

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal no: A36/2006

MOSES SHEMALE

Appellant

and

THE STATE

Respondent

CORAM:

MALHERBE, JP *et* MILTON, AJ

JUDGMENT:

MILTON, AJ

HEARD ON:

21 AUGUST 2006

DELIVERED ON:

31 AUGUST 2006

[1] The appellant, a 28 year old man, was found guilty on the 20th July 2004 of assault with the intent to do grievous bodily harm in the Magistrate's court at Hennenman, and was sentenced to a fine of R600 or 30 days imprisonment with a further 5 months imprisonment conditionally suspended for 4 years. The appellant was charged with a co-accused who was also found guilty of assault with the intention to do grievous bodily harm, however not with the

same object as the appellant.

[2] The appellant represented himself during his trial and the presiding magistrate, Mr. I.C.N. de Villiers, furnished no recorded reasons for the conviction or sentence.

[3] The appellant thereafter lodged an application for leave to appeal, to the court *a quo*, which was refused on the 2nd September 2004.

[4] The appellant thereafter lodged a petition for leave to appeal to the above court against the conviction and sentence. The leave to appeal against the conviction only was granted on the 15th August 2006 under case number P198/04.

AD MERITS

[5] The basis of the appellant's appeal is that the State could not prove beyond reasonable doubt the identity of the

appellant.

[6] It needs to be mentioned that the charge sheet reflects that both the applicant and his co-accused were charged with assault with the intent to do grievous bodily harm in that they assaulted the complainant by stabbing him with bottles. The court found on the evidence however that the applicant in fact assaulted the complainant with a panga. The charge sheet was never amended before sentence.

[7] The complainant, Aaron Mofokeng, was very seriously injured on the 28th February 2004 after allegedly being assaulted with a panga and a broken bottle. He received serious wounds to his face and his back for which he received stitches and was hospitalised. He testified that he was at a tavern where an argument broke out with the appellant earlier the evening. He admitted to being drunk that night. When he decided to leave the tavern he was chased by a crowd of people, all known to him, and whom

he saw clearly. They caught up with him, whereafter the applicant hit him with a panga once in the face and the co-accused stabbed him with the bottle. The people in the group also assaulted him. A woman thereafter arrived on the scene and stopped the fight. He could see well since there were lights in the street.

[8] The second state witness thereafter testified that she saw a group of people assaulting a person. There were no lights in the vicinity but she went up to them and chased the people away. She found the complainant bleeding on the scene. She saw no weapons except a broken bottle. No one in the group had weapons. She did not see the appellant there.

[9] The appellant's evidence was that he admitted having had a fight with the complainant earlier in the evening with fists. He did not injure the complainant, he only heard later from the tavern owner what happened after he had left the tavern.

[10] The appellant's co-accused, Simon Maloka, gave evidence that he saw the complainant and the appellant fighting earlier but that the appellant left the tavern. He thinks he went home. The complainant left the tavern but came back with a pair of scissors and started throwing everybody's beer out of their bottles whereafter the people at the tavern chased him. He denied having been part of the chase or having assaulted the complainant.

[11] The appellant called two witnesses. The first witness testified that the appellant had a fight with the complainant earlier in the evening and then they left the tavern together with other people. The second witness saw the appellant and the complainant fighting but that the tavern owner stopped the fight. The complainant left only to return with a scissors and a stick. This witness said that the complainant was looking for the appellant and he was aggressive. Complainant was later chased from the tavern.

[12] Although the presiding officer recorded no reasons for finding the accused guilty, it can be accepted that his reasons are the same as his reasons for refusing the appellant's leave to appeal. He was of the opinion that:

12.1 the complainant identified the appellant as the

person who assaulted him with the panga;

12.2 since the appellant was involved in the first fight with the complainant it was “very probable” that the appellant also took part in the fight outside the tavern;

12.3 the complainant was not a single witness and his version is corroborated by the second witness who saw a group of people assaulting the complainant.

12.4 the defence witnesses do not take the matter further. They do not know if the accused took part in the assault;

12.5 the appellant did not dispute parts of the evidence which is to his detriment.

[13] Where there has been no misdirection of fact by the trial Judge, or magistrate, the presumption is that the conclusion is correct and the Appellate Court will only reverse the judgment when it is convinced that it is incorrect.

[14] This may happen where the presiding officer of the court *a quo* may have misdirected on the fact; where the reasons are either on the face value unsatisfactory or the record might show them such or show that some facts or probabilities were overlooked. See **R v DHLAMAYO** 1948 (2) SA 677 A and **S v FRANCIS** 1991 (1) SALR 198 A at 204 D.

[15] After considering the facts placed before the court *a quo* read with the presiding officer's reasons I cannot, with respect, agree with the presiding officer's reasons for the conviction of the appellant.

[16] The State must prove beyond reasonable doubt that the appellant assaulted the complainant as reflected in the charge sheet. The test is not based on probabilities.

[17] It is common cause that:

17.1 the complainant was drunk on the night of the event.

17.2 the appellant and the complainant had had an argument earlier in the evening.

17.3 a crowd of people chased the complainant a little later on in the evening, caught up to him whereafter

he was very seriously injured.

[18] The complainant avers that the appellant was in the crowd of about 20 people who he can all recognise, and who all assaulted him. Appellant assaulted him with a panga once. This evidence is not corroborated by any other witness, neither the second State witness, nor any of the witnesses called by the appellant.

[19] The second witness could not identify the appellant at the scene of the assault and neither did she see a panga at the scene, only a broken bottle which correlates with the charge sheet.

[20] For all practical purposes, the complainant is then a single witness, specifically regarding the question of identity and his evidence must be evaluated with the utmost caution.

[21] The evidence of the appellant is that he left the tavern after having a previous physical encounter with the complainant. The two witnesses called by the applicant corroborate his version that he left the tavern and did not return and that the complainant was the aggressor when

he returned with a scissors and proceeded to throw out the other visitors' drinks and was thereafter chased.

[22] It is the duty of the court to evaluate both the case for the State and the defence, not in isolation but together. **S v RADEBE** 1991 (2) SACR 166 (T).

[23] There is serious doubt that the complainant could correctly identify the appellant at the incident where he was severely injured since he was not only drunk, but also surely in an emotional state, since he had specifically returned to the tavern armed and with a motive to fight, whereafter he was chased by an aggressive crowd which must have caused some sort of panic that could have clouded his cognitive observation. The doubt that I have regarding the accuracy of the identification of the appellant is strengthened by the fact that no other witness either for the State or the defence, placed the appellant on the scene, and neither was a panga seen in the vicinity of the scene of the crime.

[23] Although a great amount of sympathy lies with the complainant who was severely injured, the State could not prove beyond reasonable doubt on the facts placed before the court that the appellant played any part therein, and the appeal must therefore succeed.

[25] The conviction and sentence are therefore set aside.

D. MILTON, AJ

I concur.

J.P. MALHERBE, JP

On behalf of appellant:

R.J. Nkhahle
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv. D.W. Bontes
Instructed by:
The Director:
Public Prosecutions
BLOEMFONTEIN

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