



IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

SENTENCE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO ☒ YES ☐ NO

(2) OF INTEREST TO OTHER JUDGES YES/NO ☒ YES ☐ NO

(3) REVISED ☐

DATE 2011.02.11 SIGNATURE [Signature]

CASE NUMBER: A1117/09
DATE: 11 February 2011

WILLIAM JOHANNES CANNON
APPELLANT

V

THE STATE
RESPONDENT

Judgment:
Mabuse J

JUDGMENT

MABUSE J:

1. This is an appeal against both conviction and sentence. On 28 September 2009 a Magistrate Court sitting at Springs, convicted the appellant of assault with intent to do grievous bodily harm and sentenced him to R3000.00 or three months imprisonment half of which was suspended for a period of 3 years on condition that the appellant was not again convicted of common assault or assault

with intent to do grievous bodily harm committed during the period of suspension.

2. The allegations against the appellant in the court *a quo* were that on 4 March 2009, and at or near Geduld in the district of Springs, the appellant had unlawfully and intentionally assaulted one Bennie Mulder hereinafter referred to as “the complainant” by hitting him with fists with intent to do grievous bodily harm. The appellant was represented in the court *a quo* by one Mr. Van Aswegen. He pleaded not guilty to the charge against him and made a plea explanation in terms of the provisions of section 115 of the Criminal Procedure Act 51 of 1977 (CPA). According to his plea explanation which was given by his legal representative, the complainant hit the accused on the chest and the appellant warned him against it. He hit the appellant in the chest for the second time and over and above that, slapped the appellant in the face. At this point the appellant slapped the complainant in self defence.
3. Having listened to the evidence from both sides, the court *a quo* was satisfied that the State had proved its case beyond reasonable doubt. It accepted the State evidence and rejected the appellant’s version. It convicted the appellant accordingly and sentenced him as I have indicated above. The appellant now appeals to this court, leave to appeal having been granted by the court *a quo*

against both conviction and sentence on grounds fully set out in his application for leave to appeal.

4. In the court a quo the State led the evidence of the complainant and his witness Trudie Mulder (“Trudie”), while the appellant himself testified and called a witness to testify in his defence. The complainant testified that on 4 March 2009, around 14h15 at or near Bargain Auto, Geduld, and while walking home in the company of his sister Trudie, the appellant called him from behind. The appellant approached him and asked him if he was Bennie. The complainant confirmed that indeed he was Bennie upon which the appellant, and without much ado, attacked him.
5. The appellant hit him with fists six times in the face and as a result of which he fell. According to him the appellant attacked him over one Ronel, his girlfriend. He knew the reason for his assault because the appellant had on an earlier occasion sent him an “sms” in which he warned him that he would send him to a hospital if he did not stay away from Ronel. By sending him to the hospital, according to the complainant, meant that the appellant would assault him.
6. At the time of the incident Ronel was not present but he had seen her earlier when she just walked passed him.

7. The complainant denied that he had first attacked the appellant.

He testified furthermore that while the appellant was beating him with fists he never fought back. As a consequence of the appellant's assault on him, his face was swollen, his eyes were blue and his mouth sustained some abrasions inside. After the assault, he went to report at the local police station where he was sent to the doctor with a medical form to be completed by the doctor. This was handed in as an exhibit. Trudie also testified and corroborated the complainant's testimony. The appellant also testified and called a witness who supported his version. His version is that on the date in question, he was walking inside a venue in the company of his girlfriend whom he had gone to fetch from school. When he was at the corner of Wedding World, he saw the complainant on the other side of the street. The complainant was with his sister. The complainant called him. It is not clear from the evidence whether or not he went to the complainant. Nonetheless where they met, the complainant bumped him. He warned the complainant that if he continued bumping him he would be in trouble.

8. The complainant then bumped him again and this time also hit him with an open hand in the face. He then fought back and hit the complainant once in the face with a flat hand as a result of which he fell. His girlfriend thereafter pulled him back and asked him that they should leave. They left the scene immediately. He

denied that he had hit the complainant in the manner he and his sister had testified.

