



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Review No. : 62/2017

THE STATE

versus

TEBOHO MOTHALO

CORAM: DAFFUE, J *et* SNELLENBURG, AJ

JUDGMENT BY: SNELLENBURG, AJ

DELIVERED ON: 8 JUNE 2017

- [1] Teboho Mothoalo, a 25 year old male, who was not legally represented during the trial, was convicted and sentenced in the Botshabelo Regional Court (under case nr B1998/2016), on a charge of assault with the intent to do grievous bodily harm. The accused was sentenced to 3 years imprisonment in terms of the provisions of section 276(1)(b) of the Criminal Procedure Act, 51 of 1977. He was also declared unfit to own a firearm in terms of the provisions of section 103(1) of Act 60 of 2000.

- [2] The matter was subsequently sent to this court as an automatic review.
- [3] It is now the duty of this court to review the matter and to determine whether not only the conviction and sentence, but the proceedings as a whole, were in accordance with justice.
- [4] The charge preferred by the state against the accused was that on or about 17 December 2016 near or at H3 Section, in the district of Botshabelo, the accused did unlawfully and intentionally assault Lebohang Mokhethi by stabbing him with a knife with the intent of causing him grievous bodily harm.
- [5] The accused pleaded not guilty and gave a plea explanation. His plea explanation boiled down to this: He was drinking. The complainant swore at him and then hit him with an open hand. He then lost his temper, broke the beer bottle he was drinking from and stabbed the complainant with the broken bottle and not a knife.
- [6] The state presented only the evidence of Lebohang Mokhethi, the complainant. The complainant's testimony, succinctly summarised, was that he was at a tavern on 17 December 2016. He was drinking. When the complainant left the building to relieve himself outside the premises he noticed the accused standing with a girl. The accused was swearing at the girl. The complainant had to pass close by where the two of them were standing and he asked the accused to let him pass. The accused then started swearing at

him (the complainant). The complainant avoided an altercation at that stage. When the complainant returned to the tavern after relieving himself the accused and the girl were no longer standing where he had met them on his way out. He noticed the accused sitting in the yard of the tavern. The complainant entered the tavern. When the complainant left the tavern later the accused attacked him with a knife. The accused stabbed him twice in quick succession in the left frontal area of his shoulder. The complainant lifted his left arm with his hand outstretched in a defensive gesture to protect himself whilst turning away from the attack to run away. The accused stabbed him in the left hand as he was turning and then ran after him and stabbed him in the left upper quadrant of his back.

- [7] The accused cross-examined the complainant. He never challenged the number of stab wounds, the location of the stab wounds, nor the complainant's evidence of the sequence of events during the attack. The court assisted the accused by asking questions to clarify answers and pertinently raised issues with the complainant which appeared from the plea explanation.
- [8] The accused elected not to testify in the proceedings and closed his case without presenting any other evidence.
- [9] In his judgment the learned Magistrate, after dealing with the fact that the state had established a prima facie case went on to say the following:

“Ten spyte van die beskuldigde se reg om te swyg kan ek nie anders as om ‘n negatiewe afleiding [te] maak met sy versuim om te swyg (*sic* getuig) nie, en maak ek inderdaad ‘n negatiewe afleiding uit sy stilswye in lig van die sterkte van die staat se saak.”

The Magistrate then convicted the accused as charged.

[10] The learned Magistrate committed a material misdirection by making an adverse or negative inference from the accused’s election not to testify during the proceedings.

[11] Section 35(3)(h) of the Bill of Rights contained in the Constitution of the Republic of South Africa, 108 of 1996 guarantees the right of every accused person to remain silent and not to testify during proceedings. Section 35(3)(h) reads as follows:

“(3) Every accused person has a right to a fair trial, which includes the right-
(h)to be presumed innocent, to remain silent, and not to testify during the proceedings;”

[12] The fact that an accused person’s election not to testify may have adverse consequences is something totally different from making an adverse or negative inference from the fact that an accused person has decided to exercise his constitutional right to remain silent and not to testify. The two issues must not be confused.

[13] It is a well settled and trite principle that an accused person’s election to exercise the constitutional right to remain silent and not testify cannot be held against him and could never underlie a

negative or adverse inference. In **S v Maasdorp 2008 (2) SACR 296 (NC) para 18** (p303g-h) Bosielo AJP (as he was then) whilst dealing with a trial court's negative inference as result of the fact that an accused person refused to make a statement to police after having been advised of his right to remain silent, held:

"In my view, it would make a serious mockery of the rights enshrined in s 35(1)(a) and (b)(i) and (ii), if, after having properly advised an accused of these rights, such an accused person would be visited with a negative inference precisely for exercising his constitutional right to remain silent."

The same principle applies to an accused person who exercises his constitutionally enshrined right not to testify and I can hardly put it better than the Judge did in **Maasdorp** supra.¹

[14] The correct point of departure is the fact that the accused person is presumed innocent until proven guilty. The State bears the onus to rebut the presumption of innocence and to do so needs to prove the accused person's guilt beyond reasonable doubt. This means that the State bears the burden of proving each of the essential elements of the offence charged.² There is no onus on the accused to disprove any of them. If the state does not rebut the presumption, that is the end of the matter.

[15] I stated earlier that the election of an accused person not to testify may or may not have negative consequences. The reason for this is obvious, if the accused person does not testify and the prosecution fails to rebut the presumption by discharging its onus

¹ Also see **S v Mofokeng 1998 (1) SACR 57 (O) at 60g.**

² **Osman and Another v Attorney-General, Transvaal, 1998 (4) SA 1224 (CC) para 13.**

then *cadit quaestio*. On the other hand, should the accused person elect not to testify, which is his right to do, he always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence.³ In other words he runs the risk that the court may find when weighing the evidence produced by the prosecution, that the evidence is sufficient to prove its onus in absence of his testimony. Thus the decision not to testify does not attract a negative or an adverse inference, but it may not be without consequences for the accused person.

[16] What needs to be considered is whether the misdirection resulted in a failure of justice.⁴

[17] In considering the matter afresh I am satisfied that the State satisfied its onus to rebut the presumption. The State at the very least had a *prima facie* case. I would add that the learned Magistrate's evaluation of the evidence of the single witness cannot be faulted.⁵ In absence of evidence to rebut the *prima facie* case the State satisfied its burden. The conviction must therefore be confirmed.

³ Osman and Another v Attorney-General, Transvaal, Supra Para 22; S v Machaba and Another 2016 (1) SACR 1 (SCA) para 10.

⁴ S v Naidoo, 1962 (4) SA 348 (A) te 354 D – F.

⁵ In S v Sauls 1981 (3) SA 172 (A) at 180E – H the Court explained how the evidence of a single witness should be evaluated: "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. . . . The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. . . . It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense. The question then is not whether there were flaws The question is what weight, if any, must be given to the many criticisms that were voiced by counsel in argument.'It follows that the conviction should be confirmed."

[18] As for the sentence, the exercise of the Magistrate's discretion is not vitiated by any material misdirection. The sentence is not so markedly different that it can properly be described as shocking, startling or disturbingly inappropriate. It therefore follows that the sentence should also be confirmed.

[16] I would make the following order:

The conviction and sentence are confirmed.

N. SNELLENBURG, AJ

I concur and it is so ordered.

J. P. DAFFUE, J