



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A300/2013

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

[2 June 2016]

.....

In the matter between:

KHABEER, MOOSA ABDUL

Appellant

and

THE STATE

Respondent

JUDGMENT

MUDAU J:

[1] The appellant, Mr Moosa Khabeer Abdul, was charged in the Johannesburg Regional Court, with one count of attempted murder of his former wife (the

complainant). Pursuant to his conviction on the attempted murder charge, he was sentenced to 10 years' direct imprisonment. In terms of s 103 (1) of the Firearms Control Act 60 of 2000, there was no order made by the court regarding his fitness or otherwise to possess a firearm. The appeal is against sentence only with leave of the court (the petition to appeal against conviction having been unsuccessful before this court and on further petition to the Supreme Court of Appeal).

- [2] Concurrently with the prosecution of his appeal the appellant seeks an order on notice of motion that an 'updated' pre-sentence report, contained in an affidavit deposed to by a certain criminologist, compiled on 20 May 2016 at the request of his instructing attorney, be received by this court as further evidence in the determination of the appeal. The application was brought on the eve of the appeal hearing and is predictably opposed by the State.
- [3] It is trite that the power to receive further evidence on appeal will be sparingly exercised by the court. Further evidence will only be allowed in exceptional circumstances for the reason that there has to be finality in cases. The requirements to receive further evidence on appeal are: (a) there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial; (b) there should be a *prima facie* likelihood of the truth of the evidence; and (c) the evidence should be materially relevant to the outcome of the trial. See: *S v de Jager*¹ and *S v Ndweni & others*².

¹ *S v de Jager* 1965 (2) SA 612 (A) at 613C-D.

² *S v Ndweni & others* 1999 (4) SA 877 (SCA) at 880D.

[4] In this matter, if the evidence was to be allowed, it does nothing more than show that the appellant and his children have added more years to their respective ages. Of the dependent children all have since reached the age of majority, but one (now 17 years old). Counsel for the appellant was constrained to concede however, that the current ages of all concerned could easily be determined from the evidence already before court without burdening the court record with the extra evidential material. Furthermore, that the proposed pre-sentence report by a criminologist on the main, is nothing more than a repetition of what was already before court. The major development in the appellant's life being that, the appellant has since remarried, which the State was clearly willing to accept. In my respectful view, the evidence sought to be adduced is not materially relevant to the outcome of this appeal. Its addition would therefore, not serve any real purpose other than to burden the court record unduly by making it prolix.

[5] As the appeal is against sentence only certain facts which are germane to the determination of an appropriate sentence for the appellant deserve to be briefly recounted. The charge of attempted murder arose from an incident at the gate of the matrimonial home the appellant and the complainant were still sharing on the night of 14 December 2006. The complainant lived in the matrimonial home whereas the appellant lived in a flat with another son from a previous relationship at the back of the house. When the incident of attempted murder occurred they had been divorced for almost a year, with the divorce decree having been granted on 25 September 2005. The parties had been married since 1996. It was common cause that the complainant had obtained

a protection order interdict in terms of the relevant provisions of the Domestic Violence Act 116 of 1998 against the appellant in March 2006.

[6] The appellant belonged to a number of shooting clubs. He also had the garage of their house converted into an indoor shooting range .Consequently, an assortment of various firearms that included an AK-47 assault rifles, machine guns, shotguns and handguns that the appellant had lawfully in his possession, were confiscated by the police.

[7] After the divorce a lengthy court battle regarding the division of the estate continued. Eventually, an order was made that the complainant was entitled to 20% of the estate. In November 2006, an application by the appellant to have the complainant evicted from the common home was dismissed by this Court.

[8] On that fateful night, the complainant left the home of one Leonard and drove home followed by the latter in a separate car. She had asked Leonard to escort her as she was scared of driving alone by reason of the conduct of the appellant since their divorce. Upon arriving home at about 10:30 PM, Leonard drove past the house and made a U-turn a block away after she had turned into her driveway. The lights at her gate which are usually on during the night were to her surprise off. She pressed the remote control button for the gates to open to no avail although the gate motor was running. She had no choice but to alight from her car and opened the one gate manually. She was about to open the second gate when she saw the appellant who stood about 4 meters away in the driveway with a gun in hand. Without a word the appellant

fired four shots at her. She was as a result struck by a bullet or bullets on her left arm and left breast.

[9] After being shot she tried to crossover the street but fell on the road. The appellant went over where she was and told her that he did it because she had taken him to court. She requested the appellant to take her to the hospital. The appellant did so but was in no hurry to get her to the hospital as he drove slowly and even stopped when the robots were green for him to proceed. At the hospital, the appellant informed the nursing staff that the complainant was shot during a robbery in her driveway which he also noted on her hospital file. The complainant vehemently denied this and told them instead that it was the appellant who shot her. The police were called and the appellant was subsequently arrested.

[10] The appellant's version of denial of any wrongdoing and that the complainant was shot in what he thought was a botched hijacking as he woke up to the sound of a gunshot was rejected by the trial court for a number of reasons. The trial court found it unlikely that the gate would not open as a result of any electrical fault, for the appellant's adult son was shortly after the shooting incident, able to open and close the gate with a remote control.

[11] The trial court also found it highly unlikely that 'a hijacker' who would have had to climb a 1.8 m high wall or gate with an electric fence on top in order to disconnect the gate motor, was involved, for it required prior knowledge that the complainant was out that evening and the time she was most likely to return home. The fact that the complainant was unarmed and a 'soft target'

coupled with the fact that the car was not taken once she was outside during her attempt to open the gate made the appellant's version highly improbable.

[12] The appellant's conduct after the hijacking reflected an inexplicable lack of interest in contacting the police. In my view, the trial court's rejection of the appellant's version is unassailable. I am satisfied that the court below was correct in accepting the evidence of the complainant in her identification of the appellant as the person who attempted to kill her and in its rejection of his version that it was a hijacking gone wrong. It follows, accordingly, that the appellant was justly convicted.

[13] This brings me to the question of an appropriate sentence in this appeal. It is a well-established principle of our law that sentencing remains pre-eminently within the discretion of the court that dealt with the aspect of sentencing. The effect thereof means that a court, on appeal, does not enjoy unfettered powers to interfere with a sentence which has been properly imposed by a sentencing court. This court, on appeal, is only at liberty to interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where there is an immense disparity between the sentence of the trial court and the sentence that the appellate court would have imposed, had it been the trial court. Put differently, if the sentence is so marked that it can be described as 'shocking', 'startling', or 'disturbingly inappropriate' (See *S v Pieters*³; *S v Malgas*⁴; *Director of Public Prosecutions v Mngoma*⁵; and *S v Le Roux & others*⁶.)

³ *S v Pieters* 1987 (3) SA 717 (A) at 727F-H

⁴ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12

- [14] The court below accepted at the time of sentencing that the appellant was 54 years old and a divorcee with seven children three of whom were still minors. Four of the children lived with him. The appellant is a businessman involved in property development as well as a qualified gemmologist who dealt in precious stones with a licence in dealing in diamonds. He owns a number of properties and businesses with about 39 employees under his wing. There were over hundred tenants staying at that time in the flats that he owned. From his version, appellant earned R25 000-00 per month. At the time of sentencing, he was a first time offender. However, the appellant was subsequently convicted on 17 April 2009 of assault committed on 30 September 2008 but a subject of an appeal. He was as a result, sentenced to a term of imprisonment coupled with an option of a fine of which half thereof was suspended on customary terms.
- [15] The court below found that the appellant was not a candidate for the correctional supervision sentence as suggested on his behalf. It was noted that the complainant on two occasions applied for a protection order against him as he physically and emotionally abused her. The court instead found that the appellant showed no remorse for the crime committed and further that the circumstances of this particular case called for a direct term of imprisonment.
- [16] The court below also found that the minimum sentence provisions of the Criminal Law Amendment Act 105 of 1997 (the CLAA) are inapplicable as there was no reference to the relevant provisions in the charge sheet. In terms of the provisions of s 51 (2) (c) (i) of the CLAA, a first time offender convicted

⁵ Director of Public Prosecutions v *Mngoma* 2010 (1) SACR 427 (SCA) para 11.

