



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

22 MAY 2015

CASE NO: **A1025/2009**

In the matter between:

DEON CHARL PRINSLOO

First Appellant

JACOBUS HENDRIK STEPHANUS SWANEPOEL

Second Appellant

CAREL VAN DER POLL

Third Appellant

and

THE STATE

Respondent

J U D G M E N T

MAKGOKA, J

[1] The appellants, who initially faced eight counts, were convicted in the magistrate court, Mankweng, of three counts, namely malicious damage to property (count 1) and two counts of assault with intent to do grievous bodily harm (counts 2 and 5). They were each sentenced to one year imprisonment on each count, which was wholly suspended on standard conditions. They appeal against the convictions and the sentences, with leave of the trial court.

[2] The appellants were members of the South African Police Service (SAPS) stationed at the murder and robbery units of Pietersburg (now Polokwane) and Seshego. The complainants are Mrs Caroline Letsoalo (Mrs Letsoalo) and Mr Jeremiah Lekoloane (Mr Lekoloane). Count 1 – malicious damage to property – concerns the property of Mrs Letsoalo. Counts 2 and 5 (assault with intent to do grievous bodily harm) concerns both complainants. The events giving rise to Mr Lekoloane's complaint occurred during the night



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of 11 May 1998 until the early hours of 12 June 1998. Those involving Mrs Letsoalo occurred during midnight to early hours of 13 May 1998.

[3] The factual background to those events is this. The appellants were investigating a robbery and rape case during which a Mrs Combrink was robbed of her vehicle in Tzaneen by four armed men, who also abducted her to Mankweng, where she was gang-raped by those men, on two separate occasions. They were also investigating a case of armed robbery involving a supermarket in the Mankweng area. As part of their investigations, appellant 1 received information that Mr Lekoloane is a police informer in the area, and that he could assist them with their investigations. He was provided with Mr Lekoloane's contact number, as well as his residential address.

[4] It is common cause that during the night of 11 May 1998, the appellants and four of their colleagues arrived at Mr Lekoloane's house. On first encounter with him, he was handcuffed and placed in a police vehicle. He was questioned at a secluded place in Mankweng, and later driven to Seshego. He was driven back to Mankweng the following morning in the early hours at approximately 02h00. What happened to Mr Lekoloane between his first encounter with the appellants until he returned home is disputed. Mr Lekoloane says that he was assaulted, which allegation the appellants disputed.

[5] A day later, on 13 May 1998, the appellants and their colleagues went to Mrs Letsoalo at approximately midnight. This is after they had received information that her son, Masilo, was involved in some of the crimes mentioned earlier. Masilo was not home. It is common cause that the appellants and their colleagues took Mrs Letsoalo to several places looking for Masilo, and returned her to her house during the early hours of that day. Similarly, it is disputed as to what transpired during the appellants' presence at Mrs Letsoalo's house and during their search for Masilo. She says that the appellants broke and damaged her property, and also assaulted her. The appellants dispute this.

[6] It is against this factual background that I now summarise the evidence led in the trial court. Both Mr Lekoloane and Mrs Letsoalo testified. Dr Bredenkamp, a medical doctor who examined Mr Lekoloane shortly after he was allegedly assaulted by the appellants, testified in the state's case. No other factual witness testified in respect of the offences on which the appellants were convicted. Each of the appellants testified in their own defence and called no further witnesses. I will commence with the evidence of Mr Lekoloane.

[7] Mr. Lekoloane testified that on 11 May 1998 at approximately 20H00 he arrived home in a kombi. He is a taxi driver. He was with two other people in the kombi, Maribe and Willy. Shortly upon arrival, the appellants arrived in three vehicles and pointed him with firearms, grabbed him and put him into one of their vehicles and covered his head with a jacket. They drove off with him to a mountain where they assaulted him. Appellant 2 was in that vehicle. They asked him his name, which he gave to them. Upon arrival at the mountain, he was hand-cuffed by appellant 1.

