THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 180/2018

In the matter between:

WILLEM JAKOBUS ALBERTUS OOSTHUIZEN **FIRST APPELLANT**

THEO MARTINUS JACKSON **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Oosthuizen & another v The State* (180/2018) [2019] ZASCA 182 (02 December 2019)

Coram: Van der Merwe, Plasket and Mbatha JJA and Tsoka and Dolamo AJJA

Heard: 11 November 2019

Delivered: 02 December 2019

Summary: Criminal Procedure – whether State proved beyond reasonable doubt offences committed – on the version of the appellants guilt was established – assault with intent to do grievous bodily harm may be committed by threat. Sentence – sentences reconsidered – conviction and sentence accordingly amended.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria, functioning as Mpumalanga Division, Middelburg (Mphahlele J sitting as court of first instance):

1 The appeal succeeds.

2 The order of the court a quo is set aside and replaced with the following order:

'(a) Both accused are found guilty of the offences of assault with intent to do grievous bodily harm (count 5) and of kidnapping (count 4).

(b) Accused 2 is found guilty of defeating the ends of justice (count 7).

(c) The accused are each sentenced to five years imprisonment on the conviction of assault with intent to do grievous bodily harm (count 5).

(d) The accused are each sentenced to 1 year imprisonment on the conviction of kidnapping (count 4).

(e) Accused 2 is sentenced to 1 year imprisonment on the conviction of defeating the ends of justice (count 7).

(f) It is ordered that the sentence in respect of count 4 is to run concurrently with the sentence imposed on (count 5).

(g) It is ordered that the sentence in respect of count 7 is to run concurrently with the sentence imposed in count 5.

(h) The sentences are antedated to 25 August 2017.'

JUDGMENT

Mbatha JA (Van der Merwe and Plasket JJA and Tsoka and Dolamo AJJA concurring**):**

[1] On 8 November 2016, South Africa woke up to the headline news of The Sun, a tabloid newspaper, 'Burn in the coffin!'. A video recording of the incident went viral on various social media platforms. These events set the wheels of justice in motion. The appellants, Willem Jakobus Albertus Oosthuizen (Oosthuizen) and Theo Martinus Jackson (Jackson), were subsequently arrested and appeared before the Gauteng Division of the High Court, Pretoria, sitting in Middelburg. They appeared on charges of unlawful possession of a firearm in contravention of the provisions of the Firearms Control Act 60 of 2000 read with the provisions of the Criminal Law Amendment Act 105 of 1997, two counts of assault with intent to do grievous bodily harm, kidnapping, attempted murder, intimidation and defeating the ends of justice.

[2] The appellants tendered pleas of not guilty to all the charges but made a number of significant admissions as part of their plea explanations. They were convicted of all the charges except that Oosthuizen, who was charged with the unlawful possession of a firearm, was acquitted in respect of that charge. The appellants were sentenced as follows: on counts 2 and 3, both being assault with intent to do grievous bodily harm, they were sentenced to three years' imprisonment in respect of each count; on count 4, kidnapping, they were sentenced to five years' imprisonment; on count 5, attempted murder, they were sentenced to seven years' imprisonment; on count 6, intimidation, they were sentenced to six years' imprisonment; and accused 2, who also faced the charge

of defeating the ends of justice (count 7) was sentenced to three years' imprisonment.

[3] The court ordered that the sentences imposed in respect of count 3 were to run concurrently with the sentences imposed on count 6 and the sentences imposed on count 4 were ordered to run concurrently with the sentences imposed on count 5. The court sentenced Oosthuizen to a total of 16 years' imprisonment, of which five years were suspended for a period of five years on condition that he was not found guilty of any of the offences that he was convicted of during the period of suspension. He was effectively sentenced to 11 years' imprisonment. Jackson was sentenced to a total of 19 years' imprisonment, of which five years were suspended for a period of five years on condition that he was not found guilty of any of the offences that he was convicted of during the period of suspension. He was effectively sentenced to 14 years' imprisonment.

[4] The appellants sought leave to appeal against their convictions and sentences from the trial court, which application was dismissed on 27 October 2017. The appellants subsequently petitioned this court for leave to appeal against their convictions and sentences. With leave granted by this Court on 2 February 2018, the appeal against convictions and sentences are before us.

[5] It is necessary that I should give a short summary of the evidence. The first complainant, Delton Sithole, (Sithole) testified that on 17 August 2016 as he walked along a footpath from Kamfefe to Big House Squatter Camp, he was confronted by Oosthuizen. Oosthuizen, who was in a motor vehicle, enquired from him as to what he was doing there. Sithole responded by stating that he was walking on the footpath used by all other people in the area. He testified that Oosthuizen, who was confrontational, got out of the motor vehicle and grabbed

him by the wrist. Sithole managed to free himself from Oosthuizen's grip, who in a racially derogatory term said that he did not want Sithole on the farm. Thereafter, Oosthuizen proceeded to his motor vehicle and produced a firearm, whereupon Sithole fled, crossed the railway line, hoping that Oosthuizen would not be able to reach him.

[6] However, as he crossed the railway line, Jackson approached from the opposite direction in a motor vehicle, stopped him in his tracks so that he could not escape. Jackson, who was aggressive, ordered him to get on the back of his bakkie. He was driven to Danie Lee's house where they met Oosthuizen. He testified that both Oosthuizen and Jackson got onto the back of the bakkie and kicked him all over the body with booted feet. He testified that he was saved by the remark of one of the appellants who used a racially derogatory word, when he announced the presence of a black person, as a result they stopped assaulting him and proceeded to apprehend that person, who was brought to where Sithole was. This person, he said, was someone known to him, namely, Victor Rethabile Mlotshwa, the second complainant in this matter. Sithole was then set free and he proceeded to Big House Squatter Camp.

[7] Mlotshwa, the second complainant, testified that on the morning of 17 August 2016, he used a footpath through the mealie-fields to get to the main road on his way to purchase goods for his mother in town. Upon reaching the main road, a motor vehicle approached on the R25 road from Bethal to Middelburg. This motor vehicle drove straight towards him. He realised that the occupant, Jackson, was in a foul mood. He decided to run back towards the direction of Big House Squatter Camp. As he fled from Jackson, a second vehicle approached from the direction that he was proceeding to. He ended up being sandwiched between the two motor vehicles, and was unable to escape from the two men. Jackson and Oosthuizen alighted from their motor vehicles and

approached him. Without uttering a word Jackson hit him with a clenched fist, whereupon he fell down. Whilst on the ground he was kicked with booted feet and struck with clenched fists by the two appellants. He tried to get up, but was unable to do so. At one stage he noticed the presence of another person in one of the motor vehicles. Thereafter, he was instructed to get into Oosthuizen's motor vehicle. He resisted, but was assaulted, hauled into the said motor vehicle, and was forced down onto the back of the bakkie. Jackson brought cable ties, which were used to tie his hands to the motor vehicle. He tried to resist but the assault continued and finally he was secured to the motor vehicle. As the motor vehicles drove off he realised that the person he had a glimpse of was no longer there.

[8] Mlotshwa testified that he had no idea where he was being taken to. He was in the vehicle driven by Oosthuizen which was followed behind by Jackson's motor vehicle. Both vehicles drove past the place where he had been standing before being confronted by Jackson. They proceeded towards Middelburg. At the railway line they turned towards Hendrina and finally turned to the left onto the farm where the ditch was located. He observed that Jackson did not turn towards the ditch but drove past the turn-off to the ditch. Shortly, thereafter Jackson arrived. He was untied and ordered to alight from the motor vehicle. Jackson unloaded a coffin from the motor vehicle which he placed in the ditch. Mlotshwa testified that when he saw the coffin he was so shocked that he could not follow the conversation between the two appellants.