⁶ S v *Le Roux & others* 2010 (2) SACR 11 (SCA) at 26b-d.

of an offence involving the use of a firearm is liable to a minimum sentence of five years, provided that a regional court may only impose imprisonment that does not exceed by five years more than the minimum sentence imposed .

[17] It was contended on behalf of the appellant that the imposition of the maximum period of 10 years imprisonment, which the court below would by law have been empowered to impose had the minimum sentence legislation been applicable, is indicative of the inappropriateness of the sentence. The ground on which the appellant relied in this regard is fallacious. The maximum penal jurisdiction of a regional court is 15 years in terms of the Magistrates' Courts Act⁷. The natures of punishment that may be imposed by a court are set out in s 276(1) of the Criminal Procedure Act 51 of 1977 (the CPA), which includes imprisonment.

[18] The appellant sought to persuade this Court that the complainant played a part in precipitating the offence committed. The evidence by the forensic criminologist called on behalf of the appellant being that the appellant had low levels of self-control brought about by extensive relocations in the family earlier in his youth. This resulted in a degree of instability and 'erraticness' on his part. A combination of other factors such as the frustrations he had with his two ex-wives, the incident where he was defrauded of money by his bookkeeper in 2002 as well as the complainant returning late to the residence at the time of the night. It is highly unlikely that a combination of these incidents played a part as a trigger or otherwise in the appellant's shooting of the complainant in the manner he did. There is in my view, no rational

⁷ Magistrates' Courts Act 32 of 1944 (s 92 (1) (b)).

connection between the 2002 fraud incident involving the bookkeeper and the attempted murder years later.

[19] On the contrary, the appellant's actions on the night in question were that of someone acting rationally, purposefully and above all, goal-oriented. It is contrary to when someone acts with their temper and commits regrettable acts when they should have known better. In the instant case the appellant had powers of discernment and restraint, when his conduct is objectively viewed. The appellant was without doubt subjected to stressing conditions in his personal life but faced no more than millions of couples who do not resort to this kind of extreme violent behaviour. The objective evidence supports the State's contention that the appellant was not only fully aware of his actions but that there was premeditation in the commission of the offence.

[20] The trial court's sentence is also assailed on the basis that the guidelines laid down by the Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)*⁸ regarding the rights of children when imprisonment is considered for primary caregivers were ignored. Briefly in *S v M*, M was the sole caregiver of her three children, and was financially responsible for them as well. She had been convicted previously of fraud and was a compulsive gambler which was the reason for her fraudulent conduct. She was convicted on 38 counts of fraud involving a total of R29 000-00 and as a result sentenced to four years' imprisonment. On appeal to the High Court (Western Cape) one of the counts of fraud involving R10 000-00 was set aside. The high court also reduced her sentence to five years' imprisonment as intended in s 276(1) (i) of the CPA.

⁸ S v M 2007 (2) SACR 539 (CC).

She had already served several months in prison when her appeal to the Constitutional Court was considered. The Constitutional Court upheld her appeal in part and sentenced her to four years' imprisonment, wholly suspended on customary conditions, and placed her under correctional supervision in terms of s 276(1)(h) of the CPA.

[21] Reliance on *S v M* given the nature and facts in this case is misplaced. To start with, the offences committed are worlds apart. The mother in *S v M* was a single parent and was almost exclusively burdened with the care of her children. There was no other parent who could, without disruption, step in during her absence to nurture the children, and provide the care they need, and to which they were constitutionally entitled. In this case, the distinguishing feature is that according to the evidence before the trial court, the appellant is not a single parent as their mothers of his children were in Roodepoort. Furthermore, he has since remarried.

[22] It is also trite that when considering the best interests of children a court must consider evidence as to their current position to determine what their best interests require (see in this regard *De Villiers v S*⁹). Favourably in this case, the remaining minor has in any event, a mother figure in the person of the appellant's current wife. Significantly however, the Constitutional Court recognized in *M's* case that a custodial sentence of a primary caregiver may be appropriate under certain circumstances (see para 36). One is inclined to add that this largely depends on the nature and seriousness of the crime committed.

⁹ *De Villiers v S* (2016 (1) SACR 148 (SCA)); [2015] 4 All SA 268 (SCA) (11 September 2015).

[23] It is a notorious fact that instances of crime perpetrated against women in particular in this country are unacceptably high. These attitudes towards women inherently undermine the right to human dignity, the right to freedom and security of their persons, the right to privacy and the right to freedom of association as enshrined in the Bill of Rights. Also apposite in this regard is what was pointed out in *Mudau v S*¹⁰ where the SCA held as follows:

‘Domestic violence has become a scourge in our society and should not be treated lightly, but deplored and also severely punished. Hardly a day passes without a report in the media of a woman or child being beaten, raped or even killed in this country. Many women and children live in constant fear. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity. This was well articulated in *S v Chapman*¹¹ when this Court said the following:

“Women in this country have a legitimate claim to walk peacefully on the streets to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.’

[23] The nature of the offence committed and the interests of society call for a sentence in this matter as the court below found, that would constitute punishment, in my view, commensurate with the seriousness of the crime and must serve as a deterrent for other would be offenders. This should of course be balanced with the appellants’ personal circumstances and blended with a measure of mercy. From a proper reading of the pre-sentence reports, the appellant is a self-confessed millionaire. However, in dealing with the question of sentence an impression must therefore not be created that there are two

¹⁰ *Mudau v S* [547/13] [2014] ZASCA 43 (31 March 2014) para 6].

¹¹ *S v Chapman* (345/96) [1997] ZASCA 45; 1997 (3) SA 341 (SCA) at 345A-B.

streams of justice, one for the rich and one for the poor. Everyone is after all, equal before the law. It is clear that the nature of some of the appellant's businesses can still be run successfully, and the children can get material support, without his personal involvement.

[24] The aggravating features of the crime of which the appellant has been convicted, the need for deterrence and retribution, and the interests of society that a woman should be able to make free and unfettered choices without fear of reprisal from a former spouse regarding the gender of people she socialises with at whatever time, must be weighed with the appellant's mitigating factors as well as his relevant personal circumstances. It is clear that the appellant showed no genuine remorse but is in all probabilities feeling sorry for the predicament he finds himself in. It is furthermore, aggravating that the appellant committed the offence in issue whilst he already had a protection order issued against him by a court of law.

[25] In my view, the sentence imposed by the sentencing court in this case can hardly be described as 'shocking', 'startling', or 'disturbingly inappropriate'. A non-custodial sentence would be outrageously unsuitable given the aggravating features alluded to in this matter. The delay in the prosecution of this appeal can only be placed at the appellant's door as chronicled in the record of this matter and cannot be used to justify a sentence manifestly unjust (i.e. the matter was at one stage enrolled whereas he was waiting for the outcome of his petition to the SCA and lastly, where no heads had been filed). I am by no means persuaded that the court below misdirected itself in its sentencing approach. Justice shall best be served if the appellant serve his

due as the appeal is without merit. Acting out of extreme caution, I however direct that a copy of this judgment be brought to the attention of the relevant welfare authorities in Gauteng in the interest of the appellant's 17 year old child to monitor developments.

[25] Accordingly the following order is issued:

1. The application to lead further evidence is dismissed.
2. The appeal against sentence is dismissed.

MUDAU J

JUDGE OF THE HIGH COURT

I agree.

SWARTZ AJ

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 30 May 2016

Judgment Delivered: 2 June 2016

APPEARANCES

On Behalf of the Appellant: Adv M Kolbe

Instructed By: Nardus Grove Attorneys

Johannesburg

On Behalf of the Respondent: Adv I Bayat

Instructed By: Director Public Prosecutions

Johannesburg