

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

Case Number: A158/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

DATE: 13 July 2023

In the Appeal of:

NEO MATSEMELA

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

LESO AJ:

INTRODUCTION

[1] The appellant brought an appeal against his conviction for attempted murder in the Pretoria Regional Court. The appellant was subsequently sentenced to eight years imprisonment of which two years was wholly suspended and was ex lege in terms of Section 103 of Act 60 of 2000 deemed unfit to possess a firearm. On 8 September 2021 the magistrate in the court *a quo* dismissed the application for leave to appeal and the application in terms

of section 309B(5)(a) of the Criminal Procedure Act 51 of 1977. On 24 June 2022 this court granted the appellant leave to appeal his conviction. The appellant is now on bail pending the finalisation of this appeal.

GROUND OF APPEAL

[2] The summary of the appellant's grounds of appeal that the trial court erred are as follows:

2.1 Rejecting the version of the appellant as false and not reasonably possibly true;

2.2 Finding that the complainant and his wife corroborated each other in respect of the shooting and the identification of the appellant regarding count 1 was proper and sufficiently reliable, considering the mobility of the scene;

2.3 Accepting that the date incident was actually 15 January 2018, that the incident occurred at 17h00 and that the complainant was treated at 19h00 at Kalafong Hospital on 15 January 2018;

2.4 Finding that it was in fact the appellant that perpetrated the offence in respect of count 1 whilst there was no forensic evidence to corroborate same, and

2.5 Granting the appellant an application to adduce further evidence and then pronouncing that the application was never granted.

BACKGROUND

[3] The appellant together with his co-accused No. 2 and co-accused No. 3 were charged in the Regional Court, Pretoria on one count, namely,

attempted murder. The appellant and others pleaded not guilty to all counts but only the appellant was convicted.

[4] The charge against the appellant follows from the allegations about an incident that happened on **16 January 2018** in Atteridgeville in the District of Pretoria (my emphasis). I will deal with the above date of the incident in my discussion. The state alleged that the complainant was attacked by accused No. 2 and the appellant's mother, accused No. 3, and shot at by the appellant whilst driving his motor vehicle in the street where the accused lived.

[5] The state called two witnesses, the complainant, Messiah Ramano and his wife, Trinity Njoni. The appellant called two witnesses, John Rangata and Keitumetse Semelane and he also testified in his own defence.

THE EVIDENCE

The State's case

[6] The complainant, Messiah Ramano's testimony was that on 15 January 2018 he was involved in a road rage incident with the appellant's mother. His evidence was that he and his wife followed the appellant's mother to her house because he felt humiliated after the appellant's mother insulted him. He testified that on their arrival, accused No. 2 accused him of swearing at his wife and he was acting like a person who was taking out a firearm. He testified that he and his wife left because it was raining and he went to report the incident to the police. He testified further that he was advised to ask the community elders to assist him to resolve the matter. He testified further that he knew the appellant from his childhood.

[7] The complaint further testified that he went to the home of accused No. 3 for the second time with the community elders who were his family members whereupon accused No.3 came out and assaulted him and his wife

by hitting his wife with a brick. He said that after the assault he went back to the police station where he was turned back because he was not hurt. His testimony was that at 16h30 and in the company of other people, he went to the accused's home for the third time to resolve the matter as accused No. 2 had fired shots in the air when he was turning into the street. He testified that at a distance of approximately 20 to 25 meters, he saw accused No. 2 passing the gun to the appellant who shot towards the windscreen of his vehicle.

[8] The complainant's evidence was that the passengers in the vehicle were not hurt however a person from IPID helped him to drive to the hospital where he was advised that he had a bullet in his back and that he would need surgery. He however decided not to go through with the surgery and the bullet was still in his body. He could not recall what the appellant, accused No.2 and accused No.3 were wearing at the time and he refused to answer the attorney's question whether the incident occurred on a Monday or a Tuesday.

[9] The complainant's wife, Trinity Njoni started her testimony by complaining about the altercation between the prosecutor and her husband alleging that the court has been unfair on the complainant. I will not overburden this judgment by repeating the evidence of this witness because her evidence is the same on the events of the road rage and the visits to the accused home. Notably, her evidence materially differs from the complainant's evidence on the alleged shooting incident. She testified that she was sitting in the front passenger seat when she observed the shooting. She testified further that the vehicle was stopped by the speed hump and that the complainant drove until they arrived at the stadium when she got someone to drive them because she could not drive as she was carrying a baby.

Appellants evidence

[10] The appellant testified that on 15 January 2018 a person by the name of Donald drove him and dropped him at 9h00 in the same area but a different section of the township where accused No. 2 and accused No.3 reside because he was visiting the mother of his child. The appellant denied the allegations against him, he denied knowledge of the incident of attempted murder as alleged by the complainant and he denied that he was present when the complainant went to the accused's house. The appellant denied meeting the complainant and the second witness on 15 January 2018. The appellant's testimony is that he only learned about the alleged incident when the police were at his home three days later and before he handed himself to the police. He said that he was kept in custody where he was interviewed by different investigating officers for the other five cases opened by the complainant against him. He was never interviewed about the case of attempted murder.

[11] The appellant denied having been in possession of a firearm, nor having used one on the day in question nor that he owned a firearm. During cross-examination by the prosecutor, the appellant was asked why he did not bring his alibi to make a statement to the police and why he did not produce proof that he was with the mother of his child.

[12] John Rangata testified that on 15 January 2018 he drove the appellant to Maluka Street in Atteridgeville where he was visiting the mother of his child and later that evening, he called him to request him to call another taxi because he could not pick him up. The witness testified that he drives a taxi around Atteridgeville, and he did not hear of any incident 15 January 2018 as alleged by the state witnesses. He further denied that the appellant committed the alleged offence.

[13] Keitumetse Semelane testified that on 15 January 2018 the appellant was dropped by a taxi at her house at 7h00. She said she remembered the day very well because they were supposed to go to Moria. She disputed the

state witness evidence that the appellant committed an offence because according to her the appellant was with her until 20h00.

ANALYSIS OF EVIDENCE

[14] This court must determine whether there are grounds established to overturn the finding by the court *a quo*. The appellant is required to raise the errors or mistakes which were committed by the court *a quo* in applying the law.

[15] I will now deal with the grounds of appeal as summarised in paragraph 2 above. The question is whether the court *a quo* erred in its analysis of the evidence by finding that the state witnesses were consistent and reliable. Having read the evidence of both state witnesses, I was at pains to find the basis for the court finding that the witnesses were credible and reliable because it is apparent from the record, that the complainant tormented the prosecutor until she recused herself after telling the court that the complainant was insulting and shouting at her in open court. Furthermore, the state had called Katlego Molebedi to testify however this witness told the court that the complainant is his uncle and does not want him testify. He left with the complainant without giving evidence. The trial was adjourned several times on account the complainant and his wife who was the second state witness because the complainant was argumentative and contemptuous towards the court during the proceedings.

[16] The complainant argued with the defence's legal representative and he refused to answer some of the questions posed to him. The complainant could not remember the date when the alleged offence was committed despite the fact that he had just given testimony. It is clear from the record that during the proceedings the Magistrate was unable to keep the complainant under control nor did he hold him in contempt despite having notified him that he was in contempt. The complainant continued to attend

court after he finished testifying and he continued to torment the court officials and threatened the witnesses while his wife accused the court of treating the complainant unfairly and accusing the prosecutor of being incompetent to lead her evidence. The complainant also accused the police officer of not doing their job because they did not find the J88 and the firearm. When the Magistrate asked why the complainant went to the accused's home thrice, he accused the Magistrate of being unfair. This unruly and despicable conduct goes to the credibility of the complainant as a witness. I might not have had an opportunity to have a personal impression of the witness nor an opportunity to have observed the demeanour of the witnesses however, I can draw an inference from the facts as recorded that the state witnesses were not impressive. It is unfortunate that the court *a quo* did not make credibility findings on the state witnesses.

[17] The court *a quo* overlooked the improbabilities of the state witnesses' version of the alleged shooting or attempted murder of the complainant as follows:

18.1 that complainant saw the appellant shooting at the back of the motor vehicle while the complainant was driving and facing a different direction from the alleged shooter;

18.2 that the complainant could observe Accused No. 1 shooting in the air, giving the appellant the gun and the appellant shooting at his vehicle several times while the vehicle was in motion;

18.3 that three shots were fired towards the vehicle and none of the passengers who were seated in at the back got injured nor did they open a case of attempted murder;

18.4 that the complainant received conservative treatment and he was released the following morning although he was shot in the back;

18.5 that the second state witness did not report the assault after she was hit with a brick.

[18] The Magistrate failed to find that the evidence of the state witnesses is irreconcilable with the charges against the appellant in that the charge sheet bears a different date of the alleged offence as the state witnesses testified that the alleged offence was committed on 15 January 2018 while the date of the alleged offence is 16 January 2018 according to the charge sheet. Our criminal law principles require that a competent charge sheet must contain the averments in the charge sheet, should contain the elements of the offence with which the accused is charged, the time, the place and the person against whom the offence was committed must be set out in the charge.

[19] It appears that the state realised that the charge was defective because in the heads of arguments the state changed the date of the incident from 16 to 15 January 2018 for obvious reasons, the date of the incident according to the witnesses is 15 January 2018 as opposed to the date in the charge sheet. I am of the view that the state cannot cure the defects in the charge sheet during the appeal because the appellant has already pleaded to the charges in their defective form.

[20] It is evident from the record that the Magistrate suppressed certain evidence by not allowing the complainant to answer some questions including the issue of the recovery of the firearm and the unceremonious caution by the Magistrate that the attorney should refrain from asking certain questions.

[21] The court a *quo* incorrectly credited the state witnesses by finding that the evidence was consistent. On the contrary, I am of the view that their consistent evidence lies on the probability that the witness was couched to corroborate the complainant's evidence because the complainant prevented the witness to testify whereafter the matter was postponed. She had left with

the complainant and a warrant of arrest was issued.

[22] The appellant pleaded not guilty and denied having committed the offence. The appellant placed identity in dispute, His *alibi* was confirmed by two witnesses who he referred to as the mother of his child and John Rangata the taxi driver. I did not burden this judgment by summarising the evidence of accused No. 2 and accused No. 3 save to state their evidence cleared the appellant from the alleged offence.

[23] The court *a quo* failed to apply the basic principles of analysing evidence as guided by the law. The courts are cautioned not to adopt a piecemeal approach but should consider the evidence before it cumulatively.

[24] It is trite that the onus is on the state to prove beyond reasonable doubt that the appellant committed the offence as alleged. The principle of onus of proof in a criminal case was emphasized in *S v Shackell* [2001] 4 All SA 279 (A) where the SCA held that *'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'*

[25] It is clear from the above analysis that the court *a quo* applied the wrong standard of proof as the appellant was required to prove that he was not at the scene and that he should prove his alibi. There is no basis for the rejection of the appellant's alibi.

[26] I cannot comprehend the reason why the appellant was kept in custody for another 14 days despite the fact that his address was known by the police and that he handed himself in to the police.

CONCLUSION

[27] I am of the view that the court failed to properly analyze or evaluate the evidence presented before it because there are material discrepancies in state witnesses' evidence on the details of the alleged shooting as well as the arrest. The Court's credibility findings against the appellant cannot be sustained. The Magistrate should have discharged the appellant outright after the closure of the state's case because of the defective charges and lack of evidence.

AS A RESULT, I GRANT THE FOLLOWING ORDER:

ORDER

1. Appeal is upheld;
2. the conviction is set aside.

J T LESO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

I AGREE AND IT IS SO ORDERED

SNI MOKOSE
JUDGE OF THE HIGH COURT
PRETORIA

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines.

DATE OF THE HEARING: 23 May 2023

DATE OF JUDGEMENT: 13 July 2023

APPEARANCES

FOR THE APPELLANT: Adv MJ Klein

On instructions of: Kirpal Attorneys

FOR THE RESPONDENT: Adv SD Ngobeni

On instructions of: Director of Public Prosecutions Pretoria