



NORTH WEST HIGH COURT, MAFIKENG

CASE NO. CA 96/2010

In the matter between:

JOHN MATLAPE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MPSHE AJ.

A. INTRODUCTION

[1] The appellant appeared in the Regional Court for the Regional Division of North West, held in Lichtenburg, on two counts of attempted murder. The appellant was convicted on both counts as charged. Sentence of five years imprisonment on each count was imposed. It was ordered

that three years in count 1 is to run concurrently with the sentence in count 2. The appellant appeals against both conviction and sentence. The appellant was legally represented by Mr F.K. Nemaname in the Court *a quo*.

B. BACKGROUND

[2] It is common cause that:

- a) there was an altercation between the complainants in counts 1 and 2, and the appellant at a business place, namely, tuck shop;
- b) the third State witness, Mr Bethuel Mogatusi, and the defence witness, Mr Bathu Ranekae, were present during the events at the said business place;
- c) the appellant fled the business place;
- d) the complainants in counts 1 and 2 chased the appellant when he fled from the business place;
- e) the appellant fired a number of shots with his licenced firearm, a 9mm parabellum norico pistol, with serial number 663123;
- f) the complainant in count 1 sustained a gunshot wound in his stomach whilst the complainant in count 2 sustained an injury to his forehead;

g) the appellant, after having fired the shots, went to the police station at Coligny, North West, where he made a certain report to the fourth State witness, Inspector Swart, and handed the firearm referred to in paragraph (e) *supra* together with its magazine, with two 9mm parabellum rounds in it and his firearm licence to Inspector Swart;

[3] The appellant's defence was one of private defence;

[4] The appellant's version entailed that the complainants chased him when he left the business place, that whilst being chased by the complainants he fell, that when he fell the complainants attacked him with a knife and screwdriver, as a result of which he was injured on the forehead and finger, that he managed to escape after having thrown eggs, bread, milk and meat which he had purchased earlier at the business place at the complainants, that he fled in the direction of his place of residence, that the complainants continued to pursue him, that when he arrived at his house he found it to be locked and empty as his wife and children were not there, that the complainants approached him whilst he was at the door of his house, that one of the complainants was holding a screwdriver in a stabbing position whilst the other one was holding a knife in a similar manner, that he could not see which one was in possession of the screwdriver as it was dark, that he fired shots in the air as he thought that his life was in danger, that he fired five shots which caused the complainants to flee, that he decided to go to the police station to report the incident and that when he was on his way to the police station he noticed the complainants lying next to the street about

four metres from the gate of his house.

- [5] The complainants wanted the Court to accept that they also chased Ranekae and that the latter was present at the time of the shooting incident.

C. AD CONVICTION

- [6] I do not find it necessary to deal with the evidence in detail. It is admitted that it is the appellant who fired the shots and injured the complainants as he did.
- [7] The legal issue that needed to be dealt with on appeal was the presence or not of private defence as alleged by counsel for the appellant, Mrs Zwiegelaar.
- [8] However, Mrs Zwiegelaar correctly abandoned the issue of private defence. I am of the opinion that counsel's decision is the correct one given what transpired under cross-examination of the appellant:

"Sir, do you understand my question? When you were in your yard and you there, they were flanking you, was they – were they standing still or what were they doing? - - - One, one was, one was holding a screwdriver and in the stabbing, the stabbing position and the other one was doing that with the knife Your Worship. But doing the same with the knife Your Worship, by doing the same with the knife Your Worship, in the stabbing position.

I saw that you are showing the court that had it raised in above their shoulders, both of them? - - - Correct Your Worship.

And what made you decide to shoot in the air? - - - I wanted them to flee Your Worship.

Although they were getting ready to attack you at that precise moment? - - - I was not in the intention.

How many shots did you fire? - - - Five shots Your Worship.
 Did you discharge all five bullets while they were standing there, there raised with these weapons? - - - Yes. Yes Your Worship.
 While they were standing that close to you? - - - Your Worship, yes.
 So, when you drew, when you shot the last shot, the fifth shot, were they still there near you? - - - No Your Worship.
 So, where were they then? - - - They had fled Your Worship.
 And you keep on pulling these bullets into the air? And they fled? - - - Yes, they were in the premises. I do nothing to them.
 Show the court how you shot these bullets into the air? Show me, if this is a weapon, did you held it like this, this, this or straight up into the air? - - - Yes Your Worship."

- [9] Mrs Zwiegelaar attacked the conviction on the basis of contradictions amongst the State witnesses, Johannes Metambo, Jantjie Mosimane and Bethuel Mogatusi. The Court is called upon to find that the witnesses did not tell the truth and therefore acquittal should have followed.
- [10] I accept that there were contradictions. However, the mere existence of contradictions is not enough. The said contradictions should be found to have been material. The materiality of the contradictions should have an impact on the credibility of the witnesses.
- [11] The State counsel, Mr Van Niekerk, submitted that the said contradictions relate to issues of observation and recollection of an incident that happened long ago. That these contradictions are not material and do not affect the credibility of the witnesses. I am in agreement with this submission.
- [12] Having perused the judgment of the Court *a quo* and the arguments of

both counsel, I come to a conclusion that the conviction is unassailable.

D. AD SENTENCE

- [13] Mrs Zwiegelaar made submissions on the sentence imposed. She further argued that the Court *a quo* should have found that compelling and substantial circumstances existed.
- [14] Mr Van Niekerk agreed with this submission, but stated that the seriousness of the offence renders the sentence imposed less shocking.
- [15] It is trite that a Court of appeal will not lightly interfere with the sentence imposed by a trial Court in the exercising of its discretion. Unless the exercising of its discretion is clearly wrong, a Court of appeal will not interfere. See *S v Pieters* 1987 (3) SA 717 (A); *S v Pillay* 1977 (4) SA 531 (A) at 534H–535G.
- [16] The following personal circumstances of the appellant were put on record:
- 16.1 He is 39 years of age.
 - 16.2 He is married with two minor children.
 - 16.3 He is the sole breadwinner.
 - 16.4 He is employed as a gardener since 2001 with the Department of Health and earns R2 800.00 per month.
 - 16.5 He is a first offender.
 - 16.6 He is not educated.
 - 16.7 He handed himself over to the police. This is remorse.

I am of the view that the Court *a quo* should have found that compelling and substantial circumstances existed.

[17] A factor that I find difficult to ignore is that the complainants were the aggressors.

[18] I am of the view that the sentence imposed calls for an interference by this Court. Further that, given the circumstances of the case, the chain of events in particular, the two counts should have been taken as one for purposes of sentence. See *S v Thebus & Another* 2002 (2) SACR 566 (A) at 580A–B; *S v Schrich* 2004 (1) SACR 360 (CPD) at 370C–D.

[19] Consequently, I make the following order:

- a) The appeal against conviction is dismissed;
- b) The appeal against sentence is upheld; and
- c) The sentence of the Court *a quo* is set aside and substituted as follows:

“Six (6) years imprisonment. The two counts are taken as one for purposes of sentence.”

ACTING JUDGE OF THE HIGH COURT

I agree

A.A. LANDMAN
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 04 JUNE 2010
DATE OF JUDGMENT : 08 JULY 2010

COUNSEL FOR APPELLANT : ADV C. ZWIEGELAAR
COUNSEL FOR RESPONDENT : ADV J.J. VAN NIEKERK

ATTORNEYS FOR APPELLANT : HERMAN SCOLTZ ATTORNEYS
(Instructed by BOSMAN & BOSMAN ATTORNEYS)
ATTORNEYS FOR RESPONDENT : DIRECTOR OF PUBLIC PROSECUTIONS