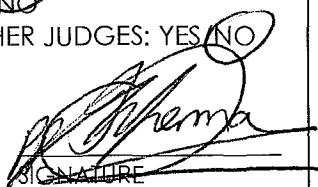


REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>5/03/2018</u>	
DATE	SIGNATURE

Case number: **A253/2017**

In the matter between:-

KHAMISI, EDWARD

Appellant

and

THE STATE

Respondent

JUDGMENT

VAN DER WESTHUIZEN AJ

INTRODUCTION

[1] The appellant was convicted in the Regional Court, sitting in Johannesburg, of housebreaking with the intent to steal and theft (count 1) and attempted murder (count 2). The appellant was legally represented and pleaded not guilty to count 1 and guilty to count 2. The facts underpinning the guilty plea to count 2, were not accepted by the State. On 18 August 2016, the appellant was found guilty on both counts and on the same day, sentenced to three years imprisonment in respect of count 1 and ten years in respect of count 2, which sentences were ordered to run concurrently. He was declared unfit to possess a firearm in terms of the provisions of section 103 of the Firearms Control Act 60 of 2000.

[2] The appellant applied for leave to appeal, which was granted in respect of his sentence only.

SUMMARY OF FACTS

[3] The Appellant and the complainant were married but at the time of the incident, were separated. The complainant stayed in a room on the premises of her employer. During the morning of the attack, she went to her room when she noticed the appellant hiding in the garden. She became scared and started to run in the direction of the main house. The appellant caught up with her, tripped her and she fell to the ground. Whilst on the ground he said that he wanted to kill her and he then stabbed her in the neck with a knife. The appellant dragged her by her feet into her room where he again threatened to kill her.

[4] Inside the room he started to boil water telling the complainant that he wanted

to burn her. He also said that he wanted to have sexual intercourse with her. Her employer called for her and the appellant then fled the scene. The police and ambulance were called and the complainant was taken to hospital. Three days later the blade of the knife was surgically removed from her neck.

TEST ON APPEAL

[5] The principles underpinning the power of a court on appeal to interfere with the sentence imposed by the trial court are well established in our law. In *S v Romer* 2011 (2) SACR 153 (SCA), at paras [22] and [23] they were discussed as follows:

[22] It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal has been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence is '(a) disturbingly inappropriate; (b) so totally out of proportion to the magnitude of the offence; (c) sufficiently disparate; (d) vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and (e) is otherwise such that no reasonable court would have imposed it.' See *S v Giannoulis*; *S v Kibido*; *S v Salzwedel & others*.

[23] In *S v Matlala*—it was held that in an appeal against sentence the fact that the sentence imposed by the trial court is wrong is not the test. The test is whether the trial court in imposing it exercised its discretion properly or not. Consequently, the circumstances in which an appellate court will interfere with the exercise of such discretion are circumscribed. In *S v Sadler* Marais JA, writing for a unanimous court, had occasion to re-state them when he said the following:

'The approach to be adopted in an appeal such as this is reflected in the following passage in the judgment of Nicholas AJA in *S v Shapiro* **1994 (1) SACR 112** (A) at 119j-120c:

“It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in *S v Rabie* **1975 (4) SA 855** (A) at 857D-F:

- “1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal —
 - (a) should be guided by the principle that punishment is ‘pre-eminently a matter for the discretion of the trial Court’, and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been ‘judicially and properly exercised’.
- 2 . The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate”.’
(footnotes omitted)

MISDIRECTIONS

[6] The appellant contended that the effective sentence imposed is shockingly inappropriate.

FACTORS CONSIDERED BY THE COURT A QUO

[7] The court *a quo* considered the following:

- 7.1. That the appellant was 37 years of age.
- 7.2. That he was a first offender.
- 7.3. That he was married to the complainant and that they have two children, one 12 years of age the other 9.
- 7.4. That he was employed as a driver prior to being incarcerated earning an income of approximately R1 800 per month of which R 700 was used for rent

and R 900 for the support of his mother and children.

7.5. That he was in custody for approximately 4 months awaiting trial.

7.6. That he had taken R600 cash from the complainant and that it had not been recovered.

7.7. The particular facts of this matter.

[8] The learned magistrate quite rightly found the conduct of the appellant particularly reprehensible. She placed a lot of emphasis on the fact that the appellant was married to the complainant and was, by virtue of this very intimate relationship, the person who was supposed to love, protect and respect her. Instead, he stabbed her with a knife in the back of her neck with such force that the handle broke off with the knife blade remaining embedded in her neck. As if this was not enough, he then dragged the injured woman by her feet into the room to torment her even further. He started to boil water and threatened to burn her. One shudders to think what might have happened had her employer not interrupted the appellant in executing his sadistical plans. The learned magistrate also, quite correctly, had regard to the fact that the complainant's life was spared through no doing of the appellant but rather due to the swift action of the employer who had contacted the ambulance and ensured that she had received medical attention.

