

SOUTH AFRICA / JUDGMENT

Jacobs and Another v S (Leave to Appeal) (CA 31/2020) [2023] ZANWHC 60 (23 May 2023)

[2023] ZANWHC 60

COURT

North West High Court, Mafikeng

BEFORE

Reddy, Hendricks

CASE / FILE NUMBER

CA 31/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NO: CA 31/2020

In

the matter between:

RUAN
JACOBS
FIRST APPELLANT
MARTINUS
JACOBS
SECOND APPELLANT
And
THE
STATE
RESPONDENT
APPEAL

JUDGMENT

REDDY AJ (HENDRICKS JP concurring)

Introduction

[1] A trier of fact fulfils an important role in the life of a criminal trial. A number of adjectives have been used to identify the role of a judicial officer. What is however incontrovertible is that a judicial officer must ensure that a criminal trial from its genesis to its ultimate conclusion is carried out with the notions of fairness and transparency within the framework of constitutional ideologies. Back in 1928, the following was stated as regards the role of a judge in *R v Hepworth* 1928 AD 265 at 277:

“A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognized rules of procedure but to see that justice is done”.

[2] The recognized rules of procedure has evolved since the codification of fair trial rights as evinced in section 35 of the Constitution. The appeal before this Court delves into the factual findings made by the court a quo as well as procedural nuances that coheres strict observance to ensure uniform and certainty in criminal procedure. Disappointingly, this trial presided over by Magistrate Dikgopo is a textbook example of what a trier of fact should avoid.

[3] On 24 April 2018, a Tuesday, Mr. Toko Jan Manyana (“TJM”), and his mother, Ms. Matabasi Sophie Manyana (“MSM”) were en route to Coetzee Winkel, Wilgeboom, to purchase supplies. Unbeknown, to TJM and his mother, their visit to the Coetzee Winkel, where his mother regularly shopped on credit, would result in both being complainants on a number of charges.

[4] Flowing from allegations proffered by TJM and MSM, the appellants stood trial at the Potchefstroom Magistrate’s Court. Given the inept drafting of the charge sheet it would make for easy reading if the various charges are set out in detail.

[5] Count 1 (First Appellant)

Crimen Injuria

That the accused is guilty of the crime of crimen injuria in that on or about the 24 April 2018 and at or near Coetzee Winkel Wilgeboom in the District Thlokwe, the accused did intentionally and unlawfully injure insult and impair the dignity of Toko Jan Manyana by referring to him as a “kaffer mannetjie “and the state is alleging common purpose. (My underlying)

Count 2 (Both Appellants)

That the accused are guilty of the crime of assault with intent to do grievous bodily harm in that on or about the 24 April 2018 and at or near Coetzee Winkel Wilgeboom in the District of Thlokwe, the accused did unlawfully and intentionally assault Toko Jan Manyana with intent to inflict grievous bodily harm by strangling him, choking him with a device and spraying him with pepper-spray and the state is alleging common purpose. (My underlining)

Count 3 (Both Appellants)

That the accused are guilty of the offence of contravening the provisions of section 126(b) read with sections 1, 103, 121(a) section 121 read with Schedule 4 and section 151 of the Firearms Control Act 60 of 2000, pointing of anything which is likely to lead a person to believe that it is a firearm, in that on or about the 24 April 2018 and at or near Coetzee Winkel, Wilgeboom in the district of Thlokwe the accused did unlawfully point anything which is likely to lead a person to believe that it is a firearm, antique firearm or an air gun to wit a BB gun at another person to wit Toko Jan Manyana without good reason to do so and that the state is alleging common purpose (My underlining)

Count 4 (Both Appellants)

That the accused are guilty of the crime of assault in that upon or about the 24 April 2018 and at or near Coetzee Winkel Wilgeboom in the district of Thlokwe the accused did unlawfully and intentionally assault Sophie Manyana by shocking her with a shocking device and the state is alleging common purpose. (My underlining)

Count 5 (Second Appellant)

That the accused is guilty of the crime of crimen injuria in that upon or about the 24 April 2018 and at or near Coetzee Winkel Wilgeboom in the district of Thlokwe, the accused did unlawfully and intentionally injure, insult and impair the dignity of Sophie Manyana by referring to him (should have read her) as a “kaffer meit.”

Count 6 (Both Appellants)

That the accused are guilty of offence of contravening the provisions of section 126(b) read with Sections 1, 103, 121 (a) Section 121 read with Schedule 4 and Section 151 of the Firearms Control Act 60, 2000. Pointing of anything which is likely to lead a person to believe that it is a firearm. In that on or about the 24 April 2018 and at or near Coetzee Winkel, Wilgeboom, in the district of Thlokwe the accused did unlawfully point anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an air-gun to wit a BB gun at another to wit: Sophie Manyana without good reason to do so and the state is alleging common purpose. (My underlining)

- [6] The appellants duly represented pleaded not guilty on 4 October 2018 in respect of the various counts applicable to each of them. Regarding the recording of the various pleas of not guilty, the manuscript endorsement by the Magistrate of the various counts was inelegant and was a recipe for confusion. This indeed proved to be so, when the verdicts were handed down. In order to capture the convictions and sentences handed down, I purposefully use the ipse dixit as per the trial court notwithstanding its legal vagueness.
- [7] On 24 October 2019, the following appears in the conclusion of the

judgement:

“In the premise accused I is found guilty as charged on count 1, which is crimen injuria, count 2 assault with intent to do grievous bodily harm and found not guilty and discharged in respect of count 3 and 6 which is pointing of anything which is likely to lead a person to believe it is a firearm. Accused 2 is found guilty as charged on count 2 assault with intent to do grievous bodily harm, count 3 and 6 are taken together as one which is pointing of anything which is likely to lead a person to believe it is a firearm and found guilty as well on count 5 which is crimen injuria. Accused 2 is found not guilty and discharged in respect of count 1, which is crimen injuria and count 4 which is assault.”