[8] While his head was covered, he was hit repeatedly with a blunt, steel object, which he later observed it to be a firearm, and appellant 2 was the one who was having possession of the firearm. He managed to remove the jacket from his head. He was handcuffed with his hands at the back. Appellant 1 also tripped him and he fell, after which the appellants kicked him with booted feet. Appellant 3 is the one who started kicking him and others joined in. By then all occupants of the three vehicles had alighted from them and surrounded him.

[9] He asked why he was being assaulted. The African person who was in the company of the appellants told him that they were looking for two of his friends, light in complexion and who liked wearing necklaces. Because of the broad description, he was not able to ascertain exactly who they were looking for. According to Mr Lekoloane he was further assaulted in various ways, including being suffocated with a tyre tube. Later his face was covered with a jacket. The appellants drove with him to Seshego, apparently the offices of the murder and robbery units, where further interrogation occurred.

[10] Later he was driven back to Mankweng. They arrived to the local police station, where appellant 3 pointed him with a firearm and threatened to kill him should he not reveal the names of the suspects. He took them to the residence of Mr Tshepo Ramonyai, a friend of his, whom the police suspected could be involved in the crimes they were investigating. Having seen his friend, they were satisfied that he was not one of the suspects, but nevertheless assaulted Mr Ramonyai before leaving.

[11] It was approximately 2h00 in the morning when they left Mr Ramonyai's house. Instead of taking him back to his house, Mr Lekoloane says that along the way, while the vehicle was in motion, appellant 2 opened the vehicle window and pushed him out. Because his leg was already twisted from the earlier assault, he crawled to his house. Later that evening, at approximately 19h00, appellant 2 arrived at his house and warned him never to

report to the police, his ordeal the previous night. He again threatened to kill him should he do so. However, by then he had already reported the matter to the police.

[12] He did not sustain any open injuries because when he was assaulted with a firearm on the head, he was cushioned by the jacket. He felt pains around the cage of his ribs. As to the injury sustained as a result of his leg being twisted, he testified that he was bandaged by the doctor who treated him. The leg had been fractured.

[13] Dr Bredenkamp examined Mr Lekoloane on 13 May 1998, the day after the incident. He confirmed the contents of the J88-form, which he had completed upon examination of Mr Lekoloane. In that form, he had noted the following injuries:

- (a) 'n skaaf plek op linker pols'
- (b) Kneuseplekke op beide polse'
- (c) Linker knieg aan voorkant 'n kneusplek'

[14] Mrs Letsoalo testified that at approximately midnight on 13 May 1998 the three appellants arrived at her house in Mankweng. The appellants announced their arrival by breaking her entrance door. She was awakened by footsteps around her house and a flashlight against her bedroom window. Thereafter her entrance/bedroom door was broken and appellants 2 and 3 entered her bedroom. There was no electricity in the area and the two appellants used torch light to illuminate her bedroom.

[15] Appellant 3 searched the drawers of her dressing table, throwing the contents around onto the floor. Appellant 3 assaulted her with open hands, and was later joined by appellant 2. Appellant 2 told her that they were looking for his son, Masilo. She indicated that Masilo was supposed to be in his bedroom. In the meanwhile, she heard sounds of banging and commotion from the other bedrooms. Her 7 year old son, Vincent, was sleeping in one of them. She could hear Vincent crying from his bedroom. Appellant 3 went to Masilo's bedroom but returned, saying Masilo was not in his bedroom. Appellant 2 went out and there came in appellant 1, who picked her up and threw her against a wardrobe.

[16] The appellants demanded that she should give them directions to the residence of Masilo's girlfriend, Mpho. She told them that she was unable to furnish directions, but she knew where the place was, and was able to take them there. It was across the road at Ga-Makanye village. The appellants instructed her to accompany them there. She drove in the same vehicle with appellants 2 and 3, and when they were about to leave she saw one of the police officers accompanying the appellants carrying her son Vincent into one of the police

vehicles. Masilo was not found at Mpho's place. From Mpho's place she was instructed to take them to the residence of one Ronnie, apparently Masilo's friend. She was unable to identify Ronnie's place among several homesteads in the area.

[17] From there, the police vehicle convoy stopped next to a bush in the vicinity of a shopping complex. She was ordered out of the vehicle and interrogated about the finger rings she was wearing. She explained to them that one of the rings was her wedding ring and that her husband had passed on. Apparently the appellants did not believe her. They assaulted her. She was taken to a graveyard to show the appellant her late husband's grave. When they arrived at the graveyard, the gate was locked. She was instructed to jump over the gate into the graveyard. Because it was a cold winter morning, her hands were so cold that she was unable to properly hold on to the steel gate to jump over it. Appellant 3 kicked her off the gate and she fell, whereupon the rest of the occupants of the police vehicles kicked her at random.

[18] She was later driven to several places, all in a vain search for Masilo. On their way back to her house, appellant 2 and 3 parted company with the rest of the other vehicles and stopped in the bushes. Appellant 2 asked appellant 3 whether he, appellant 3, would like to have sex with her. Appellant 3 ordered her out of the vehicle and pointing a firearm at her, he ordered her to lie down, which she did. Appellant 3 pinned her down on her stomach with his knee. At that stage appellant 2 dissuaded appellant 3 from anything further. Eventually she was returned home. Upon arrival and inspection of her house, she established that her property was damaged and some items were missing. Mrs Letsoalo's evidence concluded the state's case.

[19] All appellants testified. In respect of Mr Lekoloane's complaint the detailed evidence is that of appellant 1. He testified that during the relevant period, he was a detective attached to the murder and robbery unit in Polokwane (formerly Pietersburg). Mr Lekoloane's name as a possible police informer who could assist him with the investigations, was suggested to him by his colleague, Inspector Machete. Apparently Inspector Machete and Mr. Lekoloane's father were good friends, and the latter had assisted inspector Machete with his own police investigations.

[20] Once he received the information about Mr. Lekoloane's particulars, he decided to visit him during the night of 11 May 1998 as he was busy with a court in Pretoria the following day. He arranged his team and they met at their office in Seshego. Joining in that

team were inspectors, Swanepoel, Bupedi, Matlaila, Van der Pohl and Bosman. The latter was attached to the Tzaneen Murder and Robbery unit. He informed the team that the purpose of the exercise was to speak to Mr. Lekoloane, the informer, who could possibly identify possible suspects in the two cases under investigation and possibly point out where such suspects could be found. Mr. Lekoloane was himself not a suspect at that stage.

[21] All six officers drove from Seshego to Mankweng, where they found him, having just arrived. He was driving a mini-bus, and was in the company of two people. Him, inspector Swanepoel, Matlaila and Bupedi entered the premises and introduced themselves to Mr Lekoloane. At that stage he was outside the house, but inside the premises, on the drive-way. Inspectors Matlaila and Bupedi spoke to Mr Lekoloane, which conversation was conducted in Sepedi. As he was in the company of other people, it was not advisable for them at that stage to tell him what the purpose of their visit was. Inspector Matlaila suggested that they should stage a 'make-believe' arrest, i.e. pretend to arrest Mr. Lekoloane so that it should not be obvious that he was co-operating with the police. Inspectors Matlaila and Bupedi then staged a 'make-believe' arrest on Mr. Lekoloane, and he was hand-cuffed. The two people who were with Mr. Lekoloane just remained standing and later moved into the house.

[22] Mr. Lekoloane got into the car in which Inspector Swanepoel and Van der Pohl were. They drove from the house, in search of a secluded place where they could speak with Mr. Lekoloane, away from the houses, or the road, where nobody could see them. They found such a spot near the University of Limpopo. They informed Lekoloane of the purpose of their visit and enquired whether he was in a position to assist them. Inspector Matlaila and Bupedi led the discussions in an indigenous language, and from time to time explained to the rest of the officers as to what was being said.