[9] Jackson opened the coffin and warned him that should he try to escape he was going to be shot. He observed that Oosthuizen had a firearm on his waist. Jackson instructed him to get into the coffin but he refused. This led to a further assault on him by the two appellants with clenched fists and open hands all over his body. Jackson fetched a knobkierie from his motor vehicle which he used to

hit him all over the body, mostly on his back. He finally relented, got into the coffin but tried to keep his upper body outside the coffin. Oosthuizen forced him inside the coffin by kicking and pressing his body with booted feet, forcing his entire body in the coffin. He tried to keep his hands out of the coffin and begged them to let him go. He heard one of them saying that petrol must be poured onto the coffin. At that stage he was in severe pain and trembling from shock so he pleaded with the appellants to spare his life. Instead, he was asked whether he wanted to die a slow or fast death. At that stage he noticed that Oosthuizen had a canister of petrol with him. The two men had also threatened to put a snake inside the coffin. After some time, when he tried to lift himself up from the coffin he realised that no one was pressing the lid down on him, he rolled out of the coffin, and fled the place. As he ran away, he was threatened not to report the incident to the police, as the appellants would trace him to his house. He reached his home still in a traumatised state.

[10] Ms Lonia Mlotshwa, the mother of Mr Mlotshwa, testified that she had sent his son to buy stock for the tuck-shop, but he returned after lunch in a terrible state of shock, eyes red, face bruised and dirty all over as if he had rolled himself on the ground. It was only after Mlotshwa took a nap after taking pain killers, that he related to her what had befallen him that morning. Dr Ngoepe, who examined Mlotshwa in November 2016 testified that she found two linear healed scars of about six centimetres in length on the chest and a round scar on the left thigh. Mlotshwa also informed her that he was swollen shortly after the assault.

[11] Two video recordings made by the appellants at the ditch were introduced into evidence by the prosecution. The videos depicted Mlotshwa being forcefully pushed with booted feet into the coffin and the lid being pressed heavily on his head. Though the recordings were short, Mlotshwa was seen crying and pleading

for his life with two hands folded together. It was not clear who of the two appellants was forcing him into the coffin. One of the appellants was heard asking how he wanted to die, whether by being burnt with petrol or a snake being placed in the coffin. Next to the coffin lay the knobkierie. Before the commencement of proceedings, the trial court had conducted an inspection *in loco* of various places where the incidents were alleged to have taken place. It recorded that the ditch was in a secluded place and that it was wide and deep.

[12] The appellants' version was that they never assaulted nor encountered the first complainant. With regard to Mlotshwa, their evidence was that they did not intend to kill Mlotshwa at the ditch, their intention was to threaten him. They denied assaulting Mlotshwa in any way before he was forced into the coffin and denied that Mlotshwa sustained any serious injuries. The appellants averred that Mlotshwa was in possession of a bag containing copper cables, that he was apprehended with the intention to take him to the police and that he begged to be disciplined by them rather than being taken to the police. When they insisted that they were going to take Mlotshwa to the police, he threatened to kill their families and burn their crops. This made the appellants take him to the ditch and place him in the coffin. They wished to instil fear in him so that he would not carry out his threats. The appellants testified further that the amount of force exerted on Mlotshwa did not exceed that which appears in the video recordings. They conceded that they committed assault, took him to the ditch against his will, forced him into the coffin and uttered threats about the snake and the pouring of petrol over him. They denied intimidating Mlotshwa and asserted that Mlotshwa was released at their instance. Mlotshwa returned to the motor vehicles to retrieve his sandals. Mlotshwa then requested a lift from Oosthuizen, who obliged. Although Jackson admitted having burnt the coffin, he denied defeating the ends

of justice. He testified that he burnt the coffin at the instance of his employer to prevent any further abuses.

[13] In criminal proceedings the State bears the onus to prove the guilt of the accused beyond a reasonable doubt. The accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the explanation is false beyond reasonable doubt.[1] The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal.[2] The appellant's conviction can therefore only be sustained after consideration of all the evidence and their version of the events is found to be false beyond reasonable doubt.

[14] Before us, it was contended that the complainants did not pass the litmus test for the evidence of a single witness in terms of s 208 of the Criminal Procedure Act 51 of 1977 (the CPA) as laid down in *R v Mokoena*[3] and succinctly set out in *S v Sauls & others:*[4]

'[T]he absence of the word "credible" is of no significance; the single witness must still be credible, but there are . . . "indefinite degrees in this character we call credibility". There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.'

