HIGH COURT

BISHO

CASE NO. CA&R 24/96

LUNGISI KAMELI APPELLANT

VERSUS

THE STATE RESPONDENT

APPEAL

EX TEMPORE:

EBRAHIM, AJ: In the court a quo the accused was charged with Attempted Murder but at the conclusion of the evidence was convicted of assault with intent to commit Grievous Bodily Harm. He has now approached this court on appeal and the basis of his appeal rests essentially on two grounds namely:

1. That the learned Magistrate held against him his failure to cross examine on every issue in dispute.

2. The learned Magistrate rejected his story as not being reasonably possibly true.

The accused's defence in this matter is relevantly straight forward in that he avers that on the particular day of the shooting he went to the residence of his erstwhile girlfriend and after knocking at the door and it being opened, a confrontation took place between him and a gentleman he found there who, it subsequently transpired, is the present boyfriend of his girlfriend. This individual confronted him with a knife and he then fired a warning shot and in consequence of doing so the complainant stepped in between him and this individual and was accidentally shot in her foot. This version was given by the accused at the outset of the trial and is also the version proffered by him in his evidence-in-chief.

Mr Notshe has referred us to various decisions in which it has been held that in certain circumstances the failure of an accused to properly cross-examine any witness or witnesses may lead to a situation where the court on appeal is entitled to interfere with the finding of the magistrate and to uphold the appeal and set aside the conviction and clearly the sentence too. Mr

Notshe was at pains to point out that the magistrate should have gone further in his duty as the presiding officer than what he in fact did in this particular matter. Mr Notshe, however, conceded to his credit that the magistrate had properly explained to the accused his rights in terms of cross-examination and what the purpose of cross examination should be. He submitted, however, that the magistrate should have gone further than this and assisted the accused in putting every aspect which the accused put in contention, or disputed.

In this regard I find myself in some difficulty as the accused's defence is that he was confronted by the assailant with a knife and in order to defend himself he fired a warning shot and in consequence thereof, as I have said, struck the complainant. The difficulty that arises out of this is to suggest that the magistrate should then have accepted that every aspect of the evidence of the complainant and the so called assailant should have been taken as being in dispute. In my view the magistrate acquitted himself well of his duties insofar as a judicial officer is concerned. And in this

respect Mr Notshe had to concede that the explanation he provided to the accused in terms of what was required in respect of cross-examination could not be attacked in any manner whatsoever. Mr Notshe also had to concede that the magistrate, in fact, went further and when the accused had failed to put in cross examination the aspect of the knife that he was being confronted with, that this had been put to the so-called assailant by the Magistrate.

In my view the facts of this matter are clearly distinguishable from the authorities which Mr Notshe has presented to us. The thread that runs through the various authorities is that where there is an illiterate or an uninformed accused then the responsibility of the presiding officer is obviously of the nature where he has to ensure that the accused is able to put his defence or what he places in dispute properly to each witness. In this respect, and in the view that I take, the magistrate in fact put the issue that was in dispute to the witness and he did not fail in that respect.

I should mention also and this Mr Notshe could

not dispute either, that his client is not an uninformed or illiterate individual. In fact, the accused is a policeman and I would go so far as to say that he could not have been uninformed insofar as court procedure is concerned and could certainly not have been unaware of the need to put such issues, as he placed in dispute, to the various witnesses. Mr Notshe has submitted that the magistrate's judgement in effect hinges on aspects that the accused failed to put to the various witnesses. My reading of the judgement does not substantiate this. It is correct that the magistrate has referred to these aspects and he has referred to them in the context of showing that the accused was hard put to explain why he had not disputed certain aspects and not a question so much of why he had failed to put it to the particular witnesses.

In my view also the magistrate has centred his decision, or the reasons why he arrives at his decision, on the fact that he could not find that the accused's version of events was reasonably, possibly true. In my view the magistrate's findings in respect of the accused's version, his findings in respect of the state witnesses and

his overall finding of the guilt of the accused on the conviction of assault with intent to commit grievous bodily harm cannot be faulted and is correct. I should mention that prior to bringing in his finding, the magistrate, in fact, suo moto raised with the Prosecutor the question whether the facts of the matter did not amount to Attempted Murder, but in fact amounted to assault with intent to commit Grievous Bodily Harm. In my view this re-enforces the fact that the magistrate was confining himself firstly to the question of whether the defence raised by the accused could be reasonably possibly true and; secondly, that he was considering that as the aspect upon which to base his judgment despite the comments that he subsequently makes about various aspects.

I CONFIRM THEREFORE THAT THE MAGISTRATE'S FINDING THAT THE ACCUSED IS GUILTY OF THE CRIME OF ASSAULT WITH INTENT TO COMMIT GRIEVOUS BODILY HARM IS CORRECT AND IS HEREBY CONFIRMED.

DHLODHLO J: I concur.

EBRAHIM J: In regard to sentence, Mr Notshe has raised the

fact that the magistrate should have considered alternative forms of sentence. He pointed out, however, that he could not submit that the magistrate had not done so, but it appears as if he may not have considered various other aspects in regard to sentence.

On the facts we have before us and, in the view that I take of the matter, a period of imprisonment of two (2) years, given the circumstances of the commission of this offence, does not induce a sense of shock. It is as Mr Mrwebi has said that a policeman has a particular role to play in terms of defending the community and that this court should not send the incorrect message insofar as sentence is concerned.

I considered the arguments raised by Mr Notshe as to whether a first offender is not entitled to either have the sentence suspended in its entirety, or to have a sentence imposed which enables the accused to stay out of prison. Here again Mr Notshe quite correctly has conceded the other side of the coin that he cannot in any way diminish the severity of the crime.

I must point out as my Learned Brother has conveyed to Mr Notshe that the accused was confronted not by an assailant as his version has been rejected, but by an unarmed woman who was absolutely no threat to him whatsoever, as much as he may have been upset at the fact that she had now taken up with another person. It is clear from the evidence that he accepted that his relationship with the complainant had terminated some months ago and that there was no basis for him to be able to insist that a relationship still existed. Be that as it may, even if a relationship still existed between him and the complainant, it cannot be submitted in any way whatsoever that he had a right to insist on that relationship continuing, or that he had a right to insist that she could not see someone else.

The courts have consistently expressed themselves in regard to sentence by also saying that there is no principle or rule as such which automatically entitles a first offender to be kept out of prison. The facts of each matter have to be considered and on that basis it has to be determined what an appropriate sentence is.

The magistrate quite correctly has weighed up the fact that the accused is a first offender, the fact that he is in a position where he has to maintain certain other people, not as direct dependants, but certainly as dependants of some nature or another, together with the aggravating factors. Whilst it is correct, as Mr Notshe says, that the prognosis in terms of the injury has not been placed before the court, one should bear in mind on the other hand, that the shot that struck her did not cause any greater injury and if it had been higher up in her body, may very well have killed her.

In the circumstances we do not find that the magistrate has misdirected himself insofar as sentence is concerned, or that it is so inappropriate that it induces a sense of shock and I CONFIRM THAT THE SENTENCE OF TWO YEARS AS ENUNCIATED BY THE MAGISTRATE CANNOT BE UPSET ON APPEAL AND IT IS HEREBY CONFIRMED.

DHLODHLO J: I agree.

Y EBRAHIM

ACTING JUDGE OF THE SUPREME COURT

A E B DLODLO

JUDGE OF THE SUPREME COURT

DATE: 7 FEBRUARY 1997