[9] The learned magistrate also had regard to the emotional anguish the complainant would have suffered during the 3 days prior to the surgery during which time the complainant was told that the medical doctors were scared to remove the knife. During those three days she feared she would die or that she would end up

paralysed. The learned magistrate quite correctly, had regard to the fact that the complainant has still not recovered completely, had difficulty in the movement of her leg and still experiences pain.

[10] The learned magistrate considered the facts of this case most heinous, as indeed they were. The trauma caused to the complainant by these acts of violence was severe and enduring. The victims of such crimes deserve the protection of the law and the sentences that are imposed should reflect that the law takes the victims' trauma into account, see *S v Matyityi*, 2011 (1) SACR 40 (SCA). To place people's lives at risk like this and to be so enduringly cruel to them is an evil to be severely punished; it is widespread conduct as the magistrate pointed out. The learned magistrate, quite rightly, placed much emphasis on the prevalence of domestic violence against women throughout this country.

[11] From my summary of the court *a quo*'s judgment on sentence in this matter, it is patent that the magistrate took pains to consider all of the principles relevant to sentencing the appellant and to apply these to the facts of the case before her. She did not overlook the appellant's personal circumstances. She weighed these against the list of aggravating factors that she found to be relevant. It cannot be said that she misdirected herself in identifying these as aggravating factors, or in the manner in which she sought to balance these against factors favourable to the appellant.

[12] It also cannot be said that the sentence imposed was shockingly inappropriate, there certainly is precedent for sentences of a similar nature in this division, see *S v Kgwedi*, 2015 JDR 2428 (GP). The supreme court of appeal too

has not shied away from sentences of this nature, see *Zimila v S* (1179/16) [2017] ZASCA 55 (18 May 2017) nor has the Constitutional Court, see *Carmichele v Minister of Safety and Security and Another*, 2002 (1) SACR 79 (CC). There could not be a clearer case of attempted murder than this one. The complainant survived despite every effort by the appellant to murder her.

[13] It was contended that the sentence imposed on the appellant visited the appellant with a punishment to the point of being broken as insufficient regard was had to the fact that he had apologised to the complainant and that when imposing sentence, the court did not have regard to mercy. As far as the element of mercy is concerned the Court takes into consideration what is appositely stated in paragraphs 20 and 21 of the heads of argument of Mr Wasserman representing the state: “*Mercy is not a separate element that needs to be accounted for, as is suggested by counsel for the appellant. When considering the elements of retribution, deterrence and prevention, mercy is used to temper the sentence so that the sentence is fair and just and not overly harsh.*” And paragraph 21: “*Retribution and deterrence are proper purposes of punishment and must therefore be afforded due weight and consideration. If the crime is serious, it will require that the element of retribution and deterrence be given more weight and consideration than rehabilitation*”.

[14] It is correct, as submitted by Mr Wasserman, that any form of crime has a harsh effect on society. However, as Sachs J observed in the matter of *S v Baloyi* 2000 (1) SACR 81 (CC):

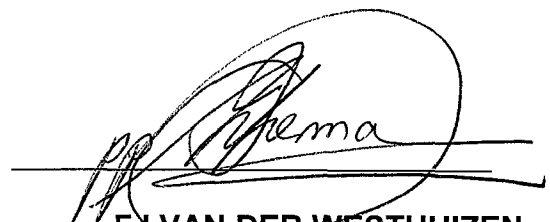
'What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and frequently goes unpunished'.

[15] Sachs J stated further that domestic violence compels constitutional concern in that it is systemic, pervasive and overwhelming gender specific as it reflects and reinforces patriarchal domination in a brutal form. In terms of section 12(1) of the Constitution everyone has the right to freedom and security of person. That includes freedom from all forms of violence.

[16] In my view, the peculiarities of this case, and the host of aggravating factors considered by the court *a quo* justify the sentence that was imposed. Interference with the trial court's sentence in this matter is not justified.

ORDER

[17] In the circumstances the appeal on sentence is dismissed.

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**FJ VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

I agree

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**I OPPERMAN
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Heard: 8 February 2018
Judgment delivered: 6 March 2018
Appearances:
For Appellant: Adv E Gueneri
Instructed by: Legal Aid South Africa
For Respondent: Adv JG Wasserman
Instructed by: Office of the DPP