- [8] On 18 November 2019 the appellants were sentenced initially as follows:

“You are sentenced to three years imprisonment half of which is suspended for the period of three years on condition that you do not call any other black person kaffir anymore otherwise that sentence will be put into operation.”

(My underlining)

- [9] On resumption of the matter on the same day, a different prosecutor requested of the Magistrate to repeat the convictions of the appellants for the purposes of completing the face of the case docket. In response thereto the following sentence is digitally recorded:

“Three years imprisonment. All counts taken as one for sentence. Only one year is suspended for a period of three years on condition that you do not mention the k-word again against any other black person.” (My underlining)

- [10] On the face of the charge sheet, the following sentence is recorded in manuscript:

“Three

- (3) years imprisonment one of which is suspended for a period of three (3) years on condition the accused is not using the “k” word during the period of suspension. All counts taken as one for purposes of sentence.”*

- [11] I will revert to the question of sentence in my concluding observations.

- [12] An application for leave to appeal the convictions and sentence were made on 17 December 2019 in respect both appellants. On 23 December 2019 the Magistrate reasoned as follows in granting the appellants application for leave to appeal against the conviction and sentence:

“...Now the question before this Court, as to whether there will be a successful, there will be a prospect of successful or whether the accused will succeed in respect of their appeal in respect of both the sentence and conviction. Taking into account the, the evidence of the State during the, the trial this Court is still adamant that there will be no any other Court that will come to a different conclusion. This grounds that the defence is relying on may not pass through appeal.....However I am also of the opinion that taking into account the fact that the State did not oppose the application then the accused person can be granted such an opportunity to pursue their appeal. It is for that reason that I grant the application for leave to appeal.” (My underlining)

- [13] The test to be applied in applications for leave to appeal has recently been re-stated by the Supreme Court of Appeal in *S v Smith* 2012

- (1) SACR 567 (SCA) at para [7] as follows:

- [7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal. (My underlining)

- [14] The application of an incorrect legal principle is a misdirection which may have untold corollaries. I would caution that the correct test be applied going forward by the Magistrate to circumvent a miscarriage of justice.

Grounds of Appeal

- [15] In a singular notice of appeal both the conviction and sentence are assailed. Regarding the convictions, the following was contended:

The learned magistrate made the following erroneous findings of fact and/or law:

1. The learned acting magistrate erred and misdirected himself by finding that the prosecution succeeded in providing the Applicant's guilt above reasonable doubt and rejecting the Applicant's versions by finding “same to be equated to a pure fabrication blended with dishonesty”.
2. The learned acting magistrate further erred and misdirected by not finding that the Applicant's version of events was reasonably possibly true.

3. The learned acting magistrate further erred and misdirected by convicting both the Applicant's on the offences of "Crimen injuria" (Applicant 1 on count and Applicant 2 on count 5)

3.1 The learned acting magistrate erred and misdirected by not properly considering the fact that material discrepancies were evident from the testimony by the two witnesses into what was said, wording allegedly used, how many times same was allegedly uttered and to whom it was allegedly directed towards.

4. The learned acting magistrate further erred and misdirected himself by finding that the first and second state witness evidence to be "impressive, consistent and corroborative to one another on material aspects" this irrespective the fact that the learned acting magistrate also found that various contradictions were evident from both the witness in both their viva evidence and their written versions shortly after the alleged incident.
5. The learned acting magistrate should have found that the state witnesses' version were a fabrication and unreliable especially in light of their evidence solicited under and during cross examination e.g the amount of times "the firearm" was allegedly "cocked, the alleged "cartridges expelled therefrom", the alleged direction it was held, this compared to the functioning of an "air pellet" etc, and further, the discrepancies in the alleged "K.." wording and times allegedly used.
6. The learned acting magistrate further erred and misdirected by convicting both the Applicant's on the offence of "Assault with the intent to do grievous bodily harm" (Count 2) and also to find that the acted I "common purpose" and further the aforementioned:

6.1 The learned acting magistrate further erred and misdirected by finding that the form J88 and medical evidence corroborated the injuries and version by the witness, this irrespective the fact that the J88 and medical evidence did in fact not corroborate this version.

7. The learned acting magistrate further erred and misdirected by convicting the first Applicant on the offence of "assault" (Count 5) irrespective of the fact that no medical evidence existed to corroborate her version and was contradicted as to where the alleged injury was sustained e.g left vs right side as testified and reported during medical examination.

[16] Regarding sentence, the following grounds are raised:

8. The learned magistrate erred and misdirected by not exercising his discretion judicially, properly and in a balanced way with regard to sentencing.
9. The learned acting Magistrate respectfully erred by imposing direct imprisonment onto the applicant's in that: -

9.1 the sentences of direct imprisonment are shockingly inappropriate under the circumstances alternatively: -

9.2 the sentence imposed is totally out of proportion to the gravity or magnitude of the offence and is therefore startlingly inappropriate, alternatively: -

9.3 that a striking disparity exists between these sentences and the sentences that would ordinarily have been imposed by another court or a court of appeal.

10. The learned acting Magistrate respectfully further erred by not properly considering and evaluating the “cumulative effect” of the sentences imposed onto the appellant;
11. Relative to the appellant’s, the learned acting Magistrate failed to have sufficient regard to the youthfulness of the appellant’s and/or the fact that they were first offender;
12. The learned acting Magistrate respectively misdirected himself in imposing such a long term of direct imprisonment alternatively: -
13. The learned acting Magistrate erred and misdirected himself by not having proper regard to alternative sentencing options, prior to imposing a sentence of direct imprisonment.
14. The learned acting Magistrate respectfully further erred by over emphasizing the aspects of retribution and deterrence and not having proper regard to the aspect of individualization in sentencing.
15. The learned acting magistrate further erred and misdirected himself imposing two different and conflicting sentences onto the Applicant’s in that:

15.1 The learned acting Magistrate imposed a sentence of “Three

- (3) years imprisonment half suspended for the period of 3 years on condition that you do not call any other person “K” anymore” and thereby becoming functus officio.

15.2 The learned acting Magistrate then erred and misdirected by then later imposing and noting, a different sentence onto the Applicant’s and in effect taking his own sentence on appeal alternatively under review.

Discretion of an Appeal Court

- [17] On being seized with an appeal against the trial court’s findings of fact, this Court should take into account that the trial court was in a more advantageous position than itself to form a judgment due to it being able to observe the witnesses and was steeped in the atmosphere of the trial. (See Schmidt and Rademeyer, Law of Evidence 3-40) This Court will normally accept factual findings made by the trial court, unless there is some indication that a mistake was made. (See R v Dhlumayo 1948
- (2) SA 677 (A) at 696 and 705. The Supreme Court of Appeal summarised this issue as follows in S v Hadebe and Others 1997
- (2) SACR 641 (SCA) at 645e - f:

“Before considering these submissions it would be well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.”

[18] This salutary principle was restated in *S v Naidoo and Others* 2003

(1) SACR 347 (SCA) in paragraph [26]:

“In the final analysis, a court of appeal does not overturn a trial court’s findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.”

Background facts

[19] It would be sensible to set out the evidence in some detail given the number of charges. On the day in question, MSM arrived at her place of abode from the Department of Home Affairs. It was between 17h00 -18h00. On arrival, at home, MSM was informed that there was no mealie meal. It was then that MSM, requested TJM to accompany her to Coetzee Winkel. On arrival at the store, in the company of TJM, Rita Coetzee (“Rita”), referred to as the grandmother of both appellants), the owner of the store was provided with items that MSM required inter alia was paraffin. Rita indicated that there was no containers for the paraffin. Turning aside, MSM, noticed a container outside and requested TJM to retrieve the same. On presenting this container to Rita, she found it to be dirty and disposed of it. Rita requested TJM to collect a clean container at the back of the store. In the store Rita and MSM, continued discussing the SASSA Cards.

[20] Arriving at the back of the shop, a small dog’s attention was drawn to the presence of TJM. On collecting, the container for the paraffin, this dog started to bark. The appellants approached from a bakkie that they were cleaning. The estimated distance between the first and second appellants were about twenty paces (20) at this point, the first appellant remarked “hey kaffer mannetjie what do you want there?.” As both the appellants approached TJM, the first appellant then uttered “hier soek ons nie fokken swart mense.”

[21] The second appellant proceeded to position himself behind TJM, using his right arm, to secure the neck of TJM. The first appellant removed pepper spray, as TJM was wearing a hat, he removed it and covered his face, thereby cushioning the full effect of the pepper spray onto his face. When the hat fell down, the first appellant sprayed TJM for the second time. TJM’s attempts to loosen himself from the hold of the second appellant proved unsuccessful as the second appellant was

taller. The first appellant then removed a Taser from his pocket, stating “I will kill you.” As TJM was struggling to loosen the grip of the second appellant, the Adidas sandals that TJM was wearing got of his foot.

- [22] According to TJM, they moved to the shop side, in front of the people. Still attempting to break the grip of the second appellant, the first appellant used the Taser on the lower right part of TJM's neck. As TJM persisted in his attempt to break free, the first appellant shocked TJM for the second time on the right portion of his rib cage. Spotting MSM (his mother) TJM exclaimed "you are standing there your child is dying there outside."
- [23] TJM had loosened himself from the grip of the second appellant falling to the ground in the process. TJM got up and wanted to retaliate. The second appellant then went to the back of the shop. The first appellant entered the shop. Within hardly two to three minutes the second appellant reappeared with a firearm. TJM noticed the firearm in possession of the second appellant about 2 paces away, it was positioned in the right hand but pointing downwards. The second appellant cocked the firearm and a cartridge was ejected. The firearm was cocked for the second time, MSM pushed the second appellant away. The firearm was then cocked for a third time and pointed at TJM. The second appellant uttered "kaffer mannetjie ek sal jou kop uitmekaar uit blaas." MSM then positioned herself between TJM and the second appellant, in doing so MSM raised both her arms. The second appellant then addressing MSM remarked "kaffer meid ek gaan jou doodmaak." The second appellant was moving towards the door, still pointing the firearm at TJM. MSM was still positioned in front of TJM. At the door Rita and the first appellant were standing. Rita then took both appellants inside the shop and secured the burglar door with both appellants inside.
- [24] From behind the secured burglar gate, the second appellant cautioned MSM that if she contemplated registering a criminal case of the events that occurred, MSM would have to identify another shop to do her purchases. A further rider was added by the second appellant, this necessitated that TJM remove himself from the property for MSM to obtain the items that she had initially intended to purchase. It was at that point the TJM left the premises and went to wait at the four way stop.
- [25] MSM's account is strikingly contrasting and can be succinctly set out as follows: On entering the scene her first observation was that the second appellant was strangling TJM sort of shaking TJM, with the first appellant using a Taser on the body of TJM sort of shocking TJM, under the arms and on the neck, whilst TJM was trying to break loose. The first appellant had shocked TJM three times, twice on the ribs and once on the neck. MSM went into detail describing the Taser that the first appellant was using, the electric sound that it emitted and the reaction of TJM when the Taser was compressed against his body. MSM questioned the appellants as to what it is that they were doing?
- [26] MSM describes her intervention as follows:

“...it was at the stage when I arrived your worship that is when I posed the question to both accused and also asking what is it that they are doing. And at that stage I held my son on the back of his head, neck pulled him with clothes trying to separate them your worship. Just for clarity did you hold accused 1 and 2 by their clothes or accused 1 and your son, I got lost there a minute- I was pulling accused 2 and my son your worship. Not accused 1?- I was only pulling accused 1 accused 2 and my son and Jan my son And accused 1 was on the other side still holding the torch.”

Can you please repeat again to the Court how you tried to separate them? You said you held your son by his shirt. How did you try [intervention by interpreter?]. I then pulled both of them your worship accused 2 and accused 1 just behind their necks your worship and their clothes. But each time I would pull accused 2, accused 2 then pulled my son Jan. And when I tried to pull Jan my son he would also try to pull accused 2 your worship at the same time.

Just for clarity did you hold accused 1 and accused 2 by their clothes or accused 1 and your son I got lost there a minute- I was pulling accused 2 and my son Your Worship

Not accused 1? - I was only pulling accused 1, accused 2 and my son. And accused 1 was on the other side Your Worship still holding on that torch.”

[27] At this point the first appellant approached MSM and used the Taser under her arm and on the ribs of MSM causing her to fall to the ground. The first appellant attempted to approach MSM. It was then that MSM picked up a stone and informed the first appellant that she was going to pelt him with a stone. It was at this point that the second appellant and TJM separated.

[28] The second appellant then left, MSM was making her way to Rita to report the conduct of both appellants. Just as quickly as the second appellant disappeared he reappeared with a firearm in his hand which was pointing towards the ground. The second appellant approached MSM and pointed the firearm at her saying “swart gat kaffermeid staan terug of ek blaas jou kop uitmekaar.” MSM raised both her hands and retorted that the second appellant should shoot (blaas). At this point TJM was behind MSM. The second appellant cocked the firearm on two further occasions, with a bullet being ejected on the second occasion falling to the ground. The second appellant pointed the firearm on three instances at her, accompanied by the same derogatory rhetoric. The second appellant was then called by Rita. Another gentleman collected the groceries from Rita and handed it over to MSM, as MSM was afraid to approach Rita to retrieve same, whilst both appellants were in close proximity.

[29] TJM registered a criminal case against the appellants at the Potchefstroom SAPS, the following day. MSM did not accompany him. At the time of registering his case, TJM had blue marks on his right eye, the right rib cage and the neck. These injuries were visible for a few weeks before eventually disappearing. A statement detailing the various allegations were recorded. TJM did not complete the medical examination on the same day.

- [30] On 30 April 2018, Warrant Officer Olivier (“Olivier”) in the execution of his duties, together with both appellants, proceeded to Plot 128, Wilgeboom. From, inside an Opel motor vehicle, the second appellant removed a baby brown firearm and a Taser which was handed over to Olivier. The search did not result in the recovery of any further exhibits. No pepper spraying device was recovered. On this day MSM recorded her statement about the occurrences of the day in question.
- [31] On 1 May 2018, seven days after the incident, TJM and MSM were examined by a forensic nurse at the Potchefstroom Hospital. No external injuries were noted on both patients, but for the swelling of the right eye of TJM, which he reported was caused by a fist. The areas where TJM experienced pain was sketched on the diagrammatical sketch which included the ribs, the neck and eye. TJM reported that these injuries that he sustained were caused by him being strangled and kicked on the ribs. MSM reported that she experienced severe pains on the right side of her body, inclusive of the right neck area. There is no eluding the historical facts that necessitated an examination of both the victims was factually dissimilar to the account that was aired in court. At best the evidence of the forensic nurse did not provide corroboration for the complainants, notwithstanding, the conclusion that both TJM and MSM were assaulted. This is unsurprising given the time that has passed since the incident.

The appellant’s case

- [32] In a nutshell, the collective versions presented were as follows. The appellants were busy washing a bakkie at the back of the shop, when TJM was noticed, also at the back of the shop. TJM was asked what he wanted. There was no response. He turned and left. TJM returned being fully aware that he was not permitted at the back of the shop. Both appellants then moved toward him to enquire as to his presence. TJM retorted in an aggressive fashion that he was not afraid of the appellants and that he would assault (bliksem) them with a brick. Using his left hand TJM grabbed the second appellant by his clothing on the chest. The second appellant using both his hands retaliated by pushing, resulting in TJM falling, landing on his hindquarters.
- [33] On rising from the ground, TJM, had a brick in each of his hands, which he brandished, causing the first appellant to subjectively believe that TJM would strike both the appellants. The second appellant then grabbed TJM, using his right hand around his neck with his left hand the second appellant circumvented TJM from assaulting the appellants with the brick. TJM was ordered to drop the bricks. MSM, then approached with a brick in her hand. The first appellant then removed the Taser from the pocket of the second appellant to scare MSM. The first appellant was uncertain if the Taser was switched on or not, but was emphatic in that he had not used it against the person of any of the complainants. As TJM and the second appellant struggled TJM let go of the bricks. The first appellant entered the shop and closed the burglar gate. The second appellant rushed to the van to collect the BB gun, which he intended to use to scare both complainants off the premises. From this vantage point he observed TJM take possession of the brick from MSM.

- [34] The second appellant was standing with what has been described as a BB gun on his side. MSM then raised her hands and uttered that the second appellant can shoot as she was not wearing a police vest and that she was not afraid to die. The second appellant rejoined that he will not shoot, TJM must leave the premises. TJM retreated, resultantly the second appellant seized the opportunity to enter the shop. The burglar gate was locked, TJM still on the premises in possession of a brick was voicing inter alia a threat to kill the second appellant.
- [35] Instantaneously, the appellants using the rear entrance of the shop, drove to the SAPS to register a case. The police instead made an incident report and provided a reference number. The appellants denied committing any of the allegations.

Evaluation

- [36] A perusal of the record demonstrates that the Magistrate failed to properly assess the evidence before him. Notably, what had transpired in the absence of MSM, was a singular account by TJM. TJM, was a single witness in this regard. It is trite that a court may convict on the single evidence of any competent witness if such evidence is clear and satisfactory in every material respect. Our courts have indicated that evidence can be satisfactory, even if it is open to a degree of criticism. (See *S v Sauls* 1981
- (3) SA 172 (A) at 180G–H). The application of caution should not be allowed to displace the exercise of common sense. (See *S v Artman* 1968
- (3) SA 339 (A) at 341C). The failure to consider and correctly apply this evidentiary principle in our law, is another misdirection.
- [37] In his reserved reasons for dismissing the application in terms section 174 of the Criminal Procedure Act 51 of 1977 as amended, the Magistrate reasons as follows in his main judgment:
- “In the matter before this Court defence raised issues inter alia, contradictions in viva voce evidence of the state witnesses vis-a-vis their statements they made to the police and that the evidence of the state witnesses was of a poor quality which might have effected their credibility hence the application for the accused to be discharged in terms of section 174 of the criminal code. When dealing with contradictions in the evidence of the complainants, this Court found such contradictions to be peripheral and amounted not to material defects. The witnesses were subjected to lengthy cross examination and not shaken during cross examination.”* (My underlining) The Magistrate bolsters this portion of his judgment by referencing it to the well-known matter of *S v Mafaladiso and Others* 2003 (1) SACR 583 (SCA).
- [38] Continuing on the exercise of his judicial discretion to refuse the discharge of both the appellants in terms of section 174 of the CPA, focusing on the credibility of the complainants, the Magistrate found as follows:

“In this case before me I was satisfied that the evidence of the state witnesses was not that of poor quality to affect their credibility.”

This court also found with no doubt that the credibility was intact hence the application for the discharge in terms of section 174 of the Criminal Procedure Act was dismissed.” (My underlining)

In respect of counts 2 and 4 the evidence the first and second state witnesses corroborated one another on material aspects... I picked up some contradictions in the statement of the first and second state witness vis a vis their evidence in Court. However, in the light of the totality of the evidence and their respective explanations which I found to be eminently reasonable. I do not regard such consistencies as so serious as to detract from the veracity and reliability of their versions. (My underlining)

[39] Further:

“Now considering holistically the evidence before me the merits and demerits probabilities and improbabilities I find the evidence of both the first and second state witnesses to be impressive and corroborative to one another on material aspects. (My underlining)”

[40] The following verdicts are eventually pronounced:

“In the premises accused 1 is found guilty as charged on count 1, which in crimen inuria, count 2 assault with intent to do grievous bodily harm and count 4 assault and found not guilty and discharged in respect count 3 and 6 which is pointing of anything which is likely to lead a person to believe it is a firearm. Accused 2 is found guilty as charged on count 2 assault with intent to do grievous bodily harm, count 3 and 6 are taken together as one count which is pointing of firearm and found guilty as well as on count 5 which is crimen inuria. Accused 2 is found not guilty and discharged in respect of count 1 which is crimen inuria and count 4 which is assault.” (My underling)”

[41] The charges pleaded to and the verdicts did not tally. It is basic that the accused must plead to a charge/s afore a verdict being pronounced. The potential pleas in this regard are set out in section 106 of the CPA. The absence of a plea disentitles an accused to a verdict. The second appellant did not plead to count 1, notwithstanding this, the second appellant was found not guilty and discharged on this count. The manner in which the verdicts are styled is legally untenable. A finding that an accused is not guilty and discharged is pronounced on a successful application framed in

terms of section 174 of the CPA. It reads:

“If, at the close of the case for the prosecution at any trial, the court is of the opinion that there exists no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.” (My underlining)”

[42] The record aerates that there were contradictions in the evidence of both complainants. Contradictions in the evidence of witnesses maybe multidimensional. These may be of a material or non-material nature.

[43] The Magistrate was alive to the distinctions that exist in terms of contradictions, but appears to have brushed these aside. The approach to contradictions are set out in *S v Oosthuizen* 1982 (3) SA 571 TPD, quoting from the headnote the following is stated:

“Where a witness has been shown to be deliberately lying on one point the trier of fact may (not must) conclude that his evidence on another point cannot safely be relied upon. The circumstances may be such that there is no room for honest mistake in regard to a particular piece of evidence: either it is true or it has been deliberately fabricated. In such a case the fact that the witness has been guilty of deliberate falsehood in other parts of his evidence is relevant to show that he may have fabricated the piece of evidence in question. But in this context the fact that he has been honestly mistaken in other parts of his evidence is irrelevant, because the fact that his evidence in regard to one point is honestly mistaken cannot support an inference that his evidence on another point is a deliberate fabrication.”

[44] In *S v Mkhole* 1990 (1) SACR 95 (A) again, from the headnote, the role of contradictions in assessing the weight of a witness's evidence, the following approach is advanced:

“Contradictions per se do not lead to the rejection of a witness' evidence; they may simply be indicative of an error. Not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.”

[45] The institutionalized case docket privilege that the State had over the contents of the case docket following English precedent,

that one is not entitled to see an adversary's brief was brought to an end in *Shabalala & Others v Attorney-General of Transvaal & Another* 1996 (1) SA 725 (CC) (See also *R v Steyn* 1954 (1) SA 324 (A) 332). Whilst it signalled the end of a trial by ambush in that the blanket privilege on criminal cases conflicts with a fair trial guaranteed by the Constitution, Act 108 of 1996. The disclosure of the prosecution's case became fertile ground for sourcing contradictions between the previous statement of a witness and the viva voce evidence as presented in the subsequent trial.

[46] In dealing with this species of contradictions, the following direction is enunciated in *S v Mafaladiso en Andere* 2003(1) SACR 583

(At 593e - 594h. (SCA):

“The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness, could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there

may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations

- and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.'

[47] In *S v Bruiners and Another* 1998

- (2) SACR 432 (SE) at 435 a-b, it was stated that two or more witnesses hardly ever gave identical evidence with reference to the same incident or events. It was thus obligatory on the trial court to decide, considering the evidence holistically, to hold whether such differences were material to warrant the rejection of the State's version. The Magistrate found that the contradictions were not material. This was clearly incorrect.

[48] In my view, a recital of epithets adulatory to the quality of the evidence of witnesses is inane if this is not borne out by the record. The conspectus of evidence of both complainants unveiled innumerable blemishes, which should have resulted in the collective evidence being categorized as unreliable. Had the Magistrate analysed all the evidence meticulously, he would have found that the evidence was riddled with material contradictions which should have resulted in a finding that the evidence of the complainants was untrustworthy for a safe conviction on any of the charges.

[49] I turn to deal briefly with a few of the material contradictions in the evidence of the complainants as evinced from the record. TJM, confirmed that the previous statement that he made had complied with all the peremptory requirements and he was satisfied that the contents, the day after the incident, was accurately recorded. Further, TJM reaffirmed that the prosecutor had gone through this statement with him. TJM was agreeable that this statement did not manifest any shortcomings. This excludes the cogency of any arguments that may seek to cast aspirations on the process that was followed in the recording of TJM's previous statement.

[50] There were material differences between TJM's viva voce evidence and his previous statement. There were at least ten (10) instances wherein TJM was unable to answer elementary questions that were posed to him in cross examination. This should have impacted on the accuracy of TJM's factual account. In his previous

statement, he makes mention of being pepper sprayed once by the first appellant. In court, TJM embellished this to two occasions. There is no plausible explanation for this. This aspect is even more confusing given TJM's own admission that his previous statement was gone over in preparation of trial. Unsurprisingly, no mention is made of the pepper spraying incident in his medical examination.

[51] TJM's previous statement makes no mention of a Taser being used against his person. The use of the Taser is intrinsic to count 2, assault with intent to do grievous bodily harm. It is disconcerting, that count two was framed "...by strangling him, choking him with a device and spraying him with a device and spraying him pepper spray and the state is alleging common purpose." (My underlining). This charged species of assault with intent to do grievous suggests the application of force unlawfully with the aid of a Taser. The latter averment is not part of TJM's previous statement or any supplementary statement. Even if generous approach to this omission is adopted, the factual account of this incident did not pass the scrutiny of probing questioning, which exposed inherent improbabilities in TJM's account, uncorroborated by medical evidence.

[52] TJM conceded that his swelling eye was not as a result of an assault by the appellants. On being medically examined, TJM, reported that he was assaulted by fist and kicked in the ribs. These wholly incongruous facts needs no further explication. It is worth mentioning, that TJM, at the time of the recording of TJM's previous statement, he confirmed that there were blue marks in the affected areas, namely, the right eye, the right rib cage and the neck. These blue marks disappeared after some weeks. Mind-bogglingly, this was not the observations of the registered nurse on the medical examination conducted seven (7) days after the incident. The entire incident relating to MSM as the complainant in relation to count 4, 5 and 6 is not recanted in TJM's account. TJM was contradictory in respect of whether the second appellant had uttered that he will shoot him or whether the second appellant said "mannetjie, ek gaan jou kop uitmekaar blaas."

[53] TJM's evidence in chief before the lunch adjournment was that second appellant, cocked the firearm once, which resulted in a cartridge being expelled. After lunch he spoke of two further occasions when the second appellant had cocked the firearm. In his written statement, it was reported that the second appellant, cocked the firearm once, no mention is made of a cartridge being ejected.

- [54] Further TJM stated that the second appellant indicated that he was not going to shoot him, he was just frightening him, whereas in court TJM testified that after the cocking of the firearm on the third occasion the second appellant, uttered “mannetjie, ek gaan jou kop, uitmekaar, blaas.” TJM, could not tender a reasonable explanation for the failure to correct factually incorrect information at the time that his written statement was recorded or during consultation with the prosecutor before trial.
- [55] MSM, who made a previous statement on 30 April 2018, did not fare any better than TJM. MSM’s factual account is for the most in contrast to TJM’s account. It speaks to her arriving at the scene where TJM was the victim of an attack. The two accounts from this point are mutually destructive. Their accounts as described on medical examination further differed.
- [56] TJM proffered a substantially different account of the assault on medical examination, he indicated that he was fisted and kicked. No mention is made of the appellants fisting or kicking him in his previous statement or evidence in chief. MSM was confident that a Taser had been used on the left side of her body, however on medical examination she complained of pains on the right side of her body.
- [57] In *S v Shackell* 2001
- (2) SACR 185 (SCA) at para [30], the SCA sets out in clear and concise terms the approach to be adopted in evaluating the sort of evidence found in the present case under consideration. It reads as follows:
- “It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks the final and crucial step.”*
- [58] In the process of assessing evidence, the trier of fact is expected to consider the conspectus of evidence that is before the court. Nugent J (as he then was) advanced the following approach in *S v Van der Meyden* 1999(1) SACR 447 at 450b as follows:
- “What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.”*
- [59] The Magistrate reasoned as follows in rejecting the appellants’ version:

“I find that the evidence of both the accused inconsistent and unreliable. Their version can be equated to pure fabrication blended with dishonesty.”

[60] In S v T 2005

(2) SACR 318 (E), at paragraph 37, the burden of proof in a criminal trial is crisply set out as follows:

‘The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to.’

[61] Ultimately, the court must determine whether the State has mustered the universally accepted threshold – that is proof beyond reasonable doubt. (See: S v Saban & n Ander 1992

(1) SACR 199 (A) at 203j to 204a-b; S v Van der Meyden 1999

(1) SACR 447 (W) at 449g-j – 450a-b and S v Trainor 2003

(1) SACR 35 (SCA) at para [9].) In this case this standard had not been attained, consequently, the application of the law to the facts inexorably

leads to a finding that the Magistrate made incorrect findings of fact. This has to be corrected. Therefore, I propose that convictions

and sentence of both appellants fall to be set aside.

General Observations on the sentence process

[62] It would be remiss of me not to make certain observations regarding the sentence, notwithstanding the inevitable order. There are a number of misdirections in the sentencing process, which in the normal run of a criminal trial would have vitiated the sentence. I hone in on a few. The eventual sentence that was imposed was a partially suspended sentence with the various counts being lumped together as one, which prima facie is confounding, given the fact that the appellants were charged with common law and statutory offences. The phraseology of the partially suspended sentence was vague, ambiguous and unfair. I expound.

[63] The suspension of sentence in the criminal courts is governed by section 297(1) of the CPA. This section provides as follows:

“Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion –

(a) postpone for a period not exceeding 5 years the passing of sentence and release the person concerned –

(i) on one or more conditions, whether as to –

...

(hh) any other matter, and order such person to appear before the

court at the expiration of the relevant period; or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding 5 years on any condition referred to in paragraph (a)(i) which the court may specify in the order ...”

[64] Post the determination that a partially or wholly suspended sentence is apropos, certain general principles are applicable. It is trite law that a suspended sentence has two beneficial effects. First, the primary aim of a suspended sentence with a negative condition, that is a condition that requires the offender not to repeat the crimes specified, is to keep the convicted person out of prison and avoid the deleterious effects of direct imprisonment. The second objective is to deter the offender from committing similar offences in that the suspended sentence hangs over the offender’s head and if he, behaves he will not have to serve it. (See *S v Koko* 2006

(1) SACR 15 (C).) There must be some relation between the nature of the offence and the condition (except in the case of community service). (See *Cloete* 1950 (4) SA 191 (E); *Tshaki* 1985 (3) SA 373 (O); *Van der Merwe* 1984 (2) SA 515 (T); *Ntele* 1986 (2) SA 405 (NC); *Adams* 1986 (3) SA 733 (C); *Collett* 1990 (1) SACR 465 (A); *Mjware* 1990 (1) SACR 388 (N); *Fontini* 1991 (1) SACR 341 (C); *Swart* 1993 (1) SACR 495 (O); *Mokopotsa* 1993 (1) SACR 740 (O); *Ndaba* 1993(2) SACR 633(A), *Pietersen* 1994(2) SACR 434(C) and *Ingram* 1999(2) SACR 127 (W).)

[65] The condition/s of suspension must be stated clearly and unambiguously. (See *Cele* 1964 (1) SA 640 (N); *Xhaba* 1971 (1) SA 232 (T); *Ramokhoathane* 1977 (1) SA 360 (O); *Makgetha* 1980 (1) SA 130 (O); *Campher* 1987 (1) SA 940 (A). A condition of the suspended sentence must not be vague. (See *Mjware* 1990

(1) SACR 388 (N); *Goeieman* 1992 (1) SACR 296 (NC); *Manquina*; *Madinda* 1996 (1) SACR 258 (E) and *Tsanshana* 1996 (2) SACR 157 (E).)

- [66] The condition/s of suspension must be reasonable and fair. This implies that the wording must be such that a lengthy term of imprisonment is not enforced as a result of a relatively minor offence. (See Tshaki 1985 (3) SA 373 (O); Allart 1984
- (2) SA 731 (T); Pretorius 1990 (2) SACR 99 (E); Grobler 1992
- (1) SACR 184 (C); Nxumalo 1992 (1) SACR 268 (O); Herold 1992 (2) SACR 195 (W) and Chabaemang 1992 (2) SACR 256 (NC).)
- [67] The transition into a constitutional democracy has a bearing on a courts' approach to sentencing, inclusive therein would be the imposition of suspended sentences. The traditional principles alluded to are still relevant and find application. Most importantly, a suspended sentence must comply with the accused's right to a fair trial enshrined in section 35(3) of the Constitution, Act 108 of 1996 The right of an accused person to a fair trial requires fairness to the accused as well as fairness to the public as represented by the State. (See *S v Jaipal* [2005] ZACC 1; 2005
- (5) BCLR 423 (CC) par 29).
- [68] Magistrates are encouraged to give due consideration to these principles when the imposition of a suspended sentence is found to be the most appropriate sentence in the future.
- [69] A few remarks would be apposite when a judicial officer considers the imposition of a globular sentence when multiple convictions are brought into play. It is said to be undesirable to impose a globular sentence where there are multiple different counts. (*S v Immelman* 1978 (3) SA 726 (A) at 728E-729A.) However the practice of taking more than one count together for purposes of sentence is neither sanctioned nor prohibited by law. In *S v Young* 1977 (1) SA 602 (A) at 610E-H Trollip JA said:
- "Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused."*
- [70] In *Rantlai v The State* (1178/2016) [2017] ZASCA 106
- (13 September 2017), Bosielo JA addressing the imposition of a globular sentence reasoned as follows:
- "The imposition of a globular sentence depends upon the discretion of the sentencing officer based on the peculiar facts of the case. However, our courts have on various occasions expressed some misgivings about such sentences particularly where an accused was*

convicted after having pleaded not guilty but subsequently having the conviction on some counts set aside on appeal. See *Director of Public Prosecutions, Transvaal v Phillips* [2011] ZASCA 192; 2013 (1) SACR 107 (SCA) para 27 where Petse AJA stated: “The practice of imposing globular sentences for multiple counts is generally an undesirable one.” See also *S v Kruger*

[2011] ZASCA 219; 2012 (1) SACR 369 (SCA) para 10.”

[71] The manner in which the Magistrate framed the entire sentence is problematical. It is apparent that he was not au fait with trite principles regarding the imposition of suspended sentences. The litany of misdirections seems to have no end. Statutory offences and common law crimes were lumped together without a proper structure of conditions which may predicate a contravention. The initial sentence imposed was three years imprisonment half of which was suspended, on unjust, and ambiguous conditions. The sentence was altered to read three years imprisonment of which one was suspended on garbled conditions. The initial sentence made no reference to the imposition of a globular sentence. In all sentences imposed, the most serious offences were not punished. Decisively, the words “not convictedwhich is committed during the period of suspension “is omitted.

[72] It would be pertinent to refer to the provision dealing with when a sentence may be corrected. Section 298 of the CPA is the empowering provision and it reads as follows:

‘298 Sentence may be corrected

When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence.”

[73] Put differently, by virtue of Section 298 of the CPA, a trial court is enjoined with a discretion, when it by mistake had imposed a wrong sentence, before or immediately after it is recorded, to amend the sentence. The application of this discretion espoused in section 298 of the CPA, must be exercised with due regard for the principle of *functus officio*.

[74] In *S v Moabi* 1979

(2) SA 648 (B) at 648H-649A the following was stated:

‘It is elementary that a magistrate is not entitled to alter either his verdict or his sentence after it has been pronounced. He can, in terms of s 176 of the Criminal Procedure Act 51 of 1977, correct a verdict which has been given in error, but then only “before or immediately after it is recorded”. Section 298 gives him the same power in regard to a wrong sentence. But then it is a sentence or verdict delivered “by mistake” as both these sections provide. That implies a misunderstanding or an inadvertency resulting in an order not intended, or also a wrong calculation. A verdict or sentence, however much open to criticism, cannot be altered if it was deliberately given or imposed. To exceed punitive

jurisdiction is probably included under "mistake". But then the correction must be done immediately, on the same day, preferable before the magistrate leaves the bench. This sentence was neither imposed by mistake nor was it altered immediately. The subsequent proceedings were a complete nullity.'

[75] Magistrates would be mindful to the application of this provision when it is apparent that sentences are materially dissimilar and could not have been cured by way of the application of Section 298 of the CPA.

[76] I raise a final matter of concern which was canvassed at the hearing of this appeal. This relates to the appeal record. It is trite that the appeal process in our criminal justice system is part and parcel of an accused's right to a fair trial. See: Section 35(3)(o) of the Constitution Act 108, 1996. An adequate record of trial court proceedings is a key component of this right. See: *Dauids v S* [2013] ZAWCHC 72 at para 13, *Sebothe v S* 2006

(2) SACR 1 (T) at para [8]. An appeal record is of cardinal importance. Although the record before this Court was adequate for the consideration of this appeal, more care must be taken in the preparation and presentation of the appeal record. See *S v Chabedi* 2005(1) SACR (SCA) at 417. The record was not properly photocopied, which made the reading of the record a painstaking and cumbersome process. Of a greater concern, was the innumerable incomplete sentences due to inaudible recordings. These practices must be deprecated to ensure the expeditious hearing and disposal of the matter and compliance with the law.

[77] The order I make is the following:

Order

- (i) The appeal is to be upheld.
- (ii) The convictions and sentence of both appellants are set aside.

A REDDY

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT

Appearances:

Date of Hearing: 25 November 2022 Date of Judgment: 17 May 2023 Revised: 23 May 2023 Counsel for the Applicant: Adv J Gerber Attorney for Applicant: Loubser Ellis & Associates 127 Provident House Old Mutual Building Mmabatho Tel: 018 011 9550 Counsel for Respondent: Adv B Kalakgosi Attorney for Respondent: State Attorneys Mega City Shopping Complex 1St Floor, East Gallery Mahikeng Tel: 018 384 0629

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2023/60.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/jacobs-and-another-v-s-unknown-topic-anwhc-2023>

Prepared on 11 October 2026 · Esheria