen his case.

[12] I thus consider that the conviction on the second count should be set aside. Although a remittal to the court *a quo* would be possible (to enable the appellant, if so advised, to apply to reopen his case), I do not think that such a course would be a proportionate use of judicial resources, given that the presence or absence of a conviction on the second count would have only a modest effect on sentence.

[13] The magistrate took the two assault charges together for purposes of sentence. Of the two alleged assaults, the first was decidedly more serious, the appellant having stabbed Jestiny Booysen in the neck with a knife. Jestiny described this as a wild slashing by the appellant. The wound had to be stitched in the emergency rooms of the hospital. According to Jestiny, the wound was difficult to stitch because it was 'near the veins'. The alleged assault on Ruad Booysen was a cut to his ankle with the same knife, inflicted while he was standing and while the appellant was lying on the ground (Ruad had pulled the

appellant away from his cousin). The difference in degree is reflected in the fact that the charge in respect of Jestiny was one of attempted murder whereas the charge in respect of Ruad was from the outset one of assault with intent to cause grievous bodily harm. The court *a quo* was correct to find that the State failed to prove that the appellant intended to kill Jestiny, but the appellant is fortunate that the neck wound was not fatal, since then he would have faced a charge of culpable homicide.

[14] I do not regard the sentence imposed by the magistrate in respect of the two assaults to be disproportionate as a sanction for the first assault alone. Nevertheless, we must accept that the conviction on the second assault must have played some part in the court *a quo*'s assessment of an appropriate sentence. Since the whole of the period of imprisonment was suspended, I see no reason to interfere in that part of the sentence. The appellant has now served about 13 months of the 24 months' correctional supervision. Justice will be done by reducing this period to 18 months. There is no merit in the appeal against the sentence on the third count.

[15] I thus make the following order:

(a) The conviction on the second count is set aside.

(b) The sentence imposed by the court *a quo* in respect of counts one and two stands as the sentence in respect of count one, save that the period of correctional supervision imposed in terms of s 276(1)(h) is reduced from 24 months to 18 months.

Rogers J

Goliath DJP (concurring)

APPEARANCES

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