



Reportable:	YES / ☒ NO
Circulate to Judges:	☒ YES / NO
Circulate to Magistrates:	☒ YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Case No: CA&R 02/15
Heard: 23/03/2014
Delivered: 27/03/2015

In the matter between:

TEBOGO MOSATA

Applicant

v

THE STATE

Respondent

Coram: Kgomo JP et Phatshoane J

JUDGMENT ON APPEAL

ORDER

A: The appeal succeeds in part as follows: The conviction on attempted murder and the sentence of six (6) years imprisonment are set aside.

B: The following order is made in their place:

- "1. The accused is found guilty of assault with the intent to do grievous bodily harm.***
- 2. The accused is sentenced to 4 (four) years imprisonment.***

3. *In terms of s282 of the Criminal Procedure Act, 51 of 1977, the sentence is antedated to 18 February 2014.*

KGOMO JP

[1] The appellant, Mr Tebogo Mosata, appeared before the Regional Magistrate, Mr V Smith, on one count of an attempt to steal the motor vehicle of the complainant, Mr Kabelo Lekgetho, and a second charge of attempting to murder the same complainant. These incidents are alleged to have taken place on the night of 09 December 2012 in Galeshewe, Kimberley. The Magistrate acquitted the appellant on the attempted theft charge but convicted him of the attempted murder and sentenced him to six (6) years imprisonment. The appellant sought but was denied leave to appeal by the trial Court. Leave was granted in respect of both the conviction and sentence on petition to this Court.

[2] The appellant, duly legally represented, pleaded not guilty. In mounting his defence he placed himself on the scene of crime but denied any involvement in the attack on the complainant. On the contrary he seems to implicate his friend, Mr Kgomotso Cedras, whom he called as his witness. He says he saw Cedras with an unfolded knife when he (appellant) intervened by removing his friend from the scene of the fracas and later saw him still clutching the open knife when they had left the scene.

[3] The complainant and his sister, Didimalang, visited a tavern/”chesa nyama” entertainment place looking for their friends, whom they found inside the premises. The siblings then went to their locked car, the subject-matter of the

attempted theft charge, to retrieve their cooler-bag from. This is when they caught the appellant attempting to break into the car. In fact it was later discovered that one of the handles of the car-door was broken. They accosted him. He retaliated by slapping and stabbing the complainant, an off-duty police officer, with a sharp instrument. Didimalang saw the stabbing but the complainant missed it. According to the siblings it was only the three of them on that spot at that juncture. If, therefore, their evidence is accepted only the appellant could have been the assailant.

[4] Ms Mazubukwana, for the appellant, instructed by Legal Aid South Africa (LASA), argued in her written submissions that:

- 4.1 The visibility was poor and the identification of the appellant was unreliable;
- 4.2 The siblings have recited their evidence in a conspiracy to implicate the appellant falsely;
- 4.3 The siblings contradicted each other materially notwithstanding the fact that they were throughout in each other's presence; and
- 4.4 If it is nevertheless found that the appellant inflicted the stab-wound, which I will come to, then, at best for the state the appellant rendered himself guilty of assault with intent to do grievous bodily harm, and that the attempted murder verdict was a material misdirection by the Magistrate.

THE IDENTIFICATORY EVIDENCE

[5] According to the complainant there were street lights where their car was parked but visibility was not very good (*"die sigbaarheid was nie so baie duidelik nie"*). However, he

maintains that he managed to identify the appellant whom he had known for the past three years.

[6] Didimalang knew the appellant even better than her brother. She knew him as Rabbit. The illumination was good, she says, because there are streetlights and “*ook flashlight was daar.*” By “*flashlight*” she meant a high-mast light. She could even see the knife that the appellant used and the blood oozing from the complainant’s stab-wound.

[7] The visibility could not have been that bad because appellant also says he saw the blood on the complainant. Someone must have managed to recognise the appellant because he says someone called out his name. The siblings only saw the appellant at the car where the confrontation took place, and not inside the better lit house. More importantly the appellant also says he managed to identify Kabelo (the complainant) who was involved in a scuffle.

[8] The approach that our Courts adopt where the identifying witness knew an accused before an incident has been set out as follows in **R v Dladla and Others** 1962(1) SA 307(A) at 310B - E:

“One of the factors which in our view is of the greatest importance in a case of identification, is the witness’ previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased. Even in the case when a witness has some difficulty in the witness-box in giving an accurate description of a facial characteristics and clothes of the person

whom he has identified, the very fact that he knows him provides him with a picture of the person in the round which is a summary of all his observations of the person's physiognomy, physique and gait, and this fact will greatly heighten the probability of an accurate identification ... In a case where the witness has known the person previously, questions of identification marks, facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made."

See also **S v Mthetwa** 1972(3) SA 766 (A) at 768A-C.

- [9] From the foregoing I am satisfied that the appellant was properly identified as the assailant of the complainant. When it comes to the description of the lighting there was in reality no contradiction between the evidence of Didimalang and her brother. It appears to me that Didimalang's powers of observation outstrips that of her brother. This explains, in all probability, why he did not even notice when he was stabbed and also that there was a high-mast light in addition to the street lights. Significantly, neither the appellant nor his witness claimed that the visibility was poor and hampered identification. Ms Mazibukwana, faced with this mountain of evidence against the appellant was constrained to concede during oral argument, correctly in my view, that the evidence of identification of the appellant as the culprit was reliable.

WAS THE APPELLANT CORRECTLY CONVICTED OF ATTEMPTED MURDER?

[10] The Magistrate said the following in his judgment on concluding that attempted murder was committed:

*“Whether on the version of the State if the Accused is guilty of attempted murder or a less serious offence of assault with the intent to do grievously bodily harm. I have to accept that in this case a knife was used. I have to accept that the Accused recklessly stabbed the complainant in this case whilst his sister was in between himself and the Accused. I have to accept that an amount of force was used, and I have to accept that the wound was inflicted on the upper body part of the complainant. **I have to accept that there was no intention that the Accused aimed for the arm, and it was a rather reckless stab towards the complainant.** If I accept all this, those factors, I come to only one conclusion that the Accused did foresee that he could kill somebody if he stabbed a person so recklessly and onto that direction of the body. So I find that the Accused is guilty of attempted murder as charged.”*

[11] The complainant was medically examined by Dr Assegaai on 09 December 2012. The doctor was not called as a witness. However his medico-legal examination certificate (J88) was handed in by consent. The appellant admitted the correctness of its contents as exhibiting the findings of the doctor. The findings are:

11.1 *“Patient allegedly stabbed with a knife. Presenting with a +/- 3cm deep laceration to medial aspect of (R) upper arm with severed (R) brachial artery.”*

11.2 The doctor then comment under conclusions that:

“Injuries very serious and life-threatening. Patient could have died due to exsanguination from the laceration to his brachial artery.”

[12] Didimalang who witnessed the stabbing says that her brother shouted at the appellant and enquired what he was doing to his car. The appellant said: *“Hey man, is dit u kar, is dit u voertuig.”* A quarrel ensued. The appellant slapped her brother with an open hand, but before he could retaliate *“toe steek hy (the appellant) hom op die hand, op die arm, toe hardloop hy (the appellant) weg.”* There is no evidence that the appellant aimed at the complainant’s chest. If I understand the Magistrate correct he states that he accepts that there is no gainsaying the inference that appellant in fact meant to stab the complainant on the arm. There is also no evidence that the complainant tried to evade being stabbed or parried the blow.

[13] The Magistrate found the siblings to have been impressive witnesses who gave reliable and credible evidence. On the other hand he found the appellant’s version not to be reasonably possibly true and rejected it. I can find no fault with such rejection. See **S v Chabalala** 2003(1) SACR 134 (SCA) at 139i-140b (para 15) where the Court stated:

“[15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full

picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."

[14] The Magistrate correctly found that the appellant was a poor witness who falsely implicated Cedras, his friend. The defence, strange enough, adduced Cedras' evidence notwithstanding the impending, if not looming, contradiction. Cedras denied any participation in the fight with the complainant and weakened the appellant's defence even further.

[15] The crucial question is whether the evidence adduced by the State establish an attempt to murder or merely an assault with intent to cause grievous bodily harm. State counsel, Mr Barnard, sought to persuade us that the Magistrate committed no misdirection in concluding that the appellant attempted to murder the complainant. However, he had a "*hard row to hoe.*"

[16] See **S v Sigwahla** 1967(4) SA 566(a) at 569H-570E where Homes JA gave this salutary exposition:

"Stabbing cases are usually a matter of degree, and intention must not be inferred by hindsight from the fact of death. The part of the body injured is relevant, but in the present case the deceased was walking and the appellant jumped forward as he struck. Hence it cannot be inferred beyond reasonable doubt that he actually aimed at the heart, as distinct from the general area of the upper body. Accordingly, the fact that the thrust did land with fatal consequences above the heart does not, in all the circumstances, necessarily give rise to the inevitable inference that the appellant intended to kill, in the

sense of directing his will toward the bringing about of the death of the deceased.

B That, however, does not conclude the enquiry because the following propositions are well settled in this country:

- 1. The expression 'intention to kill' does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as dolus eventualis, as distinct from dolus directus.*
- 2. The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The factum probandum is dolus, not culpa. These two different concepts never coincide.*
- 3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so."*

[17] Not every stab-wound inflicted with a sharp object on the upper body of a victim which is not fatal, and where no self-

defence is involved, therefore amounts to attempted murder. The highlighted portion of the quotation in para 10 (above) shows that the Magistrate throws concepts or principles or the test to be applied around rather loosely. It would be helpful if he referred to Superior Court precedents in which their formulation, if adhered to, would reduce the risk of misdirections. See also **S v Humpfreys** 2013(2) SACR 1 (SCA) at 7h-10h (paras 12-18).

[18] I am satisfied that the State had not proved beyond a reasonable doubt that the appellant intended to murder the complainant. The conviction on attempted murder ought to be set aside and replaced with assault with intent to do grievous bodily harm.

THE SENTENCE

[19] In light thereof that the appellant is guilty of a lesser offence, which consequently carries reduced moral turpitude we are at large to impose sentence afresh.

[20] The appellant was 30 years old when he was sentenced on 18 February 2014. He is unmarried and has a six-year-old son who is staying with his mother. He attained Grade 12 at school.

[21] The appellant has the following previous convictions:

21.1 He was convicted of theft on 24 April 2001 and was sentenced to eight (8) months correctional supervision in terms of s276(1)(h) of the Criminal Procedure Act, 51 of 1977;

21.2 On 12 September 2002 he was convicted on two counts of robbery which were taken together for purposes of sentence and was sentenced to six (6) years imprisonment. He was released on parole on 05 October 2005 which parole expired on 04 June 2008;

21.3 Before the parole expired he was found in possession of drugs on 29 February 2008 and sentenced on 15 July 2008 to pay a fine of R1500-00 or in default of payment to serve four (4) months imprisonment. The sentence was wholly suspended for three years on certain conditions.

21.4 On 10 December 2012 he was sentenced to three (3) years imprisonment for theft which was committed on 22 September 2012. The appellant therefore committed the current offence less than three months after he possessed the drugs illegally and a day before he was convicted for it. This explains why the investigating officer only traced him to prison when he sought to arrest him on the attempted murder charge.

[22] The appellant showed no remorse and aggravated matters by falsely implicating Cedras for his crime.

[23] The assault was very serious and nearly led to the complainant's death, but for the prompt medical intervention. The appellant also has a predisposition for violence.

[24] Having regard to all the factors, regard also being had to the fact that he attempted to break into a locked car but was

thwarted, I am of the view that four (4) years imprisonment would be an appropriate sentence.

ORDER

A: The appeal succeeds in part as follows: The conviction on attempted murder and the sentence of six (6) years imprisonment are set aside.

B: The following order is made in their place:

“1. The accused is found guilty of assault with the intent to do grievous bodily harm.

2. The accused is sentenced to 4 (four) years imprisonment.

3. In terms of s282 of the Criminal Procedure Act, 51 of 1977, the sentence is ante-dated to 18 February 2014.”

F DIALE KGOMO
JUDGE PRESIDENT
 High Court of South Africa
 Northern Cape Division

I concur.

V M PHATSHOANE
JUDGE
 High Court of South Africa
 Northern Cape Division

<u>On behalf of the Applicant :</u>	Adv N. M MAZIBUKWANA (LEGAL AID BOARD, KIMBERLEY)
<u>On behalf of the Respondent:</u>	Adv T. E BARAND (Director Public Prosecutions)