Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: AR414/2022

In the matter between:

J[…] D[…] **APPELLANT**

Versus

THE STATE **RESPONDENT**

JUDGMENT

P C BEZUIDENHOUT J.:

[1] Appellant was charged with seven counts but was convicted on one count of attempted murder (count 1) and one count of breaching a domestic violence interdict (count 4). He was sentenced to undergo seven (7) years imprisonment and four (4) years imprisonment respectively. It was ordered that two (2) years of the sentence of four (4) years run concurrently with the sentence of seven (7) years thus an effective

sentence of nine (9) years imprisonment. With the leave of this Court he now appeals against his convictions and sentences on counts 1 and 4.

[2] It was submitted on behalf of Appellant that the State had at its disposal a witness who was present at the scene according to the evidence and that it failed to call this witness but relied on the evidence of a single witness, the complainant. According to the complainant the person Mr Zangasi Mbheje was a passenger in Appellants vehicle at the time of the incident. It was submitted that as the State did not call this witness the learned Magistrate ought to have done so as his evidence could have been crucial in assisting the court to arrive at a just decision. In this regard we were referred to section 186 of the Criminal Procedure Act 51 of 1977 which states:

> "The state shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case."

[3] However this requires that the court, upon assessing the evidence, must be satisfied that unless it hears a particular witness justice will not be done in the end. From page 156 of the record it appears that the said witness Mr Mbheje was at court on that day. At page 159 of the record the prosecutor, when addressing the court, stated the following:

> "The state has resolved that it's not going to call any further witnesses. The witness that the state intended to call next Mr Mbheje, upon consulting with him, the state felt he is not going to assist the state's case. So, we are dispensing with him. If the defence wants to make use of him he is available to the defence."

It is also common cause that the defence did not call Mr Mbheje as a witness although he was the friend of the complainant and was in the car with him.

[4] In my view it cannot be said that the evidence of Mr Mbheje was so crucial that the court must have found that it could not do justice if he was not called. Accordingly, in my view, no adverse finding can be made from the fact that he was not called as a witness.

[5] It was further contended that the learned Magistrate was incorrect in preventing the counsel of Appellant from putting to the complainant what was stated in the affidavit of Mr Mbheje. In this regard we were referred to the matter of Wilfred Nuxmalo v The State AR411/06 NPD where it was held that a legal representative is entitled to put such statement to a witness. I am in agreement with this submission and indeed the learned Magistrate was incorrect in preventing counsel from doing so.

[6] In respect of count 1 the charge of attempted murder it was contended that Appellant fired a shot with a 9mm pistol at the complainant whilst she was seated in the vehicle and that the windscreen of the vehicle was struck. However the evidence of the complainant, in this regard, was contradictory as she testified that he had come out of the car and was firing straight at her. This evidence as to the firing at her does not appear in her police statement and that she was fired at while seated in the vehicle. In the police statement she stated that Appellant fired at the windscreen after she had left the vehicle and whilst she was inside Aloe Ridge Flats. This accords with the evidence of Appellant. Her evidence as to how and when the shots were fired was contradictory and was also contrary to that which she had stated in her statement to the police. It was also not stated in her statement to the police that Appellant stated that he wanted to kill her as she testified. It was therefore submitted that Appellant was accordingly wrongly convicted on the charge of attempted murder.

[7] It was recorded by the doctor who examined the complainant and compiled the J88 at St. Anne's Hospital that the complainant had stated that while sitting in a stationery car she was shot at by Appellant but not hit. She further informed the doctor

that she was assaulted by her husband and hit on the head with a firearm. In the "conclusion" the doctor noted that it was an assault allegedly by a handgun and punch to face and that the clinical findings could be caused by this mechanism. It is indicated that there were lacerations to the head and bruises to the face.

[8] Ms Ngcobo who appeared on behalf of the State conceded that the complainant exaggerated her evidence as she was giving evidence and also that her evidence was contradictory as to when the shots were fired and the words that were uttered. This also was not contained in her police statement. She conceded and in my view rightly so, that it was not proved that Appellant was guilty of attempted murder. It was only proved that he was guilty of assault with intent to do grievous bodily harm.

[9] From the evidence and especially the J88 report which is not disputed and the evidence of the complainant I am satisfied that it was proved beyond reasonable doubt that Appellant was guilty of the offence of assault with intent to do grievous bodily harm.

[10] Count 4 relates to the breach of the protection order. It was common cause that the parties were in the process of divorcing each other and that indeed the relationship was acrimonious at the time. It was also not in dispute that at the time there was an interim protection order which was still in force. In terms of the protection order Appellant was not to commit acts of domestic violence, sexual abuse, physical abuse, verbal abuse or intimidation. It is apparent from the evidence that on the day in question the complainant and Appellant met each other along the road and that an altercation ensued between them. There is a dispute as to what exactly transpired on the day in question but it common cause and admitted by Appellant that he did assault the complainant, that he fired a shot at her car when she was not in the car and that he also crashed into her car. Accordingly on his own evidence he is guilty of contravening the protection order.

[11] As the conviction is to be changed to one of assault with intent to do grievous bodily harm the sentence would accordingly also have to be adjusted and further the sentence in respect of the breach of the protection order must also be considered to see whether it was just in the circumstances. It must be borne in mind that both offences originate from the one incident and due to the acrimonious relationship between the parties at the time.

[12] Appellant has no previous convictions, was 36 years of age, married to the complainant and had one child of 10 years old whom he supported together with his wife and he also supported his mother. He was employed by the department of Safety and Liaison as a deputy manager for 9 (nine) years earing a salary of R48 000.00 per month. Due to this incident he has also lost his employment. He spent two (2) years in custody awaiting trial and after his conviction spent another year in custody before bail was granted to him after his petition had succeeded. It was held in S v Kruger 2012 (1) SACR 369 (SCA) that the period awaiting trial is to be taken into account in determining a sentence. Considering the fact that he has also been in custody for period of a year after his conviction together with the awaiting trial period amounts to incarceration for a period of three (3) years.

[13] In my view the learned Magistrate, in determining the sentence, overemphasised the incident and what transpired there at the expense of considering the personal circumstances of Appellant and also the relationship between the complainant and Appellant at the time. The sentence of four (4) years imprisonment in respect of count 4 is, in my view, severe in the circumstances.

[14] A sentence of three (3) years imprisonment for the breach of the protection order would in my view be a sentence which would bring home to Appellant the seriousness

of his actions on the day in question. In respect of the assault with intent to do grievous bodily harm it is indeed so that there were certain injuries sustained by the complainant but there is nothing to indicate that any of them were very serious.

[15] Taking into account that Appellant had been incarcerated for a period of two (2) years awaiting trial, the following sentence, in my view, would be appropriate in the circumstances.

Order

The following order is accordingly made.

1. The appeal against the conviction and sentence on count 1 is upheld and the conviction and sentence is set aside. Appellant is convicted on a count of assault with intent to do grievous bodily harm and Appellant is sentenced to one (1) year imprisonment.
2. The appeal against the conviction on count 4 is dismissed and the conviction is confirmed. The appeal against the sentence in respect of count 4 is upheld and the sentence is set aside. Appellant is sentenced to one (1) year imprisonment.
3. It is further ordered that the sentence in respect of count 4 is to run concurrently with the sentence in respect of count 1 thus an effective term of one (1) year imprisonment.
4. The sentences are ante dated to 5 May 2022.
5. In terms of section 103 of Act 60 of 2000 Appellant is declared unfit to possess a firearm.

_____

P C BEZUIDENHOUT J.

I agree.

_____

MPONTSHANA A.J.

JUDGMENT IS RESERVED:	**1 MARCH 2024**
JUDGMENT HANDED DOWN:	**22 MARCH 2024**
COUNSEL FOR APPELLANT:	**ADV D BARNARD** **CHAMBERS** **PIETERMARITZBURG**
COUNSEL FOR THE STATE:	**ADV P NGCOBO** **DPP** **PIETERMARITZBURG** **KWAZULU-NATAL**