IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: A77/2018

In the matter between:

JONAS NHLOPHEKO MONYANE 1st Appellant

BONGANI MONYANE 2nd Appellant

and

THE STATE Respondent

CORAM: DAFFUE, J *et* MATHEBULA, J

JUDGMENT BY: DAFFUE, J

HEARD ON: 18 FEBRUARY 2019

DELIVERED ON: 18 FEBRUARY 2019

INTRODUCTION

[1] On 3 November 2016 the two appellants were convicted in the Magistrate's court, Welkom on separate charges of assault with intent to do grievous bodily harm and on 29 November 2016 they were sentenced to two years' imprisonment. Their application for leave to appeal was dismissed by the trial court.

[2] On 3 November 2017 the High Court granted leave to appeal against the convictions and sentences and the matter was eventually set down for the appeal to be argued on 18 February 2019.

[3] In my view the judicial system has failed appellants. There is no explanation why the appeal procedure could not be finalised sooner. On 20 February 2017 the appellants' affidavits in support of their petition to the High Court were filed (incorrectly with the clerk of the court, Welkom). On even date Legal Aid SA applied for a transcription of the court record. Nine months later the petitions were granted, but another fourteen months lapsed before the appeals were heard. By now appellants have served their sentences and their only solace is that the offences will be expunged from their records.

THE GROUNDS OF APPEAL

[4] Several grounds of appeal are relied upon, the main grounds being that the trial court erred in the following respects:

(1) The first and third State witnesses contradicted each other insofar as the first witness testified that he was unarmed whilst the third witness testified that that witness was in possession of a weapon, to wit a rod.

(2) It disallowed the introduction of the third State witness' police statement and cross-examination in that regard to the prejudice of the defence.

(3) It did not find that several improbabilities appeared from the evidence tendered on behalf of the State.

(4) It rejected appellants' versions as not reasonably possibly true.

(5) In not finding that the complainants started the fight and that they were the aggressors.

THE JUDGMENT OF THE TRIAL COURT

[5] The judgment of the trial court

(1) does not contain a proper summary of the evidence, and more importantly, no evaluation thereof and

(2) is not structured at all.

[6] The trial court considered common purpose at length and even gave a long explanation of its understanding of the concept, but failed to summarise her factual findings properly in order to conclude why the matter could not be decided on common purpose.

[7] The trial court acknowledged that Mr Andrew Mogosi, the complainant in count 1, was a single witness. It found that his evidence was clear and consistent and passed the test applicable to single witnesses. She found corroboration for his version that he was stabbed and bleeding insofar as Mr Thabang Metsiso (spelt Dietsiso in the record), the third State witness and the complainant in count 4, saw him bleeding; also he was able to point out a scar in court. The trial court did not consider that Mr Metsiso testified that Mr Mogosi was in possession of an iron rod when he came across him and also that the two State witnesses' versions of the events differ completely. I shall deal with that later.

[8] The trial court found that Mr Thabang Metsiso is related to accused 3 and that this witness had no reason to falsely accuse accused 3 as his attacker. This finding was made notwithstanding the contradictory versions of the State and the defence and the court's acceptance "…that this was a mob fight and there was not (sic) person that was specifically fighting a specific person, it was a group against a group,…."

ADJUDICATION OF THE APPEAL

[9] When an appeal is lodged against the trial court's findings of fact, the appeal court should take into account that the trial court was in a more favourable position than itself to form a judgment because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial. See

Schmidt and Rademeyer, *Law of Evidence* 3-40. The appeal 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 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 as 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."

[10] If the appeal court is merely left in doubt as to the correctness of the factual conclusion arrived at by the trial court, it will uphold it. The Supreme Court of Appeal in *S v Naidoo and Others* 2003 (1) SACR 347 (SCA) reiterated this principle as follows 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.'

[11] No judgment is perfect and the fact that certain issues were not referred to does not necessarily mean that these were overlooked. It is accepted that factual errors do appear from time to time, that reasons provided by a trial court are unsatisfactory or

that certain facts or improbabilities are overlooked. The appeal court should be hesitant to search for reasons that are in conflict with or adverse to the trial court's conclusions. However, in order to prevent a convicted person's right of appeal to be illusionary, the appeal court has a duty to investigate the trial court's factual findings in order to ascertain their correctness and if a mistake has been made to the extent that the conviction cannot be upheld, it must interfere. See *S v M* 2006 (1) SACR 135 (SCA) paragraph [40] at 152a - c.

[12] I do not want to be unnecessary critical, but the trial court should reconsider the manner of judgment writing. It is suggested that she either follow a course in judgment writing or be trained by more experienced colleagues. It was difficult to read and understand the judgment, but I am satisfied that the trial court made incorrect factual findings. Several misdirections occurred which led to wrong factual conclusions. I shall elaborate later.

[13] To secure a conviction the State has to prove all the elements of the crime beyond reasonable doubt. The test in a criminal case has been restated in *S v V* 2000 (1) SACR 453 (SCA) in paragraph [3]. If there is a reasonable possibility that the accused is not guilty, he should be acquitted. The accused should be convicted if the court finds not only that his version is improbable, but also that it is false beyond reasonable doubt. It is not necessary for the court to believe an accused person in order to acquit him

[14] It is trite that an accused may be convicted 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. Furthermore, the exercise of caution should not be allowed to displace the exercise of common sense. See *S v Artman* 1968 (3) SA 339 (A) at 341C.

[15] I alluded to the fact that Mr Andrew Mogosi was a single witness. The same applies to Mr Thabang Metsiso. I shall return to their evidence later. Probabilities play a role in evaluation of evidence, even in criminal cases, and this will be referred to in the next paragraph.

[16] The State has to prove its case against an accused beyond reasonable doubt, but in evaluating the evidence, the trial court is entitled to consider the probabilities and improbabilities. This issue was considered in S v Chabalala 2003 (1) SACR 134 SCA at para [15] where Heher AJA (as he then was) held:

> "The correct approach 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."

See also: *S v Trainor* 2003 (1) SACR 35 (SCA) at 41b – c.

[17] An accused's version cannot be rejected merely because it appears to be improbable. It must be shown, in light of the totality of the facts, to be so untenable and/or improbable and/or false that it cannot reasonably possibly be true. See S v Schackell 2001 (2) SACR 185 (SCA) at para [30] and *S v V supra*.

[18] The following *dictum* of Plasket, J in *S v T* 2005 (2) SACR 318 (E) in paragraph [37], recently approved by the SCA in *S v Phetoe* 2018 (1) SACR 593 (SCA) in paragraph [21], should be adhered to. The State is required to prove the guilt of the accused beyond a reasonable doubt. This high standard is a core component of the fundamental right to a fair trial as enshrined in the Constitution. If the guilt is not proven beyond reasonable doubt, the accused is entitled to an acquittal, even if there may be suspicions that he was indeed the perpetrator. The inverse - convictions based on suspicion or speculation - is the hallmark of a tyrannical system of law.

[19] *In casu* and *ex facie* the judgment, the trial court did not even consider the evidence of the appellants and no proper evaluation was undertaken as explained in the authorities quoted.

[20] Mr Andrew Mogosi's version must be considered with caution. Not only is he a single witness in respect of the attack on him, but his version is contradicted by the third State witness, Mr Metsiso, as well as the appellants. I am of the view that Mr Mogosi felt aggrieved about the remarks made to him and he called upon his

son, Itumeleng, to assist and to sort out the troublemakers, being the appellants and their cohorts. Itumeleng intervened and as testified to by Mr Metsiso, he and others left the tavern when they heard news of the fight.

[21] On probabilities Mr Mogosi, who on his own version tried to intervene to stave off the attack on Itumeleng, backed off at stage, standing aside. It was at this moment that he was assaulted by first appellant. This appears to be highly improbable. It is much more probable that he, armed with a rod – whether an iron rod or a kierie – participated in the general fight between two groups of men and that he got injured in the process. Mr Masisi, the second State witness, referred to the situation as chaotic.

[22] Mr Metsiso followed the group leaving the tavern and he must have known that a fight is going to ensue. He was a willing participant as is the case with Mr Mogosi. It is accepted that these two persons were injured, but it is not so clear who landed the actual blows. As the trial court found, a group fight took place involving several participants from each side. The appellants' versions cannot be rejected as not reasonably possibly true.

ORDERS

[23] The appeal against both the convictions and sentences should be upheld.

[24] Consequently, the following orders are made:

(1) The appeals against the convictions and sentences of both appellants are upheld.

(2) The trial court's orders are set aside and substituted with the following:

"The first and third accused are found not guilty on all charges and discharged."

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J. P. DAFFUE, J

I concur

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M A MATHEBULA, J

On behalf of appellant: Mr L M THABALALA
Instructed by:
JUSTICE CENTRE

BLOEMFONTEIN

On behalf of respondent: Adv M STRAUSS
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN