IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO**: A06/2023**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

_____ _____
DATE **G.Y SIDWELL**

In the matter between:

AEDAN DOUBELL Appellant

and

THE STATE Respondent

JUDGMENT

SIDWELL AJ

[1] This is an appeal against conviction of the Appellant in the Regional Magistrate's Court of Randburg on a competent verdict of attempted

murder, namely assault with intent to do grievous bodily harm to the complainant.

[2] The Appellant was initially charged with the crime of attempted murder and was convicted on 15 November 2019 by the Regional Court in Randburg on a competent verdict of assault with intent to do grievous bodily harm.

[3] On the 16th of September 2020 the Appellant was sentenced by the same court to a fine of R10 000 or 2 years' imprisonment, half of which was suspended for a period of 3 years on certain conditions. The fine of R5 000 was paid on the same day.

[4] On the 16th of October 2020 an application for leave to appeal the conviction by the Appellant was argued in the same court. The application was refused by the learned magistrate.

[5] As a result of such refusal, a petition in terms of section 309C of the Criminal Procedure Act, 51 of 1977, was brought on 1st December 2021. On 18 January 2023 the petition was upheld and leave to appeal against conviction was granted to the Appellant by this Court.

[6] The appeal was argued on Monday, 9 October 2023 and judgment was reserved.

[7] It was pointed out by Mr Belger for the Appellant that in the event of the appeal against conviction being upheld the sentence would fall away.

THE FACTS PERTAINING TO THE ALLEGED CRIME OF ATTEMPTED MURDER AND THE SUBSEQUENT COMPETENT VERDICT OF ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM

[8]

[8.1 The facts of the matter were set out in the Appellant's heads of argument in a fair and balanced manner.

[8.2] The Appellant in his heads emphasized the significance of the medical evidence in resolving the issues to be decided. The Respondents in its heads of argument did not make submissions on the significance of the medical evidence. A consideration of this evidence is essential to a holistic assessment of the facts.

[9] In his plea explanation the Appellant stated that, on the evening of Saturday, 9 July 2016, he attended the 21st birthday party celebrations of Michaela Rogers which were held at the Cedar Lake Clubhouse in Fourways. The Appellant stated that he was invited as the boyfriend of Chloe Rogers, the younger sister to Michaela Rogers.

[10] The party extended into the early hours of Sunday morning. During the party, there was some tension amongst some of the partygoers and this culminated in an incident between the Appellant on the one hand, and the complainant, Gareth Capstick on the other hand. In his plea explanation the Appellant stated that he was subjected to verbal abuse from Capstick and the other older boys in the group during the course of the evening and before the incident.

[11] According to the Appellant's plea explanation, and his subsequent evidence, the incident commenced when he was confronted by the complainant who verbally threatened him. The threats and the manner in which the complainant raised his right first and simultaneously pushed the Appellant's chest with his left hand led him to form the view that the complainant was about to punch him. He reacted instinctively and struck the first blow, which floored the complainant.

[12] He insisted that he did this to protect himself from the threatened blow by the complainant, and that this was the sum total of his physical

reaction to the threat. He vehemently denied that he kicked the complainant, who was lying on the floor not moving.

[13] The State led the evidence of six witnesses which included two of the complainant's friends and medical practitioners who attended the complainant shortly after the incident. Evidence was led by the State that the Appellant not only punched the complainant in the jaw but that he forcefully kicked him in the head more than once. The complainant was completely immobile by then. One of the medical experts who testified on behalf of the State was a neurosurgeon who attended to the complainant shortly after the event.

[14] The Appellant gave evidence in his defence and called one of his friends, who was an eyewitness to the incident, and a medical expert, a forensic pathologist, as witnesses.

[15] The medical experts all agreed that they could not find that the complainant suffered any trauma such as one would expect from an assault where the victim was kicked forcefully more than once in the head. In effect, the experts were of the view that such a vicious attack did not happen.

THE ISSUES

[16] During argument in this court, it was put to both counsel that the evidence for the State and the evidence for the defence (excluding the medical evidence) put the court on the horns of a dilemma of mutually exclusive versions, because both versions could not exist at the same time. The two, stated in the form of two questions, are shortly as follows:

[16.1] Did the Appellant strike only one blow to the chin of the complainant? or

[16.2] Did the Appellant go ahead and forcefully kick the complainant more than once in the head whilst he lay immobilised on the floor?

[17] These were the main issues the trial court was called upon to adjudicate and these were the same issues that this court had to assess.

[18] It is the view of this court that the medical evidence would point to an answer.

[19] Further, it is accepted that a trial court should consider the totality of the evidence, not emphasising one aspect to the detriment of any other aspect.

THE LEGAL PRINCIPLES

[20] The State reminded this court that it is trite law that in criminal proceedings the State bears the onus to prove the guilt of the accused beyond reasonable doubt. It must, however, be borne in mind that this onus is not proof beyond all shadow of doubt. [*S v Ntsele* 1998 (2) SACR 176 SCA].

[21] The State also submitted that the correct approach for the trial court to follow with regard to a factual dispute between the evidence of the State witnesses and the defence witnesses, is to apply its mind to the merits and demerits of the State and defence cases as well as the probabilities of the case. Both counsel addressed us on the correct manner of resolving the disputes arising out of mutually destructive versions.

[22] The court must consider the evidence as a whole. [*S v Singh* 1975(1) SA 227 N at 228 G-H]. In the instant case this meant that the views of the medical experts and their reasons had to be considered together with the rest of the evidence.

APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS

[23] As a marker of probabilities the medical evidence clearly indicated what assault was in fact perpetrated by the Appellant on the complainant.

[24] The magistrate overlooked the fact that the State witness, Dr Kolloori, and the defence witness, Dr Nel, were agreed that, had the complainant been kicked as described by the State witnesses, he would have suffered more injuries than those observed by the doctors who examined him after the assault. The two eyewitnesses for the State, James Chippendale and Chad Summers, testified how the complainant was kicked in the face and head by the Appellant as he lay immobile on the floor. They were full force kicks and swinging kicks. The Appellant and his witness, Tyren Nicholson, testified that the Appellant did not kick the complainant. The magistrate materially misdirected herself in not taking into account in assessing the veracity of the Appellant and his witness, that the medical evidence supported the version of the defence.

[25] The magistrate rejected the Appellant's version on the ground that if the Appellant had only hit the complainant once with a fist, the complainant would not have suffered the injuries which he did. This flies in the face of the medical evidence, for the State and the defence, that the injuries could have been caused and were in this case caused by a single punch to the jaw of the complainant.

[26]

[26.1] The Magistrate rejected the evidence of the Appellant on the further ground that it was so inherently improbable as to be deceitful. It was a fabrication, she found. This was because the complainant would never have attempted to attack the Appellant, as described by the Appellant, considering the respective physiques of the two protagonists.

[26.2] The Appellant was the bigger man but the disparity between the two were was not such as to necessarily deter the complainant from

attempting to attack the Appellant. The complainant and his friends were a few years older than the Appellant and his companion, Tyren Nicholson, who were 18 years old.

[26.3] Both the complainant and the Appellant said that the complainant was alone when he spoke to the Appellant at the scene on the patio but the complainant said that his three friends, James Chippendale and Alex and Chad Summers, were out on the patio at the time.

[26.4] According to the Appellant, in the verbal exchange that took place first the complainant told the Appellant that his four friends inside were going to come and assault the Appellant, and then he said that he would do it himself. The Appellant also testified that earlier in the evening the complainant, in the company of his friends, had verbally confronted and abuse him. The Appellant said that his reaction was to avoid a quarrel with them. This may have emboldened the complainant.

[26.5] The combative attitude adopted by the complainant in the verbal exchange on the patio, which appeared from both the State and defence versions, indicated that the complainant did not ‘use my words’ to resolve disputes, as he claimed.

[26.6] In all these circumstances the evidence of the Appellant that the complainant attempted to assault him, the bigger man, was not improbable.

[27] The magistrate rejected the Appellant’s evidence for the further reason that, had the complainant and his friends abused the Appellant earlier that evening, the friends of the complainant would have attacked the Appellant when he punched and floored the complainant, and this did not happen. In this regard the Appellant testified that after he punched the complainant, he heard shouting and people were looking for him to assault him. He left the party before things could escalate. About one

and a half hours later a group of men came looking for him where he was at his girlfriend's house.

[28] The magistrate also took into account against the Appellant that he did not bother to tell his girlfriend, the sister of the celebrant, at the party of the earlier ill treatment by the complainant and his friends. In fact, the Appellant testified that he did speak to his girlfriend about this, briefly, and that she was present some of the time when it took place. She advised him to sit with the family and stay away from the troublemakers. The Appellant said that he removed himself from the situation each time he was confronted and that he did not tell the father of the celebrant about it because it was his daughter's 21st party and he thought things would settle, as he put it.

[29] The magistrate also rejected the evidence of the Appellant's witness Nicholson, who corroborated the evidence of the Appellant, on the basis that Nicholson must have realised that the Appellant exceeded the bounds of self-defence and decided to protect his friend, the Appellant. There is no support for this finding on the evidence and it amounts to speculation.

[30]

[30.1] On the question of self-defence, the magistrate found that if the complainant had threatened the Appellant with a clenched fist, the reaction of the Appellant in landing the first blow was excessive, as the complainant did not in fact assault the Appellant. This approach ignored the right of the Appellant to defend himself against an imminent attack, which our law recognises. The correct assessment of the evidence of the defence finds that the Appellant faced an imminent attack, and that the action taken by him to avert the danger of physical injury to himself was commensurate with the harm threatened.

[30.2] In the situation in which the Appellant found himself when the complainant confronted him on the patio there was no other remedy available to him, on the defence evidence. The Appellant and the

complainant were in close proximity to each other. The Appellant said that the complainant tried to punch him and did not actually punch him. As the complainant tried to punch him he took a step back and punched the complainant. Tyren Nicholson, the Appellant's witness, said that the complainant 'made to hit' the Appellant and the Appellant reacted before the complainant could land his punch. The Appellant reacted quicker than the complainant, he said. It is clear from this evidence that the Appellant acted to avert the danger and not that he retaliated once the danger had passed, as the magistrate found.

[30.3] There was no cross-examination of the Appellant or Nicholson on the proportionality of the action taken by the Appellant, or on alternative courses of action open to him. There is nothing on the evidence to indicate that the Appellant exceeded the bounds of reasonable self-defence.

[31] The magistrate accepted the evidence of the two State witnesses who testified that the Appellant kicked the complainant as he lay on the floor. She was impressed by their demeanour and by the fact that there were no differences between them that were of any significance. Further, she found that the medical evidence was consistent with the injuries which they saw the Appellant inflict on the complainant. In the last respect the magistrate was misdirected. The medical evidence was clear that the injuries were more in keeping with a single blow to the complainant's jaw than repeated forceful kicks to the face and head.

[32] There was nothing improbable or contradictory in the evidence of the Appellant and Nicholson that the Appellant only assaulted the complainant by punching him once. By contrast, the assault witnessed by the two witnesses for the State was not confirmed by the medical evidence, nor was the complainant's description of his injuries, which were exaggerated by him. There was a reasonable doubt that the Appellant perpetrated the kicks alleged by the two State witnesses. The

Appellant's denial of the kicks was reasonably possibly true and the magistrate erred in not giving him the benefit of the doubt in this respect.

