

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A24/2013

In the matter between:

SABATA MOSES MODISE

Appellant

and

THE STATE

Respondent

CORAM: DAFFUE, J et LEKALE, J

HEARD ON: 16 SEPTEMBER 2013

JUDGMENT BY: LEKALE, J

DELIVERED ON: 26 SEPTEMBER 2013

[1] On the 13th June 2012 the appellant, who was legally represented, was convicted on 2 counts of attempted murder by the Regional Court at Bloemfontein. He was, thereupon, sentenced to 6 years direct imprisonment on the first charge and 3 years, which was conditionally suspended in whole, on the 2nd count. He feels aggrieved by the convictions and sentences and now approaches us on appeal against the same with leave granted by the trial court.

- [2] On convicting the appellant on the 1st charge the court below accepted the complainant's version and rejected the appellant's version as improbable, fabricated and not reasonably possible. The trial court, further, *inter alia*, found that the wounds inflicted on the complainant as a victim were so placed that they were potentially life threatening. In respect of the 2nd charge the trial court accepted the evidence of the complainant and her nephew as credible, reliable and satisfactory and rejected the appellant's version as well as the evidence of his witness as not acceptable.
- [3] When imposing the impugned sentences the court below found that the offences were of such a serious nature as to warrant a deterrent and preventive sentence which ensures the removal of the appellant from society while, at the same time, allowing him to rehabilitate.
- [4] In the notice of appeal and the heads of argument filed for and on his behalf, the appellant assails the conviction on the first charge on the ground that he only exceeded the bounds of self-defence and is, as such, only guilty of assault with intent to cause grievous bodily harm. In respect of the second charge the appellant contends that the complainant contradicted her nephew and that the court below erred in finding that the wound she sustained was life threatening without any admissible evidence to that effect being before her. It is, further, submitted by Mr Bantjes on behalf of the

appellant that the trial court erred in finding that the appellant had the intention to kill the complainant and, further, in not accepting the appellant's version as reasonably possibly true.

- [5] The state supports the conviction on charge no 1 as well as the sentences but submits that the conviction on the 2nd charge cannot be sustained in the light of the injuries sustained, among others. In Ms Bester's view the available evidence established assault with intent to cause grievous bodily harm as opposed to attempted murder. She submits that the relevant conviction should be changed accordingly while the sentence should be confirmed as being appropriate for assault with intent to cause grievous bodily harm.
- [6] The nature and gravity of the crimes involved are apparent from the evidence of the complainant and her nephew who corroborated her evidence in material respects with regard to the second charge. The complainant testified that following years of turbulent, violent and abusive love relationship with the appellant, on the morning of the incident giving cause to the first charge viz. 10 February 2011, she called the appellant to inform him that she was terminating the relationship and the latter was not happy therewith although he only mumbled that they would meet. She, later that morning, accompanied the police to the appellant to serve an interim protection order on him. Later that very day, the appellant accosted her in the street on her way home from the shop and stabbed her with a

kind of hunting knife, some 20 – 25cm in length, 5 times, once at the back of the neck, the forehead, in the chest, on the shoulder and on the forearm without any cause therefor. She received medical attention at the hospital as an outpatient and the stab wounds were sutured. She laid a charge against the appellant but he was not arrested until the 21st August 2011 with the police maintaining that they could not get hold of him. On the 19th August 2011 she was in the company of her nephew, on her way home from the family planning clinic at Pelonomi Hospital, when they came across the appellant in the street. The appellant requested to talk to her and required her nephew to step aside for that purpose. She responded in the negative, whereupon, the appellant pulled out the very same knife with which he earlier stabbed her and wanted to attack her but she retreated. Her nephew, thereupon, intervened pointing out that he was aware of the appellant's belligerent disposition and advised her to oblige and accompany the appellant to his place. En route to the appellant's residence she attempted to run away but her nephew once again cautioned her against doing so. Inside the appellant's home the latter subjected her to questioning about her alleged love relationship with one Shadrack and, when she disputed the existence of such a relationship he got angry and pulled out the knife and stabbed her on the forehead. Her nephew intervened successfully.

[7] The appellant's version on the first charge was that after

service of the protection order on him the complainant called him to a clandestine meeting at which they, eventually, struggled over her cell phone after she had acted suspiciously while talking to someone over the same. The complainant grabbed him by the private parts demanding that he let go of the mobile phone but he resisted. The pain got unbearable and he pulled out his pocket knife and scratched the complainant on the neck, hand and shoulder all in endeavour to ward off the attack on his private parts. He knows nothing about the alleged attempt on the complainant's life on the second occasion because on that day he only accompanied the complainant to the family planning clinic and her nephew was not with them. No violent interaction took place between them and, after the altercation in charge number 1, they had a normal intimate relationship and even exchanged sexual favours.

- [8] The factual findings of the trial court are presumed to be correct unless and until they are shown, with reference to recorded evidence, to be wrong. The acceptance, by the trial court, of the evidence of a witness and its conclusions on the same are presumed to be correct absent misdirection on its part. The appellant must convince the court of appeal that such acceptance and conclusions are wrong on adequate grounds and not merely by showing that there was a reasonable doubt that the trial court was correct. (See **S v Hadebe and Others** 1997 (2) SA 641 (A) and **S v Francis**

1991 (1) SACR 198 (A) at 204c – e.)

- [9] Counsel on both sides are correctly in agreement that reliance by the trial court on evidence based on medical notes which were not before the court is misplaced and the state, through Ms Bester, contends that the location of the various injuries on the complainant's person and the nature of the weapon used to inflict them clearly indicate that the appellant was intent on killing the complainant.
- [10] A perusal of the record confirms the trial court's finding that the appellant was self-contradictory and that he, further, contradicted his plea-explanation. We are, further, convinced *ex facie* the record that the appellant's version on the 1st count was inherently improbable and defied human experience. It is simply alien to human experience that a person experiencing excruciating pain associated with hostile pressure to his private parts would have the time and comfort to weigh up the pros and cons of his reaction to such an attack by deliberately selecting weapons with which to meet such an attack, choosing areas at which to strike and measuring the force with which to meet such an attack in order to protect himself. One reasonably expects a victim of such attack to react instinctively, trying to rid himself of the cause of the pain and not to look around intent on reaching the nearest stone in order to use it as a weapon against his attacker.

- [11] We are, further, not persuaded that the contradictions relied upon to assail the conviction on the second count are material. It is clear from the record that the complainant's nephew corroborated her evidence with regard to how, when and where the appellant struck her with a knife. As correctly conceded for the state, the totality of evidence, however, does not sustain the conclusion that the appellant had the intention to kill the complainant when he stabbed her once in the head. To this extent the court below misdirected herself in returning a verdict of guilty to attempted murder when the evidence established an intent to cause grievous bodily harm.
- [12] There is nothing before us to show that the trial court misdirected herself in her factual findings and in her evaluation of the evidence as well as her conclusions with regard to the witnesses on both counts. We are convinced that the appellant's versions on both counts were correctly rejected as not reasonably possibly true.
- [13] The appellant, further, effectively attacks the sentence imposed with regard to the 1st count on the basis that he is a father of four dependent children, had a good income at the time of his arrest, spent considerable time in custody as awaiting trial inmate and his last brush with the law was in 1988.
- [14] The state, on its part, maintains that the sentences are

appropriate regard being had to, *inter alia*, the gravity of the offences concerned and the fact that the complainant had secured a protection order against the appellant which did not scare him off. Ms Bester, further, points out that the sentence in respect of the 2nd count creates the impression that the court *a quo* moved from the footing that it was punishing the appellant for assault with intent to cause grievous bodily harm as opposed to attempted murder. She, thus, submits that the sentence in question remains appropriate even in the event of the verdict being changed to guilty to assault with intent to cause grievous bodily harm.

- [15] Sentencing is the preserve of the trial court and we, sitting in the appellate mode, can only interfere with the sentence imposed where the trial court did not exercise its discretion reasonably or the sentence is grossly inappropriate or disproportionate. (See **S v Pieters** 1987 (3) SA 717 (AD).)

- [16] We are not persuaded by the material before us that the trial court did not strike a healthy balance between the personal circumstances of the appellant as the accused, the gravity of the offences and the interests of the society. In fact we are in effective agreement with the state that the fact that the offence in charge number 1 was committed shortly after the appellant was served with the protection order is aggravating and deserved special attention, in the form of stiff sentence, from the trial court. The offences in the instant matter make a

mockery of such a protection order and are, in fact, indicative of the contempt the appellant has for the law.

ORDER

[17] The conviction in respect of charge number 1 and the sentences are confirmed.

[18] The conviction in respect of charge number 2 is set aside and in its place and stead is substituted the following:

“Ad charge number 2:

The accused is found guilty of assault with intent to cause grievous bodily harm.”

L. J. LEKALE, J

I concur.

J. P. DAFFUE, J

On behalf of appellant:

Adv. B. L. Bantjes
Instructed by:
Kramer Weihmann & Joubert Inc
BLOEMFONTEIN

On behalf of respondent:

Adv. A. Bester
Instructed by:
The Director: Public Prosecutions
BLOEMFONTEIN

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