9. Mr van Aswegen, the appellant's legal representative, filed extensive grounds of appeal. As such grounds are on record, I do not deem it necessary to repeat them in this judgment. It is important however, to point out that in the third ground of appeal, the appellant contends that the Magistrate in the court a quo erred in finding that the State had proved its case beyond reasonable doubt; that the court failed to analyse or assess the evidence of the State witnesses properly and to take the inherent improbabilities in the State versions into account; that the court erred in rejecting the appellant's version as not to be reasonably possibly true.
10. The approach that this appeal court should adopt in a matter of this nature has been properly set out by Greenberg JA, as he then was, in *R v Dhumayo and Another* 1948 (2) SA 678 A.D. The approach is captured aptly by the learned author, A Kruger in Hiemstra's Criminal Procedure. He states, on pages 30.45 as follows:

"A court of appeal must bear in mind that a trial court saw the witnesses in person and could assess their demeanour. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. The court of appeal will only reject a trial court's assessment of evidence if

it is convinced that the assessment is wrong. If the court is in doubt, the trial court's judgment must remain in place (S v Robinson 1968 (1) SA 666(A) at 675H). The court of appeal does not zealously look for points upon which to contradict the trial court's conclusions, and the fact that something has not been mentioned does not in itself mean that it has been overlooked."

11. It is not the duty of this court to substitute the judgment of the court a quo with its own judgment. An appeal court must decide the appeal on the facts before it as contained within the four corners of the record of appeal. It is the duty of this court to establish from the record of appeal firstly, if the court a quo has misdirected itself on the facts of the matter and secondly, to satisfy itself that the court a quo assessment of the evidence was not wrong. Based on authority of Pillay v Krishner and Another 1946 SA 946 AD at page 941 there is a duty on the appellant to satisfy this court that the court a quo misdirected itself as far as the facts of the case are concerned and furthermore that the court a quo's assessment of the evidence at the trial was wrong.
12. It is common cause between the State and the Defence that the issue in dispute at the trial of the matter was whether or not the appellant acted in self defence at the time he hit the complainant. As a consequence of the appellant's plea, it was common cause between the State and the Defence furthermore in the court a quo

that the appellant had hit the complainant. What the court a quo had to do was to establish whether the complainant was assaulted in the manner in which he testified or in the manner in which the appellant and his witness testified.

13. Mr Moeng, who appeared for the appellant, submitted that the appellant's version is reasonably possibly true and that the respondent did not prove it to be false beyond any reasonable doubt. With regard to the burden of proof, he submitted furthermore that the respondent, which bore the onus to prove its case beyond reasonable doubt, had failed to do so. He further submitted on behalf of the appellant that there was doubt in the Respondent's case and that in the premises, the Appellant should have benefitted from such doubt and that the appellant should have been found not guilty and acquitted. On the other hand, Mrs Molepo, counsel for the respondent, submitted that the appellant had been correctly convicted by the court a quo and that the appellant's appeal against his conviction should be dismissed.
14. It is clear that there are very serious problems with both the respondent's and the appellant's versions. The magistrate remarked that there was nothing wrong with the evidence of the respondent's witness or the manner in which they testified. He found both witnesses impressive and on that basis accepted their evidence.

15. The magistrate found that the evidence of the respondent's witnesses was inconsistent but found that these inconsistencies were not material. According to the complainant, the appellant hit him six times with fists in the face and it is this assault that resulted in the injuries that he sustained on that particular day. At the same time, the complainant's witness, Trudie, testified that the appellant threw four to five punches which hit the complainant. It is clear that, with regard to the number of punches which the appellant allegedly threw at, and hit the complainant with, the respondent's evidence is inconsistent. It is this inconsistency that the court a quo referred to as being immaterial and here I must agree with the magistrate's analysis of the evidence. In this regard see *S v Mkohle 1990(1) SACR 95(A) at 98 F-G* where the court stated that:

"Contradictions per se do not lead to the rejection a witness' evidence. As Nicolas J, as he then was, observed in S v Oosthuizen 1982 (3) SA 571 (TPD) at 576 B-C, they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number of importance, and their bearing on other parts of the witness' evidence indicative of an error."

16. Although there are inconsistencies in the respondent's witnesses' evidence, the inconsistencies, the court *a quo* correctly found, were not of a material nature.
17. Mr Moeng argued that the court *a quo* should have found that there was doubt in the evidence of the respondent's witnesses. The origin of this doubt, so he argued, is that it is not clear whether the injuries that the complainant sustained resulted from the assault on him with an open hand by the appellant or as a result of him falling on the ground. This leads me to consider the evidence of **appellant** in the court *a quo*.
18. According to the appellant, he only hit the complainant once with a flat hand. The injuries that the complainant sustained and which have been accurately captured in the J88 were according to the appellant the result of the aforementioned assault with an open hand. The complainant's version that the appellant hit him with fists has been corroborated by his witness, even though the witness does not know the number of fists that the complainant was hit with. This is not a material difference. According to the complainant, the injuries that he sustained during the incident were caused by the appellant when he hit him with fists. Although he fell, his evidence does not reveal that he sustained injuries as a consequence thereof. The testimony of the complainant that the appellant hit him with fists on the face is further corroborated by

the J88. It is highly unlikely that by their nature and location, the complainant's injuries could have been caused by an assault with a single open hand.

19. The court a quo seems to have concluded that the appellant, acting in self defence, hit the complainant six times with fists and under those circumstances exceeded the bounds of self defence. This reason is, in my view, flawed and is not based on the facts of the matter. It is also not based on the evidence of the state witnesses who denied that the complainant attacked the appellant. In the circumstances the court a quo could not have been justified in coming to a finding that the appellant had acted in self defence.
20. The court a quo could only have come to a finding that the injuries inflicted on the complainant were serious and that their seriousness could only be in accord with the evidence of the respondent's witnesses namely that the appellant had hit the complainant with fists. If the court accepts that the appellant hit the complainant with fists, then it must find that it happened under the circumstances testified by the complainant and his witness and that the appellant did not therefore act in self defence at the time he assaulted the complainant.
21. Accordingly the necessary facts for drawing an inference that the appellant acted in self defence are lacking.

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish ... But if there are no positive proved facts from which an inference can be made, the method of inference fails and what is left is mere speculation or conjecture.” See *Ciswell v Powell Duffey and Associated Collieries Ltd.* 1940A AC 152 196, 1939(3) A ER 722 733. See also *AA Onderlinge Assuransie Beperk v De Beer* 1982(2) SA 6 23.

22. Based on the State’s case and the nature and seriousness of the injuries that the complainant sustained, the court a quo was correct in finding that the appellant was guilty of assault with the intent to do grievous bodily harm. The appellant, in my view, was correctly convicted and his appeal against conviction should fail.
23. The appellant has also noted an appeal against the severity of the sentence on the basis that it is harsh and inappropriate in the circumstances of this case. Mr. Moeng argued that in imposing sentence, the court a quo should have given due weight to the fact that, at the time of the sentence, the appellant was merely 20 years old, a relatively young man and furthermore that he had a clean record. He furthermore argued that the court should have striven to keep the appellant out of jail.

24. Counsel for the respondent, on the other hand, submitted that the court a quo had taken into account the appellant's personal circumstances, the interests of society and the seriousness of the offence in sentencing the appellant. She submitted that the court a quo had exercised its discretion properly in the imposition of sentence; that the sentence imposed was appropriate in the circumstances of this case and that the appeal against sentence should be dismissed.

25. R v Maphumulo and Others 1920 AD 26 at 57 stated as follows:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for having a light sentence than an appeal tribunal and we should be slow to interfere with its discretion."

26. In order to succeed with his appeal against sentence, and I must pause here and state that these are the grounds the appeal tribunal shall look into on appeal, the appellant must satisfy the appeal court that "the magistrate in the court a quo has misdirected himself as to the facts or the law or that he has exercised his discretion capriciously upon a wrong principle or so

unreasonably as to induce a sense of shock.” See *R v S* 1958(3) SA 102 at p.104 a-b.

27. This court is now enjoined to go fully into the evidence and pronounce against the court a quo’s perceived misdirection. Although the court a quo referred to the purposes of sentence, the personal circumstances of the Appellant, the seriousness of offence and the interest of the community, it is quite clear that it merely paid lip service to these factors. The court has failed to evaluate the sentence it imposed on the appellant.

28. The court a quo imposed the sentence it did on the appellant because:

“Assaulting people tent (sic) to be a norm nowadays.”

The court a quo made no reference to the fact that, among others, the appellant was a scholar at the time of the imposition of sentence and furthermore that he had a clean record. The court over emphasized the prevalence of the offence at the expense of the personal circumstances of the appellant and by doing so committed a misdirection which entitles this court to interfere with the sentence imposed on the appellant. Accordingly I agree with Mr. Moeng that the sentence imposed by the court a quo on the appellant should be interfered with.

29. I accordingly propose the following order:

1. The appeal against conviction is hereby dismissed.
2. The conviction of the appellant by the court a quo is hereby confirmed.
3. The appeal against sentence is hereby upheld.
4. The sentence imposed on the appellant by the court a quo is hereby set aside and replaced with the following:

“The accused is sentenced to R3000.00 (three thousand rand) or three (3) months imprisonment which is wholly suspended for five (5) years on condition that the accused is not again convicted of common assault or assault with the intent to cause grievous bodily harm committed during the period of suspension.”



P.M. MABUSE
JUDGE OF THE HIGH COURT

I agree, and it is so ordered



M.W. MSIMEKI
JUDGE OF THE HIGH COURT

Appearances:

<i>Appellant's Counsel:</i>	<i>S. Moeng</i>
<i>Respondent's Counsel:</i>	<i>NC Molepo</i>
<i>Date Heard:</i>	<i>2 August 2010</i>