[15] It was submitted that the trial court did not have regard to the cautionary rule when assessing the evidence of the single witnesses. It is trite that the court

[1] *S v V* 2000 (1) SACR 453 (SCA) at 455B.
[2] *S v Van Meyden* 1999 (1) 447 (W) at 448F-H.
[3] R v Mokoena 1956 (3) SA 81 (A); [1956] 3 All SA 208 (A).
[4] *S v Sauls & others* 1981 (3) SA 172 (A) at 180E-F.

can only convict on such evidence if it is satisfactory in all material respects. At the same time the court of appeal is reticent to interfere with the credibility findings of the trial court as well as the evaluation of the oral evidence, unless there is a material misdirection.[5]

[16] It is clear from a reading of the judgment on conviction that the trial court failed to apply the cautionary rule that applies to the evidence of single witnesses. Given the many improbabilities and contradictions in the complainants' account, if she had applied the necessary caution, she could not have accepted their evidence because it could not be said to have been satisfactory in all material respects.

[17] The trial court's approach to the evidence was arbitrary. For instance, it accepted that there was insufficient evidence before it regarding the instrument referred to as a firearm, but at the same time accepted the evidence of the complainants where there was a lack of sufficiency of evidence. There is no indication in the trial court's judgment that it was alive to the fact that it had to approach the evidence of the two complainants with caution on account of the fact that they were single witnesses. It was incumbent upon the trial court to show that it took into account the necessary caution. The trial court set out the evidence in great deal, but nothing suggests that it was properly evaluated. Regard must be had at all times to the fact that the onus to prove the case beyond a reasonable doubt rests on the state.

[18] The two complainants alleged that the incidents took place on 17 August 2016 whereas the appellants testified that they knew only of one incident involving Mlotshwa, which occurred on 7 September 2016. The trial court in its

[5] *Pistorius v S* [2014] ZASCA 47; 2014 (2) SACR 314 (SCA) para 30.

judgment alluded to the dispute about the date, but did not make any finding with regard thereto. This was significant as it has a bearing on probabilities. The court's approach in assessing evidence in a criminal case is to weigh up all the elements that point towards the guilt of the accused against all those that 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.[6]

[19] The trial court did not consider the merits and demerits, discrepancies and contradictions in the respective versions of the complainants, especially as they were single witnesses. In highlighting this misdirection, I point out the following discrepancies and contradictions:

- According to Sithole when Mlotshwa was apprehended, he was brought to him and asked if he knew Mlotshwa. He answered in the affirmative and was then released; whereas Mlotshwa's evidence was that he became aware of the presence of another person as he was being assaulted by the appellants but was unable to identify that person, save to say that it was a black person.
- Sithole's evidence was that later on the day of the incident he spoke to Mlotshwa who informed him that he had been placed in a "box". This was explicitly denied by Mlotshwa.
- When Sithole was cross-examined as to why he did not report his assault to the police, he stated that they did not know whether those people, (referring to the appellants) were farmers or not. Once again Mlotshwa denied speaking to Sithole about this. Mlotshwa's version was that he did not report the incident because of the threats from the appellants.

[6] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

- Mlotshwa in fact denied ever speaking to Sithole about the incident.
- Mlotshwa's evidence was that he was extensively assaulted on his back with a knobkerrie, which has a very large metal nut, however, he did not point out such injuries to the doctor who examined him.
- A photograph of Mlotshwa was handed in to the court as exhibit L. This photograph had been taken by Oosthuizen shortly after he had been placed in the coffin. Mlotshwa conceded that that was how he looked after being placed in the coffin. The photograph did not show any visible injuries on his face and chest. This shows the improbability of Mlotshwa's evidence about having been hit all over his body including the face with fists, as well as a knobkerrie without sustaining any visible injury on his body.
- Mlotshwa denied that he was found in possession of stolen copper cables, but in the video, Mlotshwa was asked about the copper cables, which indicates that such issue was not a fabrication on the part of the appellants.

[20] Given the many improbabilities in the complainants' account, coupled with contradictions in their own evidence and the objective facts, the trial court erred in accepting the evidence of Sithole as proof of the commission of the assault against him. The trial court's evaluation of the evidence and its approach to credibility findings of the State witnesses was incorrect in light of the material contradictions and improbabilities. The court a quo should have determined the matter on the version of the appellants. The video recordings and photographs corroborate their version.

[21] It is clear, however that on their own evidence, Mlotshwa was unlawfully deprived of his liberty. They are therefore guilty of kidnapping. On their version they had no intent to kill The question arises as to whether the appellants on their version should have been convicted on assault common or assault with intent to do grievous bodily harm, where the assaults include threats of burying Mlotshwa

alive, burning him and putting the snake in the coffin. *Snyman Criminal Law*, *5th Edition* page 455, defines the elements of the crime of assault as follows: '(a) conduct which results in another person's bodily integrity being impaired (or the inspiring of a belief in another person that such impairment will take place); (b) unlawfulness and (c) intention'.

[22] On page 461 the learned author states about assault with intent to do grievous bodily harm that '[a]ll the requirements for an assault set above apply to this crime, but in addition there must be intent to do grievous bodily harm'. That intention can be inferred 'from the nature of the weapon used, the way in which it was used, the degree of violence, the part of the body aimed at, the persistence of the attack and the nature of the injuries inflicted, if any'. He further states that 'the crime can be committed even though the physical injuries are slight.' In S v *Mtimunye*[7] the court held that a threat to inflict grievous bodily harm may result in the conviction of assault with intent to do grievous bodily harm. The court reasoned as follows:

'[O]ften the intention of the perpetrator of an assault is inferred from the act by which a physical assault is carried out. Where an assault consists of a threat, there can be no reason why the intention cannot be inferred from the contents of the threat, unless, obviously, it appears that the perpetrator does not have the intention or the ability to carry out the threat.'

I am in agreement with this dictum. In my view the objective facts appearing from the video, especially as described in para 11 above do show the intent to do bodily harm.

[23] The second appellant's conviction of defeating the ends of justice should also stand. Jackson's defence that he acted on the instructions of his employer Mr De Beer, is without merit. De Beer's evidence was that when he received the

[7] *S v Mtimunye* 1994 (2) SACR 482 (T); [1994] 4 All SA 388 (T) 484I-J. (my translation)

video which had gone viral, he forwarded it to Jackson. De Beer's evidence was that he already knew that the police were looking for the culprits. He instructed Jackson to get rid of the coffin. By then Jackson knew that the police were looking for the culprits. By burning the coffin, the latter wrongfully and unlawfully destroyed evidence of the commission of crime, with the intention to defeat the ends of justice.

[24] The appellants' convictions of assault with intent to do grievous bodily harm is a competent verdict to a charge of attempted murder (count 5) in terms of s 258(b) of CPA and kidnapping (count 4) as well as Jackson's convictions of defeating the ends of justice (count 7) should be confirmed. The convictions in respect of all the other offences should be set aside.

[25] I turn now to the appeal against sentence. As we have interfered with the convictions of the appellants no purpose would be served by dealing with the arguments of the appellants' counsel concerning the misdirections made by the trial court. We are at large to consider sentence afresh.

[26] Oosthuizen was born on 11 August 1988, is married and a father to two minor children. He only completed Grade 10 in 2005 due to financial constraints. He was then employed as an assistant farm manager by the SIS Farming Group (Pty) Ltd. He was promoted to a full managerial position that he held for a period of eight years. He left that position to join G & M Farming Company as an assistant manager, a position he held for five years until his arrest on 14 November 2016. After his arrest his family moved in with his parents in-laws and survive on selling fresh produce. Oosthuizen is a first offender

[27] Jackson was born on 6 October 1987. He failed grade 10 due to lack of funds and having an unstable family life, where his disabled father abused alcohol and his mother was unemployed. He is married and has three minor children. At the time of his arrest he was employed by JM de Beer Farming Group and had been so employed for the past 12 years as a farm foreman. After the incident, he had to leave the farm as he was considered a risk. His wife is gainfully employed at PG Labour Hire, where she has been employed for the past 10 years. Jackson is a first offender.

[28] This Court has found that the appellants should have been convicted of assault with intent to do grievous bodily harm instead of attempted murder. The lack of serious injuries on Mlotshwa does not make the conviction a lesser offence. This Court finds that the most aggravating factor in this case was the failure by the appellants to acknowledge that what they did to Mlotshwa was very serious and humiliating. It is neither here nor there that Mlotshwa allegedly committed an offence, as no one is entitled to take the law into his own hands. This is an aggravating circumstance as the appellants could easily have called the police to arrest Mlotshwa. The appellants grew up in the so-called "New South Africa", post 1994, where people are supposed to live harmoniously together. They grew up in a South Africa where no one race should be dominant over another.

[29] The most disturbing part of this matter was that whilst threatening Mlotshwa with a gruesome death, the appellants had the audacity to video record their sadistic actions. It was most horrifying to view a man being forced into the coffin, the lid being pushed down forcefully, the man screaming for help and begging for mercy. It was a most humiliating and disturbing scene.

[30] The appellants sadistic appetites were not satisfied by that: the video recording had to be shared with other people. De Beer confirmed that the video recording had gone viral. Oosthuizen had even downloaded it onto his computer. These actions did not only impact on the right to dignity of Mlotshwa, but on all black South Africans. The mere fact that it went viral shows that it shook the entire country. The actions of the appellants were appalling to all races. The monstrous actions of the appellants need to be condemned in the strongest terms possible.

[31] The approach I have adopted in sentencing the appellants considers their personal circumstances, the seriousness of the offences and the interests of society.[8] In addition I have considered the rationale of sentencing namely deterrence, retribution and rehabilitation.

[32] The commission of a serious offence may attract a custodial sentence even if the accused is a first offender.[9] The fact that the crimes committed also infringed the constitutional rights of the complainant compounded the seriousness of the offences.

[33] The appellants never at any stage expressed remorse or publicly apologised to the complainant. The appellants never accepted responsibility for their actions. This impacts on their prospects of rehabilitation.

[34] Having considered and balanced the personal circumstances of the appellants, the nature and seriousness of the offences they committed and the interests of society, I am of the view that the following sentences are appropriate: in respect of the offence of kidnapping, a sentence of one year imprisonment; in respect of assault with intent to do grievous bodily harm, a sentence of five years

[8] *S v Zinn* 1969 (2) SA 537 (A); [1969] 3 All SA 57 (A).
[9] *S v Kwatsha* 2013 (1) SACR 311 (KZP) para 27-28.

imprisonment; and in respect of defeating the ends of justice, one year imprisonment. I would order the shorter sentences to run concurrently with the five year sentence. The result is that both appellants will be sentenced to an effective five years imprisonment.

[35] In the result, I make the following order:

The appeal succeeds.

2 The order of the court a quo is set aside and replaced with the following order:

‘(a) Both accused are found guilty of the offences of assault with intent to do grievous bodily harm (count 5) and of kidnapping (count 4).

(b) Accused 2 is found guilty of defeating the ends of justice (count 7).

(c) The accused are each sentenced to five years imprisonment on the conviction of assault with intent to do grievous bodily harm (count 5).

(d) The accused are each sentenced to 1 year imprisonment on the conviction of kidnapping (count 4).

(e) Accused 2 is sentenced to 1 year imprisonment on the conviction of defeating the ends of justice (count 7).

(f) It is ordered that the sentence in respect of count 4 is to run concurrently with the sentence imposed on (count 5).

(g) It is ordered that the sentence in respect of count 7 is to run concurrently with the sentence imposed in count 5.

(h) The sentences are antedated to 25 August 2017.’

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YT Mbatha
Judge of Appeal

Appearances:

For the Appellants:	C J Van Wyk (with him A Coertze and W Burger)
	Instructed by:
	Marius Coertze Attorneys, Pretoria
	Symington & De Kok, Bloemfontein
For the Respondents:	R Molokoane
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein