SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 943/2017

In the matter between:

ISHMAEL JIYANE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Jiyane v The State* (943/2017) [2018] ZASCA 111 (13 September 2018)

Coram: Seriti, Saldulker, Mbha and Molemela JJA and Mokgohloa AJA

Heard: 18 August 2018

Delivered: 13 September 2018

Summary: Criminal law and procedure - appellant incorrectly convicted on a charge of robbery and sentenced to three years' imprisonment - appeal against sentence and conviction upheld and set aside - appellant found guilty of assault with intent to do grievous bodily harm - sentenced

to three years imprisonment wholly suspended for five years on certain condition.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Basson and Teffo JJ sitting as court of appeal):

1 The appeal against both conviction and sentence succeeds.

2 The accused's conviction and sentence are set aside and replaced with the following:

'(a) The accused is guilty of assault with intent to do grievous bodily harm.

(b) The accused is sentenced to three years imprisonment wholly suspended for five years on condition he is not convicted during the period of suspension of any offence involving violence.'

JUDGMENT

Seriti JA (Saldulker, Mbha and Molemela JJA and Mokgohloa AJA):

[1] The appellant was arraigned on 20 April 2015 in the Magistrates Court, Daveyton on a charge of robbery, read with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997. The allegations levelled against him were that on 24 August 2014 he unlawfully and intentionally assaulted Mr John Malinga, the complainant, and with force took a cellular phone and an amount of R1000.00 from him. He was convicted as charged and sentenced to three years' imprisonment. He was

also declared unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000.

[2] The appellant was granted leave to appeal against both his conviction and sentence which appeal was dismissed by the Gauteng Division, of the High Court Pretoria (per Basson and Teffo JJ). The appellant with special leave of this Court, now appeals against his conviction and sentence.

[3] The background facts are as follows. The complainant testified that on the day in question, at approximately 05h00, he went to the premises of the appellant's tenant, one Thembe. When he arrived at the premises of the appellant the gate was locked. Whilst still waiting at the gate a young child came and opened the gate. The child was apparently going to the shop.

[4] The complainant entered the premises and knocked on Thembe's room door, as he was supposed to give her R500. The appellant emerged from the main house and said that it was still morning and the complainant was causing a disturbance. When the complainant asked the appellant if he could see Thembe, the appellant re-entered his house, and he returned with a sjambok in his hand. The appellant ran towards him, and realising that the appellant was going to hurt him and he ran away to another street. The appellant continued to chase after him and eventually got hold of the complainant and began hitting him with the sjambok several times until he fell to the ground. Whilst the complainant lay on the ground the appellant continued his assault upon him, although he apologized the appellant continued to hit him with the sjambok. The appellant then began to search him and took his cellular phone and

R1000.00. After taking his money and cellular phone, the appellant went back to his residence.

[5] The complainant stood up and when he looked around he saw the appellant coming towards him, carrying a knobkierie. He once again ran away and the appellant chased him, caught up with him and hit him again several times with the knobkerrie. The complainant sustained serious injuries namely a fractured left wrist, a fractured right leg and bruises to the face and the back of his head. The South African Police officers arrived at the scene and an ambulance was summoned which transported him to hospital. He was hospitalised for approximately 10 weeks. At the hospital he had to undergo an operation, amongst other medical treatments and procedures, which necessitated the application of plaster of paris to his arm and leg.

[6] In his evidence-in-chief, the complainant testified that during the first episode of assault, the appellant searched him and took his cellular phone and money. He further said ‘when I stood up, I realized that he took my cell phone and I did not have money anymore. I saw that he did take the phone and when I searched myself, I did not have money anymore’.

[7] During cross-examination of the complainant, the defence attorney put it to the complainant that on the day in question nobody opened the gate for the complainant and he might have jumped over the fence or the gate. He was knocking hard on the door and the appellant chased him out of the yard. The appellant blew a whistle to notify the community that there was an intruder in his yard. As the appellant was blowing the whistle, the complainant charged at him and assaulted him. Members of

the community thereafter arrived and assaulted the complainant. It was also put to him that the appellant will testify that he did not take the complainant's cellular phone and money.

[8] The appellant in his evidence-in-chief only confirmed the correctness of the version put by his legal representative to the complainant. In cross-examination, the appellant stated that on the day in question he heard somebody knocking hard at the door and windows. He further said, that the knocking started at 04h00 and persisted until 05h00 and that the complainant was severely intoxicated. The appellant admitted that he beat the complainant but did not know if he sustained any injuries nor the extent thereof. During the cross- examination of the complainant it was never put to him that he knocked hard on the windows nor that he knocked from 04h00 until 05h00 or that he was very drunk. In *S v Boesak* 2000 (1) SACR 633 (SCA) at 647C this court held:

'. . . [I]t is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client.'

With this in mind, it is clear that the appellant's counsel did not put these assertions to the complainant and this to me appears to be an afterthought on the part of the appellant.

[9] In the heads of argument and during oral submissions the appellant's counsel submitted that the appellant did not receive a fair trial as the Magistrate constantly descended into the arena, and his conduct constituted a substantial deviation from the standard of conduct and impartiality required from a presiding officer. The appellant's counsel further submitted that the magistrate's line of questioning amounted to a cross-examination of the appellant and were posed in an intimidating

manner. I have scrutinised the questions put to the appellant by the magistrate. In my view, although the questions were extensive, I am unable to find any indication that the magistrate's conduct constituted a substantial deviation from the standard of conduct and impartiality required of him. There is no indication that the magistrate descended into the arena nor that he was cross-examining the appellant. These submissions are therefore without merit.

[10] The appellant's counsel further submitted that the trial court erred in accepting the evidence of the complainant who was a single witness. The trial court approached the evidence of the complainant with caution. After analysing all the evidence, the trial court came to the conclusion that the complainant was a credible witness. A court of appeal is not at liberty to depart from the trial court's finding of fact and credibility unless they are vitiated by irregularity or unless an examination of the record of evidence reveals that those findings were patently wrong. In *S v Pistorius* 2014 (2) SACR 314 (SCA) para 30 this court held as follows:

'It is a time-honoured principle that once a trial court has made credibility findings an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial was clearly wrong (*R v Dhlumayo & another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12.'

I cannot find any reason to interfere with the factual and credibility findings of the trial court. (See also *S v Francis* 1991 (1) SACR 198 (A) at 198J-199 (A) and *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645E-F.)

[11] The appellant's counsel submitted that even if the evidence was correctly accepted, the appellant was convicted of the wrong offence by

the trial court. He further submitted that the appellant should, in the circumstances of this case, have been convicted of common assault or assault with intent to do grievous bodily harm.

[12] In terms of s 260 of the Criminal Procedure Act 51 of 1977, an accused facing a charge of robbery may be convicted of assault with intent to do grievous bodily harm or the offence of common assault which are competent verdicts on a charge of robbery, if such offences are proved.

[13] Robbery consists of the theft of property by unlawfully and intentionally using violence to take the property of another person or the threat of violence to induce the possessor of the property to submit to the taking of the property. In this matter, there is no evidence which suggests that the appellant assaulted the complainant with the intention of taking any of his property. The assault was not aimed at getting the complainant to submit to the taking of his property. Further that the complainant did not seem to recall how he lost his cellular phone and money. In his evidence the complainant said that the appellant took his cellular phone and money and thereafter the appellant returned to his house. He stood up and he realised that the appellant took his cellular phone and money. On the totality of the evidence it was not proved beyond reasonable doubt that the appellant used violence against the complainant with the intent of depriving the complainant of his belongings.

[14] My view is that the trial court erred in convicting the appellant on the robbery charge. The evidence led is sufficient to sustain a conviction on the competent verdict of assault with intent to do grievous bodily harm, as the injuries sustained by the complainant are serious injuries and

further a conviction on this basis is supported by the evidence led before the trial court.

[15] I now turn to the issue of sentence. In mitigation of sentence the appellant's counsel advised the court that the appellant was 32 years old at the time of his sentencing by the trial court. He has one minor child aged four years, the child and the mother of the child are dependent on him for support and maintenance and the appellant was a first offender.

[16] The trial court imposed the sentence it did on the basis of a conviction of robbery and in the light of that fact my view is that the conviction has no factual basis, the sentence imposed by the trial court should be set aside and substituted with an appropriate sentence. The facts of this case demand the imposition of a wholly suspended sentence; the appellant is not a candidate for a custodial sentence. In my view a sentence of three years wholly suspended will be appropriate in this case.

[17] In the circumstances I make the following order:

1 The appeal against both conviction and sentence succeeds.

2 The accused's conviction and sentence are set aside and replaced with the following:

'(a) The accused is guilty of assault with intent to do grievous bodily harm.

(b) The accused is sentenced to three years imprisonment wholly suspended for five years on condition he is not convicted during the period of suspension of any offence involving violence.'

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JUDGE OF APPEAL

APPEARANCES

For Appellant: A Gissing

Instructed by: Strauss De Waal Attorneys, Johannesburg

Symington De Kok, Bloemfontein

For Respondent: S Scheepers

Instructed by: The Director of Public Prosecutions, Johannesburg

The Director of Public Prosecutions, Bloemfontein