[33] There was no evidence by the State as to how the complainant came to be lying on the floor, during or after his verbal exchange with the Appellant. There was only the evidence of the Appellant and Nicholson on this. Their evidence was acceptable and, objectively considered, it proved that the Appellant acted in self-defence when he punched the complainant on the jaw, thereby flooring him. The Appellant should have been acquitted.

In the result the following order is made:

1. The appeal succeeds.
2. The conviction and sentence are set aside.

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G.Y SIDWELL
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

COERTSE CJ AJ

INTRODUCTION

[1] I've had the privilege to read the judgment of my sister Sidwell AJ. We've reached the same conclusion. We have decided to file our own separate judgments.

[2] This is an appeal against conviction only of the appellant in the Regional Court of Randburg on a competent verdict of attempted murder, namely assault to do grievous bodily harm to the complainant.

[3]

3.1. Counsel for the parties presented their respective arguments in a clear and concise way; the court appreciate the professional presentation.

3.2. Counsel for both the Appellant and the Respondent made their respective heads of argument available to the court; that was over and above the fact that these heads were filed on Caselines.

[4] The appellant was initially charged with the crime of attempted murder and was convicted on 15th of November 2019 by the regional court in Randburg on a competent verdict of assault to do grievous bodily harm.

[5] On the 16th of September 2020 the Appellant was sentenced by the same court to a fine of R10,000 or 2 years imprisonment, half of which was suspended for a period of 3 years on the usual conditions. The fine of R5,000 was paid on the same day.

[6] On the 16th of October 2020 an application for leave to appeal the conviction by the Appellant was argued in the same court. The application was refused by the learned magistrate.

[7] As a result of such refusal, a petition in terms of section 309C of the Criminal Procedure Act, 51 of 1977, was brought on 1st December 2021. On the 18th of January 2023 the petition was upheld and leave to appeal against the conviction was granted to the Appellant by this Honourable Court.

[8] The appeal was argued on Monday 9 October 2023 and judgment was reserved.

[9] It was pointed out by Advocate Belger that in the event of the appeal against the conviction be upheld, then in that case the sentence also falls by the wayside; it follows then further that the fine that was paid by the Appellant should be repaid to him.

THE FACTS PERTAINING TO THE ALLEGED CRIME OF ATTEMPTED MURDER AND THE SUBSEQUENT COMPETENT VERDICT OF ASSAULT GBH

[10] The court is of the view that the facts of matter in the court a quo are fairly and very balanced set out in the Appellant's heads of argument. The Respondent's heads of argument almost exclude any reference to the medical experts' s evidence and these heads do not contribute much to form a holistic view of the matter.

[11] In his plea explanation the Appellant stated that, on the evening of Saturday, 9 July 2016, he attended the 21st birthday party celebrations of Michaela Rogers which was held at the Cedar Lakes Clubhouse in Fourways. The Appellant states that he was invited as the boyfriend of Chloe Rogers, the younger sister of Michaela Rogers.

[12] The party extended into the early hours of Sunday morning. During the party, mention is made of some tension between some of the partygoers and the pressure started to built up which then culminated in an ugly incident between the appellant on the one hand, and the complainant Mr Gareth Capstick. During his plea explanation he informed the court that he was subject to verbal abuse from Capstick and other older boys in the group.

[13] According to his plea explanation, and his subsequent evidence, he was accosted by the complainant and under the circumstances he formed the view that complainant was about to strike him with a clenched fist. He reacted instinctively and struck the first blow which floored the complainant.

[14] He insisted that, that was the sum total of his physical retaliation to protect himself from a blow by the complainant. He vehemently denied that he ever kicked the complainant which was lying on the floor not moving.

[15] The state led evidence of six witnesses which included two of the complainant's friends and medical practitioners who attended the complainant shortly after the incident. Evidence was led by the state that appellant went ahead and forcefully kicked the complainant four times, who was by now completely immobile, to his head. One of the medical experts on behalf of the state is a neurosurgeon who had attended to the complainant shortly after the event.

[16] The appellant gave evidence and led evidence of one friend of his and a medical expert who practices as a forensic pathologist.

[17] The medical experts all agree that they could not find any trauma that one would expect after such an alleged incident where the person was kicked forcefully four times against his head. Practically it means that they are of the view that such a vicious attack did not happen.

THE ISSUES

[18] The trial court was faced with the dilemma that the appeal court is facing, namely, what to make of the evidence as a whole? During argument in the court of appeal, it was put to Adv Belger and to Adv V S Sinthumule that the evidence for the state and the evidence for the appellant [both excluding the medical evidence] puts the court on the horns of a dilemma of mutually exclusive versions because both versions could not exist at the same time. The two versions, stated in the form of two questions, are shortly as follows:

18.1. Did the appellant struck only one blow to the chin of the complainant? or

18.2. Did the appellant went ahead and forcefully kicked complainant four times against his head whilst immobilised on the floor?

[19] In short these were the real issues the court of appeal was called upon to adjudicate and these were the same issues that the trial court had to decide.

[20] It is the view of the court of appeal that the medical evidence would point to an answer.

[21] It is further rather trite that a trial court should consider the totality of the evidence not emphasising the one aspect to the detriment of the other aspect. And a court of appeal should not interfere in a trial court's verdict if that was the case.

THE LEGAL PRINCIPLES

[22] The state reminded the court of appeal that it is trite law that in criminal proceedings the state bears the onus to prove the guilt of the accused beyond reasonable doubt. It must however, be borne in mind that this onus is not proof beyond all shadow of doubt. [S v Ntsele 1998 (2) SACR 176 SCA]. The court of appeal is aware of this inviolate principle.

[23] The state also submitted that the correct approach for the court [that is obviously the trial court and the court of appeal, to follow with regard to a factual dispute between the evidence of the state witnesses and the defence is to apply its mind to the merits and demerits of the state and the defence as well as the probabilities of the case. That is precisely the point that was raised by way of questions to the representatives of this dilemma facing the court of mutually destructive versions.

[24] The court must consider the evidence as a whole. [Singh 1975 (1) A (N) 228 G-H.] In the instant case, it means that the medical experts views and reasons should be considered.

APPLICATION OF THE LEGAL PRINCIPLES TO THE FACTS

[25] The appeal can be decided on grounds other than either accepting or rejecting the state's version or the version of the appellant. And the court is of the view that the independent medical experts' evidence points the appeal court in a specific direction as to the probabilities of the case.

[26] The state's case is in a nutshell that the appellant kicked the complainant forcefully four times against his head whilst lying immobile on the floor, whereas the appellant's version is diametrically opposed to this version; not so he said, he denies having kicked the complainant at all. Where do the probabilities of this case lie?

[27] It is the opinion of the court of appeal that the medical experts' views are contra that of the state's version and more in line with that of the appellant, and this is accepted by the court of appeal. It is pointed out that the state's medical expert agreed with the medical experts on behalf of the appellant. They did not take issue with one another on the probabilities of the injuries that one would expect under circumstances such as presented by the state.

THE REMEDY

[28] The appeal is upheld and the conviction set aside with the consequent order that the fine of R5000.00 [five thousand Rand] that was paid by the Appellant be repaid by the State to the Appellant within 14 days after publication of this judgment.

THE ORDER

[29] The appeal is upheld and the conviction set aside with the consequent order that the fine of R5000.00 [five thousand Rand] that was paid by the Appellant, be repaid by the State to the Appellant within 14 days after publication of this judgment.

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Coertse CJ
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

APPEARANCE:

FOR APPELLANT	:	P BELGER. INSTRUCTED BY HEWLETT BUNN INCORPORATED
FOR RESPONDENT	:	V. S SINTHUMULE INSTRUCTED BY DIRECTOR OF PUBLIC PROSECUTIONS
DATE OF HEARING	:	09 OCTOBER 2023
DATE OF JUDGMENT	:	29 NOVEMBER 2023

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be on 29 November 2023.