

**IN THE HIGH COURT OF SOUTH AFRICA
[NORTH GAUTENG HIGH COURT, PRETORIA]**

REPORT FILED ☒
OF INTEREST TO OTHER JUDGES
REVISÉ

Case Number: SH665/08

Appeal Number: A857/09

14/07/10
In the appeal between:

14/7/2010

THOKOZANI NDLANGAMANDLA

APPELLANT

and

THE STATE

RESPONDENT

JUDGEMENT

PIENAAR A

[1]Appellant was arraigned in the Regional Court at Benoni on 3 October 2008 on one count of attempted murder.

[2]On 13 January 2009 Appellant pleaded not guilty and elected not to provide an explanation setting out the basis of his plea in terms of the provisions of section 115 of the Criminal Procedure Act, 51 of 1977.

[3]On 26 March 2009 Appellant was convicted on one count of attempted murder by the Court a quo and sentenced in terms of section 276(1)(b) of the Criminal Procedure Act, 51 of 1977, to 10 years imprisonment of which 3 years imprisonment was suspended for 3 years on condition that the Appellant was not found guilty of attempted murder or assault with the intent to do grievous bodily harm committed during the period of suspension.

[4]Effectively Appellant is obliged to serve a term of 7 years imprisonment.

[5]In terms of section 103(1) of the Firearms Control Act, 60 of 2000, no determination was made by the Court a quo, resulting in Appellant being deemed unfit to possess a firearm.

[6]On 26 March 2009 Appellant was granted leave to appeal by the Court a quo against the conviction and sentence handed down.

[7]Heads of argument were served and filed by Mr Mosopa, on behalf of Appellant, and Mr Davhana, on behalf of Respondent, to whom the Court is indebted for their able presentation.

[8]Admirably and in accordance with the honoured tradition of advocacy, counsel for Appellant, for which he is commended, properly and correctly conceded that there was no merit in the appeal against the conviction, notwithstanding the extremely disturbing and outrageous manner in which the presiding magistrate had conducted herself in Court during the trial, to which I will presently return.

[9]I am satisfied that the concession made by counsel for Appellant is proper and well founded, and therefore the appeal against the conviction handed down is dismissed and the conviction on one count of attempted murder is confirmed.

[10]Before proceeding to deal with the appeal concerning the sentence handed down, I deem it appropriate to air my utter dismay with the demeanour of the presiding magistrate and the manner in which she had conducted herself and managed her Court during Appellant's trial.

[11]It is meet to refer to certain passages in the record in substantiation of the aforesaid, with my emphasis, which I quote verbatim.

[11.1]At page 4 of the record:

'Prosecutor: *Were you drinking? – Yes.*

*What kind of liquor did you take on
that day? – Beer and sorghum beers.
The quarts or what? – Litres.*

Court: *The issue is whether he was drunk,
whether he can remember.*

Prosecutor: *Okay.*

Were you drunk? – I drank but I was not drunk.

Could you remember anything that happened on that day? – Yes.

Tell the Court what happened. – I left my place early in the morning that day.

Court: *Ja Sir I do not, we are not interested.*

Court: *Get to the point you are in a tavern unless there something that happened before you got to the drinking place. – I want to explain what happened fully Your Worship.*

Q for crying out, *yes Sir but you know we have got other matters waiting so we only want to know what is relevant unless something happened between your house and the tavern that is relevant to this matter the Court does not want to know what you did in the morning.'*

[11.2]At page 5 of the record:

'Prosecutor: *For how long have you known him prior to the incident? – It has been so long I have known him but I am staying (intervene).*

Court: *Years, weeks.*

Prosecutor: *Years, weeks? – A few weeks I would say.*

How many weeks?

Court: *Oh for crying out loud.*

Interpreter: *Ja maybe he speak Shangaan Your Worship.*

Court: *Yes please then ask him sir. Mr Mbong-we this is ridiculous you know why this is not a brain surgeon question it is a simple question.*

[11.3]At page 6 of the record:

'Prosecutor: *In the two days that you knew him did you have any quarrels with the accused? – No we had no problems.*

Please Sir, can you speak Shangaan. –

That is he found me seated talking to another man at a drinking place.

Baba can you please speak Shangaan.

Court: Listen Sir, what language do you want to speak. Now make up your mind. Ja no, no, no this is not a court where you speak some kind of strange Fanagolo you speak Shangaan. Is that your mother tongue? – No.

Now what is your mother tongue? – I am talking Zulu mostly.

*Then why are you chop and changing?
– I am not fluent in Shangaan.'*

[11.4]At page 13 of the record:

'Court: Is Zakhele's mother Triphina? – Yes.

Do you know her as Triphina? – Yes Triphina.

*Then call her Triphina not Zakhele's mother. – Okay Your Worship. Alright.
– I want to search that is what he said.*

Do you know accused wife? – I started knowing the accused wife that day of the incident. I did not know her prior Your Worship.

Her prior?

Prosecutor: *Where did you see her?*

Court: *Sorry Ms Poswa her prior?*

Prosecutor: *Sorry Your Worship.*

Court: *Did you not know who prior? – Her prior Your Worship.*

Who is that who is "her" is that the accused wife or is that the accused because, who are you talking about? – I do not know her name but I only know her by sight.

Prosecutor: *Sir (intervene).*

Court: *The accused wife? – Yes I am not sure as to whether it is his girlfriend or a wife he paid lobola or so I am not so sure.*

I give up let us go ahead.'

[11.5]At page 15 to 16 of the record:

'Prosecutor: 'Yes left hand pocket. – A black knife.

Tolk: Dit is 'n mes wat draai Edelagbare as jy so maak dit draai en as hy, dit is plank, jungle knife. I have no idea Your Worship my (intervene).

Court: I get the impression that it is a blade that actually..... Just ask where Okay can I Okay can I ask you? Sir, can I ask you when, hey wenna (speaks in African language).

Tolk: Ekskuus Edelagbare'.

[11.6]At page 22 of the record:

'Mrs Naidoo: Did you sign your statement Sir? – Yes.

Was your statement read back to you to make sure that (intervene)?

Court: Please do not have a conversation with

this man you got to have cognisance
(inaudible) person's intellectual level.
So please just keep it simple?'

[11.7]At page 25 to 26 of the record:

'Court:

What did you not say? Sorry Mrs Naidoo. – At that stage when he was busy stabbing me I said I jumped shortly after the stabbing I jumped to my next door neighbour's place (intervene).

Mr Mbongwe can you imagine I know this is what this gentleman is using the word jump but can you imagine that a person who was stabbed to such an extent that he fell down would be able, physically able to jump over a fence? I know communication is one of the lazy hobbies in the society but just enquire from him what in God's name does he mean by jump, jump means you take off you fly through the air. A picture of health. – I was not jumping over the fence I was pushing fences as demonstrated Your Worship.

*That is right you walked into the fence
I fell over it that is the big, what you
demonstrate that is a big difference
between that and jump.*

*Mr Mbongwe you are a Court
interpreter you should clarify that.*

Interpreter: *I'm trying Your Worship we (inter-
vene).*

Court: *Okay, I know it is difficult but please.
We do not want to make medical
history. Sorry Mrs Naidoo, take it up
with him what does he mean? What
did you not say, what did he say, he
said I did not say that.'*

[11.8]At page 30 of the record:

Court: *Give us a name of one witness Sir if
you would kindly do so? – Zakhele's
mother is present .*

*But does Zakhele's mother have a
name? Is she not Triphina? Then for
God sake when you refer to somebody
call him by the name, him or her? –
Triphina.*

[11.9]At page 37 of the record:

'Court: *Who is Zakhele's mother? – I do not know her.*

Prosecutor: *Zakhele or Zakhele do you have a child by the name of Zakhele? – My daughter is Khele Your Worship.*

Court: *Oh then you are the mother. You see this why I have got a big hate for this grand talk about (intervene).*

Prosecutor: *So and so is Martha.*

Court: *Instead of calling a person by his name. Okay.'*

[11.10]At page 42 of the record:

'Mrs Naidoo: *Thank you Your Worship. Madam you said that you were drinking at the time when the argument started at Norman's place? – Yes.*

How much had you had to drink at that particular time?

Court: *Alone I am not talking about what,*

now I rest my case. Every time that question is asked, how much did you drink oh we had. I had a case of quarts then later we. I hear you and fifty others. Listen to the question. How much did you drink, put down your throat? – I think I had four quarts Your Worship, 750ml.

You alone? – Yes Your Worship.

Were you (inaudible)? Over what period? You alone drank four quarts of beer? – We were, what we were sharing Your Worship was a sorghum beer Your Worship. We were not sharing beers.

But were does the four quarts come in now Mrs Naidoo?

Mrs Naidoo: I do not know. Madam you had four quarts of what?

Court: Mr Nong, please just tell her that she threw down her throat not what she shared.

Interpreter: Yes Your Worship.'

[11.8]At page 43 of the record:

'Interpreter: *She said it is a bucket Your Worship.*

Court: *No, no she shows look at that about 8 centimetres. Do you agree Mrs Naidoo?*

Mrs Naidoo: *Your Worship it seems to be getting smaller.*

Court: *Oh for, you know Ms Poswa I wish to God you people will sort this out in consultation.*

Prosecutor: *Your Worship I did.*

Court: *So I do not get de annoyed. Madam, now make up your mind, how much did you drink? Show me the bucket? What you call a bucket which is not a bucket for crying out loud that will be a very flat bucket. Why would you call such a thing a bucket? Ms Lubbe have you got a ruler here? You indicating a, that, you say, show me on this ruler how high was this bucket okay? – Mr, Inspector (intervene).'*

[11.13]At page 44 of the record:

Court: 13 centimetres – 13 centimetres how many of those containers did you personally have? – It was four containers Your Worship.

Four, I am talking about a tall glass why would you call it a bucket? For crying in a bucket.

Mrs Naidoo: Okay.

Court: Sorghum beer is that homemade or did you buy it? – It is not a homemade Your Worship. Now that is something to the better. Okay because I know some of these beers they put anything in it, battery acid I do not know what the hell else but anyway.

Mrs Naidoo: Your Worship not (inaudible) straight me I just clarified one aspect.

Court: You can please do it.

Mrs Naidoo: Thank you Your Worship.

Court:

It is just you know Mrs Naidoo I for the life of me I cannot understand this. I will never be able to understand this if you ask a person how much did you drink oh we had a case of, I had a case of beers and then everyday oh no it later comes to light no it was myself and six others which does not make it a lot of beer you know. But on your own personally I think it is physically impossible to drink a case of beers all by yourself but this is what we hear, a simple question. I cannot understand why the answers are always so confusing if there is something wrong with people's understanding, how much did you drink. Carry on. Please clarify it thank you?'

[12] The aforesaid is clearly demonstrative of a presiding officer that is meddlesome, not only with the prosecution, but also the defence and the interpreter, who are important Court officials entitled to the dignity and respect their respective offices carry, and lastly but not the least, the witnesses and the accused. Clearly the presiding magistrate conducted the case in a manner placing her ability to properly adjudicate the case at jeopardy as the person holding the scale between Appellant and the State in order to determine objectively and dispassionately the way the balance tilts.

See **R v Roopsingh 1956(4) SA 509(AD); S v Phiri 2008(2) SACR 21(T)**.

[13]None of the Court officials, be it the interpreter, the prosecutor or the defence, is given or allowed the opportunity to present the evidence in the manner they deem meet and expedient, with the result that the presiding magistrate is forever caught up in the cauldron taking place in the arena.

[14]To exacerbate this situation the presiding magistrate's conduct and demeanour is at times irritable, derogatory, outrageous and blasphemous, which is manifestly unprofessional, unethical and not becoming of the station occupied by the presiding magistrate. Nor does it portray dignity, control and objectivity, being the foundation on which respect for the judicial system is founded. The presiding magistrate's demeanour is discourteous to all of the relevant officials and parties, whereby is included the witnesses and the Appellant, whilst the hurling of insults with impunity *in facie curiae* is most unbecoming conduct which cannot be condoned and which ultimately fails to substantiate and portray the principle that justice should not only be done, but should also be seen to be done. See **S v Schietekat 1998(2) SACR 707(C); S v Phiri, supra**.

[15]It is apposite to repeat what was said by the learned judge in S v Schietekat, supra at 716e in regard to the conduct of a judicial officer:

'A judicial officer wields enormous power. Gowned, sitting on high and surrounded by the trappings of his office he cuts an

imposing and terrifying figure. Consequently he must constantly ensure that every courtesy is extended to those who appear before him. To stand accused of a crime is a frightening ordeal. No person should be allowed to feel intimidated in the orderly presentation of his case'

[16] Suffice it to state that the presiding magistrate has not done her office proud. I am of the opinion and deem it expedient that this matter be referred to the Magistrate's Commission for investigation and implementation of the necessary remedial steps to address an actual and extremely serious situation which calls to be redressed expeditiously. It is to be mentioned that should this magistrate continue to manifest the same demeanour in future it is foreseen that it could ultimately be found that an accused had not enjoyed a fair trial and that justice had not been done. This is a situation that cannot be allowed to continue and thereby bring the administration of justice into disrepute. It is clear, to say the least, that although the presiding magistrate had been admonished by this Court in the past, the magistrate continues to ignore such admonishments in a manner contemptuous of this Court. Such contemptuous conduct cannot be sanctioned by this Court.

[17] The whole spectre of a Court room, from the presiding officer, prosecutor, defence, interpreter and witnesses, whereby is included the accused, is entitled to be dealt with in a dignified and respectful manner, otherwise Justitia, who is a zealous lover, fails to be honoured. The aforesaid conduct of the presiding magistrate undoubtedly constitutes a grave irregularity impacting negatively on the proper administration of justice. In this regard I am of the

opinion that this is a border line case which could have resulted in the conviction being set aside due to the trial not having being conducted in accordance with justice. See **S v Gwebu 1988(4) SA 155(W); S v T 1990(1) SACR 57(T); S v Gqulagha 1990(1) SACR 101 (AD); S v Kuse 1990(1) SACR 191(E); S v Schietekat, *supra*; S v Madigaze 1999(2) SACR 420(W); S v Phiri, *supra*.**

[18] I trust that the aforesaid criticism will be heeded and that the conduct complained of will be remedied at the earliest convenience with the necessary disciplinary measures being imposed, if found to be justified.

[19]Turning to the appeal on the sentence handed down, it was submitted by Mr Mosopa, that the sentence was harsh and inappropriate, and considering Appellant's personal circumstances, a lesser sentence should have been imposed.

[20]In this regard it was submitted that the presiding magistrate had misdirected herself by failing to properly evaluate Appellant's personal circumstances when weighed against the particular circumstances that had prevailed prior to the assault on the complainant.

[21]Mr Davhana, on behalf of the State, contended that no misdirection had been committed by the presiding magistrate and that the sentence handed down, although harsh, was appropriate and proportional to the nature and seriousness of the crime committed.

[22]It is trite law that the Court handing down a sentence is called upon to consider the personal circumstances of the accused, the

nature of the crime committed and the interest of society in order to determine an appropriate sentence. See **S v Zinn 1969(2) SA 537(AD)**.

[23]I have no doubt that the presiding magistrate misdirected herself and over emphasised the seriousness of the crime committed by Appellant thereby neglecting to properly consider Appellant's personal circumstances and the interests of an informed society. This resulted in the Court a quo concluding that the crime Appellant was convicted of was serious which society expected to be dealt with sternly. Therefore the Court a quo found that a lengthy term of imprisonment was called for to be a deterrent not only to Appellant, but to others too.

[24]Besides the medico-legal report on form J88, which was handed in as exhibit "A", tabulating the complainant's injuries, no medical evidence was presented to the Court a quo regarding the severity of the wounds sustained and whether any of them had been life threatening, besides the fact that the number of wounds noted by the medical practitioner contradicted the evidence of the complainant.

[25]No evidence was placed before the Court a quo to found and substantiate the conclusion that it was only by the grace of God that complainant had survived and that the Appellant was a cruel, brutal and callous person. This was manifestly a further misdirection committed by the Court a quo.

[26]There is no doubt that the presiding magistrate's conclusion that Appellant had been arraigned incorrectly, and that Appellant should

have been charged with housebreaking with the intent to commit murder and attempted murder, undoubtedly weighed heavy on the presiding magistrate's mind and influenced her to consider and hand down an unduly harsh and inappropriate term of imprisonment. There is no indication that the presiding magistrate had distanced herself from this conclusion when she determined what an appropriate sentence would be.

[27] Suffice it to point out that the magistrate's attempt to justify the sentence handed down by differentiating between an attempted murder whilst under the influence of liquor or committed at a shebeen, fails to carry the day. According to Appellant and the complainant, Appellant had been drunk when the incident took place whereby a measure of jealousy regarding Appellant's wife had been involved, which was disregarded by the presiding magistrate.

[28] Without detracting from the gravity of the crime committed by Appellant, I am satisfied that when measured on the barometer of seriousness, the crime committed does not fall in the utmost callous and brutal category, *per se* indicative thereof that Appellant was inherently wicked. No evidence was presented that in Appellant's case the prognosis for rehabilitation was out of the question or negligible.

[29] Although the current and unprecedented wave of violence, murder, homicide, robbery and rape imposes a responsibility on the Courts to act fearlessly and in unambiguous terms to announce to the world its repugnance of such conduct, the sentence ultimately handed down should nonetheless be blended with a measure of mercy. Such

is the hallmark of an informed and civilized society. See **S v Kumalo 1973(3) SA 697(AD); S v Sparks 1972(3) SA 396(AD)**.

[30]The repugnance and abhorrence with which a committed crime is viewed is not necessarily dependant on the term of imprisonment imposed. See **S v Whitehead 1970(4) SA 428(AD); S v Holder 1979(2) SA 70(AD)**. A necessary corollary of the aforesaid is the fact that it is imperative to mete out punishment not in a standardized format but with due consideration of the particular facts peculiar to the case. See **S v Skenjane 1985(3) SA 51(AD)**.

[31]On a proper appreciation and evaluation of the circumstances in this case, I am of the view that the age of Appellant, the fact that Appellant was a first offender, married and gainfully employed supporting his family, the fact that he was incarcerated for almost 6 months awaiting trial, that no serious injuries were inflicted on the complainant taken together with the fact that liquor had been imbibed and that a measure of jealousy was involved, taken cumulatively with the fact that it is accepted that there are reasonable prospects of rehabilitation, the imposition of a term of imprisonment is nonetheless justified. Such a sentence is to be blended with the required measure of mercy which will satisfy the interests of an informed society, reflecting the seriousness of the crime committed and effectively acknowledge the personal circumstances of the Appellant.

[32]Having regard to the aforesaid circumstances, I am satisfied that the Court a quo had failed to consider and evaluate the factors enumerated and to consider the said factors in the proper perspective

to the detriment of Appellant. Therefore the Court a quo had misdirected itself with the result that this Court is at liberty to set aside the sentence handed down and to impose an appropriate sentence. Under the circumstances I am of the view that the term of imprisonment imposed by the Court a quo, being the prescribed maximum, renders the sentence inappropriate and unjust inducing a sense of shock. Therefore this Court is at liberty to consider an appropriate sentence afresh.

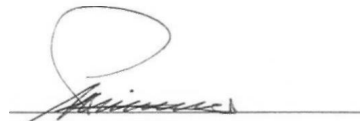
[33]Consequently the sentence imposed and handed down by the Court a quo is set aside on appeal and in terms of section 276(1)(b) of the Criminal Procedure Act, 51 of 1977, the Appellant is sentenced to 8 years imprisonment of which 3 years imprisonment is suspended for 3 years on condition that Appellant is not convicted of attempted murder or assault to do grievous bodily harm committed during the period of suspension.

[34]In the result the following order is made:

1. The appeal against the conviction on one count of attempted murder is dismissed and the conviction is confirmed.
2. The appeal against the sentence imposed is upheld and altered to read as set out hereinafter.
3. In terms of section 276(1)(b) of the Criminal Procedure Act, 51 of 1977, Appellant is sentenced to 8 years imprisonment of which 3 years imprisonment is suspended for 3 years on

condition that Appellant is not convicted of attempted murder or assault with the intent to do grievous bodily harm committed during the period of suspension.

4. In terms of section 282 of the Criminal Procedure Act, 51 of 1997, the sentence is antedated to 26 March 2009.
5. In terms of section 103 of the Firearms Control Act, 60 of 2000, Appellant is declared unfit to possess a firearm.
6. The Registrar is directed to forward a copy of this judgement to the Magistrate's Commission for the necessary investigations to be instituted into the conduct of the presiding magistrate and to initiate the appropriate disciplinary measures.



W. F. PIENAAR
ACTING JUDGE OF THE HIGH
COURT

I agree. It is so ordered.



M F LEGODI
JUDGE OF THE HIGH COURT

CASE: A857/09

**FOR THE APPELLANT: ADV M J MOSOPA
INSTRUCTED BY: LEGAL AID**

**FOR THE RESPONDENT: ADV V L N DAVHANA
INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS**