

SOUTH AFRICA / JUDGMENT

Mabhongo and Another v S (36/2016, PE671/2015) [2017] ZAECGHC 30 (7 March 2017) [2017] ZAECGHC 30

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Mageza, Bloem

CASE / FILE NUMBER

36/2016, PE671/2015

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

APPEAL CASE NO: 36/2016

CASE NO: PE671/2015

MVUSELELI MABHONGO FIRST

APPELLANT

BAXOLISE VUSO

SECOND APPELLANT

AND

THE STATE

RESPONDENT

APPEAL

JUDGMENT

MAGEZA AJ

- [1] This appellants were convicted and sentenced in the Regional Magistrate's Court, Port Elizabeth on two charges of kidnapping and attempted murder. First appellant is the father of the second appellant.

- [2] The findings of the Court a quo turned on the truthfulness or otherwise of the versions offered to the court a quo by the two appellants. Incidentally, as to what exactly transpired in the first scene, the kidnapping scene set out hereunder, first appellant contradicted the second appellant. In respect of the second scene, the attempted murder charge, the first appellant contented himself by tendering evidence, the nature of which was to place him elsewhere, thereby extricating himself from the murderous assault that was visited on the complainant.

The charges: Kidnapping:

- [3] The appellants each tendered a plea of not guilty to two charges relating to the kidnapping and attempted murder of the complainant,

Them bani Tshikila. These charges arose from events which took place in Booyens Park, Port Elizabeth on 24 October 2014.

- [4] Both the appellants pleaded not guilty and elected not to disclose the basis of their defence. According to the charge sheet, the attempt to murder the complainant was carried out through assaults by means of, inter alia, an axe handle; hockey and golf sticks. The State's case was supported by both the complainant and his mother who were the only witnesses

called by the State.

Complainant's testimony:

- [5] The complainant testified broadly that around 19h30 of that day, he was on his way home and at the corner of the street he resides in, he met up with second appellant who was accompanied by one Sim. Sim grabbed him by the throat and asked him about the whereabouts of one Mphumzi. Second appellant who was with Sim, attempted to restrain him by holding his feet together. The two assailants accused him of having stolen corrugated iron sheet (corrugated iron) belonging to first appellant. Complainant screamed and his mother heard his scream and came to the scene accompanied by two other women. She arrived at about the same time as a white Toyota delivery van driven by first appellant.
- [6] During this melee, his mother tried to intercede but failed. His mother said if he did steal corrugated iron he should tell them where it was. He told her he knew nothing about the whereabouts of corrugated iron. He was made to sit in the front seat with Sim sitting on top of him. The attackers manhandled him and bundled him in by force and drove off with him. He did not know where they were taking him to and first appellant drove the vehicle.

Complainant's mother:

- [7] Complainant's mother testified that she was at home and heard complainant calling out to her and she went outside to find second

appellant and Sim holding complainant. Second appellant arrived and complainant was forcefully loaded into first appellant's white Toyota van. They bundled him into the van, drove off and first appellant switched the vehicle's lights off as they drove away. Cross-examined by Mr Hayward for first appellant, she said first appellant had in fact visited her earlier that day looking for the complainant in connection with the whereabouts of corrugated iron he said had been stolen by the complainant. She advised first appellant to call the police and report her son if he believed that he had stolen his corrugated iron but the first appellant told her he would not call the police and would solve the problem on his own.

First appellant's testimony on kidnapping charge:

- [8] First appellant said he was called by his son, the second appellant, who informed him that they had found the complainant. He proceeded to where they were and when he got there everyone was standing and waiting peacefully and there were no scuffles. He said complainant's mother was there together with some community members and everyone was calm. According to him complainant's mother told her son to go with them and to point out where the corrugated iron was. He said everyone was happy and there was merriment and laughter. He said the complainant went along willingly and climbed into the vehicle after having been instructed by his mother to do so.

Attempted murder charge: Complainant's testimony:

- [9] The complainant is the sole witness as regards the attempt on his life. He said from the first scene of the alleged kidnapping, first appellant drove, with the lights of his vehicle switched off, to the other side of Stanford Road through a farm and bushes. The van was brought to a halt by first appellant in a dark and isolated area in the bushes. He said there were no houses there at all and first appellant ordered Sim and the second appellant to tie him up using a rope which first appellant had brought in the van. He was tied around the waist. Second appellant and Sim held the rope pulling at him from two opposite ends. He was pulled further away from the vehicle deeper into the bushes. It is not disputed that he ended up in Livingstone Hospital as a result of the beatings.
- [10] First appellant then took out a wooden stick from the van and started beating him with the stick all over his body. This went on for some time whilst second appellant and Sim restrained him from running away or protecting himself. He helplessly tried to fend off the unrelenting blows with his arms and hands but was struck repeatedly by first appellant from head to toe until first appellant exhausted himself. Complainant said he also became tired, was at this point in great pain and could no longer block the blows. First appellant handed the stick to second appellant who also assaulted him until he lay prostrated on the ground. The second appellant then picked up a stone and started hitting him all over his body including his face.

- [11] Sim also assaulted him with the stick. Throughout these beatings, he was interrogated about the whereabouts of the corrugated iron. He begged them to stop. He said at some point, first appellant made a call on his mobile phone. Following this call, some people arrived among the bushes they were in. According to him first appellant thereafter left. He said he was assaulted by some of these people and the second appellant continued assaulting him as well. The beating went on for a considerable time with the beatings unabating.

First appellant's testimony regarding the assault:

- [12] First appellant denied ever assaulting the complainant. He recounted some background and narrated how he came back from work that day to discover corrugated iron missing from his yard. He said that he received information that complainant was the person who had stolen the goods. He asked the second appellant to go and look for the complainant. He later received a call from second appellant saying they had found complainant. He went to the scene and found the complainant, his mother, second appellant and Sim. This was not at the corner, as testified to by the complainant and his mother, but at the gate of complainant's home. All according to him was peaceful and everyone was chatting and laughing happily. He said complainant's mother instructed complainant to go with them in his vehicle to point out where he had sold the corrugated iron. He testified that complainant went along cheerily with both appellants and Sim sitting in front.
- [13] He testified that it was the complainant who was directing them where to go. The complainant had told them to proceed through a gravel road which led them to 'Vastrap' where complainant said the goods were stored. He said taking that route was the complainant's idea and he himself did not know the community of that area well. Complainant took them to a place where there was a 'coloured male and female' but then changed his mind and said the goods were at a shack owned by him and one Mafutha. They did not find the goods as well at this third place.
- [14] Complainant thereafter pointed out another place which he referred to as the 'Chinese' place. There they found people who said they did not know the complainant. They heard a whistle blown by the 'coloured female' shouting something about a thief. He told second appellant to wait and he left them there with complainant.
- [15] Later he received a call from second appellant stating that there were members of the community assaulting the complainant at the spot where he had left them. He rushed there and found four men assaulting the complainant saying they had been looking for him for quite a while for stealing their goods. He said he then decided to leave the scene with the second appellant. He denied ever assaulting the complainant.
- [16] When asked why he did not report the matter to the police, he said he had tried to call the Police but their station telephone kept dropping his calls. As regards the vicious attack on complainant, he said he was only attacked and assaulted by community members. He knew the community of 'Vastrap' but those that assaulted complainant were strangers he was not familiar with. They said complainant was a thief. He tried to stop these strangers from

assaulting the complainant. He later said he never thought of reporting a theft complaint with the police because 'we met as parents' and we talked with his mother.

Second appellant's version:

- [17] He testified that he had been accompanied by Sim to go and look for the complainant that day at his home but could not find him. Complainant's mother was home and she told them complainant was not home. They went to wait at the corner and complainant arrived and they went to talk to him. They told him they wanted to know where the stolen corrugated iron was and complainant denied any knowledge of stolen corrugated iron. Complainant's mother came and said complainant must go and show them where these goods were. He said at some later stage complainant told them he had stolen these together with one Mafutha. First appellant then came and complainant climbed willingly into the vehicle and they left.
- [18] He said there was disagreement with complainant but he nevertheless got into the vehicle saying he is scared of Mafutha. He denied that complainant was assaulted by any of them and said there had been no reason to do so. He said complainant was free and could have escaped from the scene at any time if he so wished. From there they drove to 'Vastrap.' He denied they stopped at a farm and assaulted complainant.

The Magistrate's findings:

- [19] The magistrate was alive to the fact that she was faced with two conflicting versions, both in respect of the alleged kidnapping and attempted murder. This being the position, the court set out that it had to assess the merits and demerits of all the testimony with due regard to probabilities taking into account the evidence as whole. The magistrate found that there was little criticism the court could level at the state witness's evidence. The court observed that it made no sense that the complainant could have left with the appellants willingly and in a jolly mood because it was clear that the parties were not agreed about the theft allegations. The court found that the evidence of the two appellants is at variance with one another. She concluded that from the accepted evidence, the complainant had not gone willingly with the appellants and that it was clear from the evidence that he was taken against his will. The evidence of the two appellants was described by the magistrate as evidence which was being made up as the appellants muddled along. In my view that criticism was justified.
- [20] With regards to what took place at the farm where complainant had been assaulted, the magistrate found that the two appellants

contradicted each other in very material respects. Whilst the first appellant said that he left second appellant and Sim to go to the place pointed out by the complainant, there was a coloured gentleman and a lady whilst second appellant said there were many people gathering there when a whistle had allegedly been blown. The magistrate found that it was improbable that the complainant would have at first had said he did not know anything about corrugated iron and then suddenly agree to go and show them different places where corrugated iron was stored, only

to turn around and take the appellants on an endless roaming exercise to various places where no corrugated iron could be found. For these and many other reasons she found their versions in respect of both counts most improbable. She said the appellants had to furnish a version which was reasonably possibly true and they had failed to do so. She rejected their evidence as contrived and false and found them guilty, as charged.

[21] I agree with the magistrate that the appellants had materially conflicting versions and this arose from the fact that their

testimony is a concocted clutter of illogical assertions. The complainant testified that he was waylaid by Sim and the second appellant. He was restrained at that scene and the second appellant called his father, the first appellant. He did not go willingly with the appellants and Sim. It is common cause that the appellants left with the complainant from that point and subsequent to that, the complainant ended up being admitted to Livingstone hospital for a duration of two full months. His injuries are detailed in the record and these were extensive. The beating he received could have easily resulted in his death. Those who assaulted him must have been conscious of the prospect that he could lose his life. Despite this, they did so without being concerned about such a result.

Testimony of a single witness:

[22] In so far as the deadly assault is concerned, the complainant may be a single witness but section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness provided the evidence deposed to by such a witness is treated by the presiding judge or magistrate with caution and, the evidence is substantially satisfactory in all material respects or same is corroborated. See *S v Mthetwa* 1972 (3) SA 766 (AD) at 768A; *S v Daba* 1996 (1) SACR 243 (E) at 249d - e; *S v Mehlahe* 1963 (2) SA 29 (A).

[23] It is also a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, *S v Webber* 1971 (3) SA 754 (A) at 758G-H.

[24] As was reiterated in *S v Chabalala* 2003

(1) SACR 134 (SCA), the proper approach to assessing evidence is 'to weigh up all the elements which point towards the guilt of the accused against all

those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and

improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt'. The inherent probabilities therefore play a critical role in the enquiry.

[25] The dictum of Brand AJA (as he then was) in *S v Shackell* 2001 (2) SACR 185 (SCA) at para 30 sets out in clear and concise terms the approach to be adopted in evaluating the type 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. 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..."

[26] Both the complainant and his mother contradicted the first appellant's tale that complainant went along willingly. She stated

that first appellant had come to her home and his firm posture was that complainant had stolen the material. In other words, the idea complainant was the thief was firmly embedded in his mind. His attitude was that he simply wanted the complainant to reveal where he had sold the corrugated iron.

[27] I agree with counsel for the state that there was no need to bind and bundle the complainant and take him to the bushes if the intention was not to viciously assault him with complete disregard to the sanctity of his life. They assaulted him because they wanted him to reveal where the material was. No one else within the community had reason to assault the complainant so viciously save for the appellants. The first appellant's version that the community members came out of nowhere, saying that they had been looking for the complainant for a long time because he had been stealing from them is a fabrication and an afterthought.

[28] First appellant failed to conduct himself as the adult and father of the second appellant. He failed to lead by example and in many cases, including the present, parents and adults take the lead in perpetuating this spiral within some of our communities. His convoluted and vague narration of how he left the complainant with second appellant and one Sim, placing himself elsewhere, was bereft of rational likelihood. The version is far-fetched, a red herring and improbable beyond all doubt.

Sentence:

[29] The magistrate sentenced the appellants as follows:

First appellant sentenced on count 1 to 4 years' imprisonment, half of which was suspended for a period of 5 years on certain conditions. On count 2 first appellant was sentenced to a period of 8 years' imprisonment, 2 years of which were suspended for 5 years on certain

conditions.

[30] Second appellant was sentenced on each count to a period of 5 years' imprisonment in terms of Section 276(1) (i) of the Criminal Procedure Act. The sentences were ordered to run concurrently in respect of both appellants.

[31] As regards sentencing, this court's power to interfere in sentences is limited as this primary role lies in the discretion of the sentencing court. 'A court of appeal may not simply substitute a sentence because it prefers it and will be entitled to interfere only if the sentencing court materially misdirected itself or the disparity between its sentence and the one which this court would have imposed had it been the trial court is 'shocking', 'startling' or 'disturbingly inappropriate'. See *S v Malgas* 2001

(1) SACR 469 (SCA) at para 12.

[32] On the facts before us there was no misdirection on the part of the magistrate for the reasons stated heretofore. The offence is a serious offence and the sentences are justified in the light of the crime, the appellant's personal circumstances and interests of society.

[33] In the result, the appeal against conviction and sentence is dismissed.

PT MAGEZ AJ

ACTING JUDGE OF THE HIGH COURT

I agree

G H BLOEM

BLOEM J

JUDGE OF THE HIGH COURT

For the appellant:

Adv H Bakker, instructed by Howard Collen Attorneys, Port Elizabeth

For the state:

Adv D Els of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing:

1 February 2017

Date of delivery of the judgment:

7 March 2017

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