

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A287/2010

In the appeal between:-

ITUMELENG SHABAN MAJA

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, R *et* DAFFUE, J

HEARD ON:

6 FEBRUARY 2012

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

5 APRIL 2012

[1] On 29 March 2010, the appellant Itumeleng Shaban Maja was convicted in the Magistrate's Court, Botshabelo on one count of assault with the intention to do grievous bodily harm. On the same day, he was sentenced to 6 years imprisonment in accordance with the provisions of section 4(1) of the Dangerous Weapons Act 71 of 1968.

[2] After having unsuccessfully applied for leave to appeal to the

court *a quo*, a petition was filed with the High Court whereupon leave to appeal was granted against both conviction and sentence on 11 August 2010.

[3] Nine grounds of appeal are directed at the conviction of appellant, primarily against the finding by the court *a quo* that appellant was correctly identified as the perpetrator. The appellant appeals against the sentence on the basis that a term of 6 years imprisonment is shockingly inappropriate and that the court *a quo* overemphasised the gravity of the offence and interest of the community and neglected to properly take into account appellant's youth and the fact that he was a first offender.

[4] In his Heads of Argument Mr J D Reyneke, who appeared on behalf of the appellant, referred to the relevant case law pertaining to identification and although he indicated that it was his instructions to request that the conviction be set aside, he eventually in oral argument conceded that the conviction was in order and that he could not make any sensible submissions in an attempt to persuade us to uphold the appeal in this regard. His concession is commendable in

the light of the evidence summarised in the next paragraph.

[5] It is prudent to briefly refer to the following to indicate why I am of the view that appellant's conviction is in order.

5.1 Prior to the attack on complainant, he and the appellant were in an altercation in the tavern;

5.2 Complainant accused appellant of trying to rob complainant's sleeping friend, Mr Pepenene who testified as state witness;

5.3 All tavern guests and appellant, complainant and Mr Pepenene in particular consumed liquor during their visit to the tavern;

5.4 The aforementioned guests left the tavern together at about 2 o'clock in the morning when it closed for business;

5.5 Prior to the attack on complainant he and appellant knew each other and appellant knew that complainant resided in G section;

5.6 Complainant was attacked in front of his house soon after the tavern closed and the guests left and there was sufficient light and opportunity for complainant to identify his attacker;

5.7 Nothing has been taken from complainant's person and the attack was clearly not undertaken to rob, but on all probabilities intended as revenge or retaliation. The attack might have continued, was it not for the approach of the state witness and complainant's friend, Mr Pepenene.

5.8 An issue was made in the notice of appeal of the lack of certain information contained in the complainant's written statement and his failure to identify the perpetrator, but nothing turns on this end. No adverse finding can be made in respect of the complainant's credibility. The statement was not properly proven, not handed in as an exhibit and not read out fully into the record in order to comprehensively consider and deal with it in its context and any alleged differences between the statement and complainant's testimony in court.

[6] Mr Reyneke argued that the sentence of 6 years imprisonment should be set aside and replaced by a sentence of 3 years imprisonment. He relied on the unreported judgment of **S v THUNZI**, 2010 JDR 0901 (CC), a

judgment of the Constitutional Court now reported in 2011(3) BCLR 281 CC, and submitted that the Court found that no prescribed minimum sentences were applicable in terms of section 4 of The Dangerous Weapons Act 71 of 1968. Consequently he submitted that the court *a quo* transgressed its jurisdiction of 3 years imprisonment contained in section 92 of the Magistrates' Court Act 32 of 1944. Mr Strauss, who appeared on behalf of the State, submitted that section 4 of The Dangerous Weapons Act 71 of 1968 was declared unconstitutional and he agreed with appellant's legal representative that a sentence of 3 years imprisonment was an appropriate sentence. Therefore he argued that the appeal should succeed and the sentence of 6 years imprisonment be replaced with a sentence of 3 years imprisonment.

- [7] It is necessary to make certain remarks in respect of the **THUNZI** judgment *loc cit.* The Constitutional Court did not declare section 4 of The Dangerous Weapons Act 71 of 1968 unconstitutional as submitted. The Court specifically dealt with section 4 of The Dangerous Weapons Act 71 of 1968 (Transkei) and made the following finding:

- “1. It is declared that Government Notice R409 published under Government Gazette No 4601 on 7 March 1975 is inconsistent with the Constitution and hence invalid, and is set aside.
2. This order does not invalidate any conviction or sentence in terms of The Dangerous Weapons Act 71 of 1968 (Transkei), unless either an appeal from or a review of, the relevant sentence is pending, or the time for noting an appeal has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a competent court.”

Further directions were made by the Court pertaining to written submissions to be filed by the Speaker of the National Assembly, the chairperson of the National Council of Provinces and the Minister for Justice and Constitutional Development, *inter alia* as to whether or not the continued operation of The Dangerous Weapons Act 71 of 1968 of Transkei, Bophuthatswana, Venda and Ciskei is unconstitutional and should be struck down. In accordance with the Court's directions a further hearing was to be held on the 11 November 2010 to consider the above, but to the

best of my knowledge no judgment has been pronounced on the issue.

[8] Although appellant made use of a dangerous weapon and attacked the complainant in a brutal manner, I am of the view that the attack was not so severe that it could be regarded as a murderous attack as found by the court *a quo*. In saying this, I am acutely aware of the fact that one or more of the wounds sustained by complainant might have caused his death and that complainant was rather fortunate. There is nothing on record to indicate that the injuries sustained were life-threatening and/or that he suffered any serious consequences as a result of the attack. The appellant is a first offender and this should have carried more weight *in casu*.

[9] Sentence is pre-eminently a matter for the discretion of the trial court and an appeal court is only entitled to interfere with a sentence where there has been a material misdirection by the trial court or when the sentence imposed is shockingly and startlingly inappropriate. For the reasons mentioned earlier the trial court did not achieve a judicious balance

between all relevant factors and the sentence is also shockingly inappropriate. I am of the view that we should accept the submissions of both legal representatives and consequently I would dismiss the appeal in respect of the conviction, but uphold it in respect of the sentence. The following orders should therefore be made:

1. The appeal against the conviction is dismissed.
2. The appeal against sentence is upheld.
3. The sentence of the court *a quo* is set aside and substituted with a sentence of 3 years imprisonment.
4. The sentence is anti-dated to 29 March 2010.

J.P. DAFFUE, J

I concur and it is so ordered.

C. VAN ZYL, J

On behalf of appellant: Mnr. J D Reyneke
Instructed by:

Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. M. Strauss
Instructed by:
Office of the Director of Public
Prosecutions
BLOEMFONTEIN

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