[23] From that information, he deduced that Mr. Lekoloane was familiar with certain car-hijackers and robbers in the Mankweng area, but he, Mr. Lekoloane did not mention any names to them. However, he told them that the robbers changed names regularly, and used aliases, in most instances. It was suggested that a police photo album depicting the photos of suspects, be shown to him, the idea to which Mr. Lekoloane was receptive. As the album was in their offices in Seshego, they had to drive there for Mr. Lekoloane to view the album. They arrived in Seshego at approximately 23H00.

[24] Upon arrival at their offices, Mr. Lekoloane was shown two photo albums. He 'instructed' him that in the event he identified any possible robbers in the Mankweng area, he should indicate that fact. Mr. Lekoloane identified photos of 4 suspects and indicated that they operated in the Mankweng area. At approximately 11H30 Mr. Lekoloane's family members arrived at their offices, worried about, and looking for, him. Inspector Swanepoel spoke to them and assured them that there was nothing to worry about, and that Mr. Lekoloane was busy assisting them with investigations, and further that he would be brought back home. They also spoke to Mr. Lekoloane and after it was explained to them that he had not been arrested, they went back home.

[25] Mr. Lekoloane then indicated to them that there was a person (whose photo was not in the album) but whom he suspects to be involved in robberies and rape, whom he offered to identify where he lived, in Mankweng. The six of them drove back to Mankweng. It was approximately 01H00 in the morning when they arrived at the suspect's house, but after enquiries, the persons did not match the description of the person they had in mind. They decided to end their investigations and took Mr. Lekoloane to his house at approximately 02H00 in the morning. Inspector Swanepoel and Mr. Lekoloane exchanged contact details, and arranged to meet later that evening.

[26] With regard to Mrs Letsoalo's complaint, the essence of the appellants' evidence is this. On 13 May 1998 the appellants and three of their colleagues visited Mrs Letsoalo's house at approximately midnight, in search of his son, Masilo. In respect of the complaint of Mrs Letsoalo, the appellants testified that the investigating officer had received information that the fingerprints of Masilo Letsoalo were found on a vehicle which was the subject of the robbery. An operation was planned to go and arrest Masilo Letsoalo. Upon arrival at the address identified as his residence, they surrounded the house and entered the house. They found a young boy and the suspect's mother, Mrs Letsoalo. Masilo was not there. They questioned his mother in a friendly and polite manner. She agreed voluntarily to help them. She was loaded into one of the motor vehicles and she pointed out the home of the Masilo's girlfriend and they all went into the house while she remained in the motor vehicle, and Masilo was not found.

[27] On the way they checked her rings to see whether they matched those taken during the robbery under investigation. She then took them to different places until they reached Ga-Mamabolo village where they found Mr. Jerry Mamabolo who agreed to help them. Mrs

Letsoalo and her son were subsequently returned home by appellants 2 and 3, while Mr. Mamabolo was returned back home by appellant 1.

[28] That briefly, is the evidence led before the trial court. In respect of all three counts of which the appellant were convicted, the stage relied in each on the evidence of a single witness – Mrs Letsoalo on the malicious damages to property and assault, on the one hand, and Mr. Lekoloane, on assault, on the other. This obviously required of the trial court to approach such evidence with caution, to ensure that the evidence was satisfied in all material respects.

[29] Before I consider the arguments on behalf of the parties, it is useful to remind ourselves of the proper approach in matters such as the present. The approach to be adopted by a court of appeal when it deals with the factual findings of a trial court is found in the collective principles laid down in *R v Dhlumayo* 1948 (2) SA 677 (A). A court of appeal will not disturb the factual finding of a trial court unless the latter had committed a misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it. See also *DPP v S* 2000 (2) SA 711 (T); *S v Leve* 2011 (1) SACR 87 (ECG); and *Minister of Safety and Security and Others v Graig and Another NNO* 2011 (1) SACR 469 (SCA).

[30] In terms of s 208 of the Criminal Procedure Act, 51 of 1977, an accused may be convicted of any offence on the single evidence of any competent witness. The court can base its findings on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect (*R v Mokoena* 1932 OPD 79 at 80) or if there is corroboration (*S v Gentle* 2005 (1) SACR 420 (SCA)). See further, *R v Mokoena* 1956 (3) SA 81 (A) at 85; *S v T* 1958 (2) SA 676 (A) at 678; *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G; and *S v Banana* 2000 (2) SACR 1 (ZSC).

[31] With respect to the learned magistrate, it does not appear from her judgment that she duly cautioned herself accordingly. She accepted the evidence of both Mrs. Letsoalo and Mr. Lekoloane uncritically, without testing it against the bench mark of it being satisfactory in all material respects. Mrs Letsoalo testified that she sustained visible injuries. Despite the court suggesting that the doctor who examined her should be called to testify, the State elected not

to do so. The State failed even to place before court, her medical records for the relevant period.

[32] With regard to Mr Lekoloane, his evidence of the injuries sustained during the alleged assault, was thoroughly discredited by the objective, medical evidence of Dr. Bredenkamp. The doctor testified that he did not observe any injuries alleged by Mr Lekoloane in his evidence. Mr. Lekoloane was, especially, a most unsatisfactory witness. He was garrulous, long-winded and tailored his evidence as the cross-examination exposed the discrepancies in his evidence.

[33] The learned magistrate simply brushed off the above by suggesting that the witnesses were simply 'exaggerating' the nature and extent of their alleged assault at the hands of the appellants. This is an impermissible approach. That 'exaggeration' goes to the heart of their credibility as witnesses, and the trial court misdirected itself by not considering its overall impact on the rest of the evidence of the two witnesses, especially in the light of their being single witnesses, with no corroboration of their evidence. Mr Lekoloane's evidence of the alleged injuries suffered, as stated already, was totally discredited and was not borne out by the medical evidence. I therefore conclude that the learned magistrate committed a material misdirection in accepting the evidence of both Mrs Letsoalo and Mr. Lekoloane on the assault charges, to the extent such evidence was disputed by the appellants.

[34] I turn now to the conviction on the count of malicious damage to the property of Mrs Letsoalo. The appellants' attack against the conviction on this count is two-pronged. First that the trial court erred in using the photographs of the damaged property without such photos being proven by the person who took them. Put differently, the argument is that the evidence of the photos was inadmissible and should not have been considered by the trial court without the photographer being called to testify for the purpose of proving them. Second, it contended that the trial court erred in its conclusion that the appellants were the ones whose actions caused the damage to Mrs Letsoalo's property. This ground is based on the so-called concession by Mrs Letsoalo during cross-examination that she could not identify the person who caused the damage.

[35] There is no merit in any of the two arguments, and they can be disposed of summarily. With regard to the photos, Mrs Letsoalo testified about the nature and extent of the damage to her property – broken entrance doors, cupboards and other household items. Her evidence in that regard was not challenged. In fact it appeared to be common cause that there had been

damage to her property. Therefore, the photos were merely to demonstrate to the court the nature and extent of the damage, which was common cause. For the above reasons, the learned magistrate did not have to rely on the photos. The direct and uncontroverted evidence of Mrs Letsoalo was sufficient. See *S v Fuhri* 1994 (2) SACR 829(A); *S v Ndika and Others* 2002 (1) SACR 250 (SCA) and *S v Karaler and Another* 20006 (2) SACR 298 (N).

[36] There has not been any suggestion that her property was not damaged. Instead, it was suggested during cross-examination that the damage could have occurred during Mrs Letsoalo's absence while she was accompanying the appellants to look for her son, Masilo. This is far-fetched and speculative. Mrs Letsoalo's evidence was that entry into her house was gained by breaking the entrance doors to her house, as well as her bedroom door. This was not disputed by the appellants. On their own version, the appellants used force and 'swift' entry into the house. As the learned magistrate correctly pointed out, it was not the appellants' evidence that they knocked and doors were opened for them.

[37] Mrs Letsoalo clearly testified that her bedroom door was broken shortly before two of the appellants entered her bedroom. This was not disputed, so was her evidence that there was loud banging of items in other bedrooms. Her evidence that appellant 2 and 3 broke things in her bedroom was not seriously disputed. From all of the above, it is clear that the appellants and their colleagues, who were in the other bedrooms, were acting in concert and with a common purpose. The essence of the doctrine is that where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design. See Burchell *Principles of Criminal Law* 4 ed at 574. Also see *S v Safatsa* 1988 (1) SA 868 (A); *S v Mgedezi and Others* 1989 (1) SA 687; *S v Thebus and Another* 2002 (2) SACR 566 (SCA) and *S v Thebus and Another* 2003 (3) SACR 319 (CC), (2003 (6) SA 505 (CC). I therefore conclude that the appellants were properly convicted on this count, and the appeal in respect thereof should fail.

[38] As stated in the introduction, the appeal is also directed against the sentence, an aspect I now turn to. It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See generally: *S v Petkar* 1988 (3) SA 571 (A), *S v Snyder* 1982 (2) SA 694 (A) and *S v Sadler* 2000 (1) SACR 331 (SCA) and *Director of*

Public Prosecutions, KZN v P 2006 (1) SACR 243 (SCA) para 10. As to the nature of the misdirection which entitles a court of appeal to interfere, the following was stated in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F:

‘Now the word ‘misdirection’ in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court’s decision on sentence.’

[39] In the present case, there is no discernable misdirection of any type, let alone the one referred to above. The trial court, in my view, considered all the relevant factors in respect of sentence, namely the circumstances of the commission of the offences, the personal circumstances of the appellant, the mitigating and aggravating circumstances, which it balanced against each other. I bear in mind that the convictions on the assault charges are to be set aside, and that, ordinarily, would affect sentence. However, I am of the view that even without the assault charges, the sentence of 12 months’ imprisonment for malicious damage to property, wholly suspended, is still a suitable sentence. I therefore do not intend to interfere with that sentence. The aggravating factor is that the appellants were police officers. They acted like rogue elements that night. The appeal against the sentence therefore falls to fail.

[40] Before I conclude, I make the following observations. The prosecution in this matter was not handled with the necessary diligence and competence. That benefitted the appellants, for, had that not been the case, the appellants would most probably have been convicted on all counts. For example there is no reason why the appellants should not have been charged with assault for admittedly hand-cuffing Mr Lekoloane without his consent. They should have faced even more charges, including the kidnapping of Mr Lekoloane. The appeal succeeds to the extent discussed above, only because the prosecution was inept, and not because of anything else.

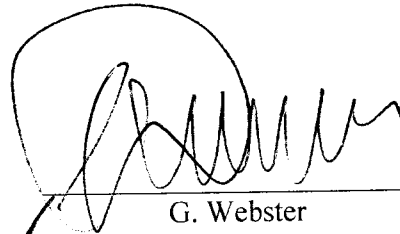
[41] In the result the following order is made:

1. The appellants’ appeal against the convictions in respect of counts 2 and 5 (assault on Mrs Letsoalo and Mr Lekoloane) is upheld;
2. The appellants’ appeal against the convictions in respect of count 1 (malicious damage to property) is dismissed;
3. The appeal against the sentences is dismissed.



T.M. Makgoka
Judge of the High Court

I agree



G. Webster
Judge of the High Court

APPEARANCES

For the appellants: Adv. J.C Kloppe

Instructed by: Pretoria Justice Centre

For the respondent: Adv. P.T. Nkuna

Instructed by: Director of Public Prosecutions, Pretoria