

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

Appeal No.: A19/2014

In the matter between:

ARIEL PERCEVEL KOTZE

Appellant

and

THE STATE

Respondent

CORAM:

LEKALE, J et JAJI, AJ

HEARD ON:

23 JUNE 2014

JUDGMENT BY:

JAJI, AJ

DELIVERED ON:

11 SEPTEMBER 2014

- [1] The Appellant, unrepresented at the time, was convicted of assault on 16 April 2013 by the District Court at Welkom. He was, eventually, sentenced to thirty six (36) months correctional supervision in terms of Section 276(i)(h) of the Criminal Procedure Act 51 of 1977 (as amended). His application for leave to appeal against conviction and sentence was refused by the Court *a quo* on 4 June 2013. The Appellant was granted

petition against conviction and sentence by members of this court on 31 October 2013. He now comes before us on appeal against both conviction and sentence.

[2] The Appellant's grounds of appeal, amongst others, are the following:

- (i) The learned Magistrate committed misdirection by not evaluating the evidence in totality on merits. She did not make credibility findings on the evidence tendered by both the State and defence;
- (ii) The court did not reject the version of the accused as false and so improbable that it cannot be accepted;
- (iii) It failed to deal with material contradictions between the complainant and his witnesses in relation to the circumstances surrounding the assault and the assault itself; (record page 11, lines 9 – 11; record page 12, lines 1 – 6) (record page 58, lines 9 – 14; record page 95, lines 22 – 25; record page 96, lines 1 – 4);
Regarding assault itself (record page 12, lines 5 – 6; record page 84, record page 128, line 12 – 16);
- (iv) It is therefore submitted in light of the above that the State failed to prove the guilt of Appellant beyond reasonable

doubt and consequently conviction herein stands to be set aside.

[3] Appellant's grounds of appeal regarding sentence are as follows:

- (i) the courts of appeal may not interfere with the imposed sentence, unless it can be shown that the court *a quo* misdirected itself or that the sentence imposed is shockingly inappropriate;
- (ii) The personal circumstances of the appellant were recorded in mitigation of sentence;
- (iii) The court *a quo* failed to properly consider that the sentence imposed curtails the freedom of movement of the appellant, especially if regard is had on the conditions of the sentence;
- (iv) Sentence should be set aside as it is disproportionate to the offence, the interests of the community and those of the appellant.

[4] The Respondent supports the conviction and sentence. The following grounds on merits were submitted:

- (i) The onus in a criminal case is for the State to prove the accused's guilt beyond reasonable doubt not every flimsy doubt;
- (ii) The court *a quo* did not make any findings regarding credibility of State and defence witnesses (record page 188 – page 191);
- (iii) The court *a quo* based its judgment on video material seen by the magistrate (record page 189, line 7 – page 191, line 1);
- (iv) According to the court *a quo*, video evidence corroborates the version of the complainant even though the video is inaudible (page 189, line 7 – 14);
- (v) According to the court *a quo*, evidence of the complainant that Mr Molefi warned the appellant to leave the complainant alone is to a certain extent corroborated by video evidence;
- (vi) It is not clear whether the court *a quo* agreed with the evidence of the complainant regarding what happened outside Nando's (record page 191, line 2-5)

"Outside Nando's I do not have much since I did not see anything in the footage, even if it is there it means my computer is not eligible

to see anything outside Nando's since I didn't see anything that far."

- (vii) Even though the state conceded that there were differences in the evidence of the state witnesses, it was not material to the extent that the evidence would be rendered not credible.
 - (viii) Looking at the evidence in totality, according to the court *a quo* it was clear that the appellant was the person that started the fight;
- [5] The Respondent submitted that even though the court *a quo* did not mention in the judgment the seriousness of the offence, interests of the community and personal circumstances of the appellant, according to the correctional report and the fact that the appellant is not a first offender, it was clear from his past record that he has anger management problem. In the circumstances, the respondent supports the sentence.
- [6] At the commencement of the appeal hearing Mr Nkhahle, appearing for the appellant, successfully requested leave to depart from the notice of appeal and his heads of argument to deal with the manner in which the video footage was dealt with by the trial court. The State supported him in that regard with Ms Giorgi also expressing her reservations on the admissibility of the court's observations on the footage reflected for the first

time in the judgment without the parties having had the opportunity to comment thereon.

- [7] The record shows that there were issues in relation to the manner the video was introduced in court. Clearly there were issues in dispute regarding what was in the video. (page 28 paragraph 8 – 19) of the record, (page 29 paragraph 10 – 11), (page 31 paragraph 19 – 20). There were issues of procedure of bringing evidence raised, some by bringing evidence raised, some by the court, some related to authenticity of documents, (page 41 paragraphs 4 – 10).
- [8] The appellant clearly raised concerns regarding the video footage. He was never provided with the video footage beforehand (page 49, paragraph 16 – 20) (page 50 paragraph 1 – 5, paragraph 20 – 25). He even stated that if he had a lawyer, it would have requested the video and verified it, (page 50 paragraphs 5 – 10).

Indeed, the court asked the appellant if he wanted to view the video footage as well. One would have thought that the appellant as an accused was entitled to view the evidence to be used against him. In any event the court advised that it will allow him opportunity to view the footage. (page 50, paragraph 15 – 20 of the record).

In page 51, paragraphs 21 – 25, the appellant apparently had a chance to view the video footage. It's not clear from the recording where it took place but not in an open court as one would expect. Clearly from the record, page 54 paragraphs 10 – 19, the video was before court but the laptop did not take the programme, and obviously could not be viewed. Pages 119 – 123 of the record depict evidence of the video footage viewed by appellant and witness not the court. At page 119 paragraphs 17 – 22, clearly there is a dispute as to what is in the footage as against evidence of witness before court.

It is also clear from the record that at this relevant time, the magistrate had not viewed the video footage, page 120, paragraphs 23 – 25).

- [9] The admissibility of the video at the relevant time was not established (page 121, paragraph 15 – 21). At page 133, paragraph 1 – 10, the witness conceded that he copied the video, if he could be allowed to play it, he could be able to confirm if indeed it was the copy he made or not.

Instead of allowing him to view it, with the leave of the court, it's given to the witness to merely look and see it. Unfortunately, the laptop was not taking the programme. The video footage was accepted as evidence and handed in.

Interestingly, at page 134, page 10 – 25, of the record; particularly in cross-examination, the appellant questions the manner the video was taken. He wanted to know what specific instructions were given to the witness when the video footage was made. The answer is not satisfying. The court at page 136, paragraph 8 – 10, advised that it will view the footage and will give it back once it's done with it.

- [10] In the first line of the judgment (page 188, paragraph 1), the magistrate concluded that “this was one of the clear cases” at page 189, paragraph 7 – 25, to page 190, paragraph 7 – 25. She based her judgment on the video footage that she watched and analysed on her own. At page 191, paragraph 2 – 5, she conceded that she did not see some aspects of the footage especially outside Nando's because her computer was not legible to see those aspects. She went on in spite of the above to conclude that the state proved that the version of the appellant was improbable hence the return of the guilty verdict.
- [11] **Hiemstra's Criminal Procedure**, ss221 – 222: on video evidence **“Video material is real evidence”**. The court must record its observations. In video recordings the images are shown to the court and the legal representatives to give them the opportunity to question the witness' observation. Unfortunately, the record *in casu* does not show the court recording any observations as evidence. Instead, the appellant raised issues about the video footage. In the case of **S v**

Mohase (1) SACR 185 (O) at 191 (A), it was confirmed that the court must record its observations.

- [12] In **Newell v Cronje & Another** 1985 (4) SA 692 (EC) at 698 A-B, it was held that where a presiding officer makes personal observation, they must be conveyed to the parties who then have the opportunity of agreeing with or challenging such observations. The magistrate in the case at hand did not convey her observations. As correctly pointed out by counsel on both sides, her observations are only set out in and form the basis of the judgment (See page 189, paragraph 11 – 25 and page 190, paragraph 1 – 5).

“In the case of Newell (supra) it was held that it was clearly her duty to convey her views to the parties either by way of placing such views formally on record or by questioning the witness. She did not do so in this case at hand.”

- [13] In the case of **Kruger v Ludick** 1947 (3) SA 23 (A), the court in setting the procedure to be adopted when dealing with real evidence (exhibits, video footage, finger prints and inspections in loco) asked, the following:

“What precisely is the purpose of and value of a presiding officer’s observations of ‘real evidence’ whether it be in respect of exhibits tendered in court, or of objects or places visited by the presiding officer in loco? It was held that such observations may be for the purpose solely of enabling the presiding officer ‘better to

comprehend the testimony’ without adding anything to the evidence already adduced viva voce by the witness. It may provide ‘an even more direct and satisfactory source of proof.’”
(Wigmore on evidence).

The court went on to say

“Therefore, presiding officer should, and usually does, record his/her observations of exhibits tendered in court, or arising from an inspection in loco and invites both parties to comment on his findings. If not, objected to, such findings became evidence by consent of the parties, and may properly be relied upon without being testified to on oath.”

The record shows no such procedure taken by the court. This all happens against the backdrop of an unrepresented accused. The court ought to have assisted the accused during this process.

[14] In paragraph F (*supra*)

“A presiding officer is usually in no better position than a witness accurately to form an opinion or impression, ... his judicial training should both enable and cause him to evaluate his own impressions with care, and to recognize that he may be equally as fallible as a witness maybe ...”

According to the magistrates impression, “this was one of the clear cases” (see the record, page 188, paragraph 1 – 5).

The court continued to note that

“It is proper for the presiding officer in evaluating such evidence (exhibits/inspection/real evidence) to bear in mind that his/her own observations have not been and cannot be tested by cross-examination.”

In Kruger, *supra*, the court concluded that

“Clearly from the above authorities, the presiding officer’s personal observations must be conveyed to the parties who then have the opportunity of agreeing with or challenging such observation.”

The appellant was never afforded the opportunity, instead he was told of the evidence seen by the magistrate (see page 189, paragraph 8 – 25 and page 190 – 191 paragraph 5.

- [15] I am of the view that the procedure adopted by the magistrate herein was irregular. It is clear from the introduction of video evidence, footage viewed outside court and the magistrate viewing it alone to such an extent that she made her own observations. She carried on using those observations in her judgment without first having noted the same and advised the other role players especially the appellant. The appellant was never given the opportunity to respond or challenge the observations. Clearly, the magistrate was being subjective when noting her observations.

[16] In conclusion, I am of the view that the actions by the magistrate were prejudicial to the appellant to such an extent that the prejudice led to a guilty finding. This irregularity can only be corrected by setting the conviction and sentence aside. This was not a clear case as the magistrate believed. The state on the evidence properly before court could not prove its case beyond reasonable doubt. The appellant has contested some aspects of the video footage as well as the stage at which it was availed to him which *prima facie* could not reasonably possibly afford him a chance to prepare his case properly and timeously. The state failed to prove its case against the appellant.

ORDER

[17] The appeal succeeds.

[18] The conviction and sentence are set aside.

N.P. JAJI, AJ

I concur.

L. J. LEKALE, J

On behalf of Appellant:

Adv R.J. Nkhahle
Instructed by:
MB Mogotsi Attorney
WELKOM

On behalf of Respondent:

Adv S Giorgi
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

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