



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: A166/2017

In the appeal between:

DATHINI SOLOMON MAXALA

Appellant

and

THE STATE

Respondent

CORAM: REINDERS, J *et* MATHEBULA, J

JUDGMENT BY: MATHEBULA, J

HEARD ON: 16 OCTOBER 2017

DELIVERED ON: 19 OCTOBER 2017

- [1] These were appeal proceedings with leave granted by members of this court on petition. The appellant was convicted in the regional court, Welkom, on two (2) counts namely assault with intent to do grievous bodily harm and attempted robbery. He was sentenced to five (5) and three (3) years direct imprisonment respectively. In terms of section 280 of Act 51 of 1977 both

sentences were ordered to run concurrently. The appeal is against both convictions and sentences.

- [2] On the 28th February 2015 at Thabong, Welkom, Tshediso Makgalamele a boy aged fifteen (15) years was walking in the street heading home from school. It was Saturday afternoon. He came across two (2) male persons and one of them accosted him. This assailant held him by his waist belt and demanded that he hand over his wrist watch. Initially he resisted and the assailant pulled out a knife. Instead he offered to give him the R9.00 in his possession. The assailant commented that it was meagre and pressed ahead his demand for the wrist watch. He started scratching him on the face with the knife and inflicted a stab wound on the fourth finger of the right hand which required one stich.
- [3] The complainant decided to defend himself and hit the assailant with a fist. A scuffle ensued and both fell on the ground with the assailant still armed with a knife. As they continued locking horns, the assailant managed to stab him on the back sustaining a deep wound. At some stage they both stood up and the assailant fled the scene empty handed. The complainant was taken to hospital for medical attention.
- [4] The appellant denied any involvement and put his identity in dispute. The complainant was approached by two persons that he could describe as short and tall. The incident occurred during broad daylight with no impediment whatsoever on visibility. He testified that he was surprised by the conduct of the tall assailant

and he endeavoured to have a proper look at him. Both of them did have a conversation with each other prior to the complainant sustaining injuries. He was dark in complexion and had a beard. He was neither fat nor thin. He was wearing blue track pants and top. This is the very same persons that was apprehended and brought to him by the police at the back of their van minutes later when he was at the hospital.

- [5] It is on the basis of this evidence that the court a quo convicted the appellant on two (2) counts of assault with intent to do grievous bodily harm and attempted robbery. Leave to appeal was granted against convictions and sentences precisely due to possible duplication of charges. The thrust of the appeal is whether the court a quo erred in convicting the appellant on both counts. Both counsel for the appellant and the respondent are in unison that the court a quo erred in finding the appellant guilty on both counts whilst the same facts were used to support both charges. I agree with their submission on this aspect.
- [6] The appellant approached the complainant with the purpose of relieving him of his possession. In this case it was the wrist watch that was his main objective. The complainant was unwilling to comply and at first displayed stubborn tendencies. In order to subdue him to co-operate, the appellant resorted to pulling out a knife. The violence exerted was directed towards subduing the complainant to co-operate in order to achieve the ultimate prize. That was to rob him. The entire episode was a continuous act from the beginning to the end. The complainant was scratched and stabbed in an attempt to compel him to succumb to the

whims of the appellant. In its evaluation of the evidence placed on record, the court a quo noted on page 57 line 11 that the whole purpose was robbery and as a result the complainant was injured. It is incorrect to conclude, as the court a quo did, that the appellant formed different or separate intentions as he perpetrated his unlawful acts against the complainant.

- [7] The requirements of the correct standard to be applied were articulated as common sense and fairness of the court in **S v Khuzwayo 1960 (1) SA 340 (A) at 344B**. It is difficult to develop a set of rules that can be applicable in all circumstances. In **S v Benjamin 1980 (1) SA 950 (A) at 956 F-G** the court espoused the enquiry in the following manner:-

“Om te beslis of daarin ‘n bepaalde geval ‘n onbehoorlik splitsing van aanklagte is, maak ons Howe veral twee praktiese hulpmiddels gebruik, nl:

- (1) waar meerdere handeling plaasgevind het, of hulle met ‘n enkele opset verrig is as ‘n voorgesette gebeurtenis,**
- (2) waar die getuienis om die een aanklag te bewys ook meteen die ander aanklag bewys”.**

Applying the legal principles as developed, I am convinced that the court a quo erred and that the conviction on count number 1 is duplication of charges. I say so on the basis of the reasons advanced in the preceding paragraphs. It is my considered decision that the conviction and subsequent sentence relating to count number 1 cannot stand. It ought to be set aside. As far as conviction on count number two (2) is concerned, I could find no

misdirection on the part of the court a quo and the conviction must stand.

[8] The last issue to be considered is the sentence component of the appeal on count number 2. The appellant is aggrieved about the sentence of three (3) years direct imprisonment imposed for attempted robbery. During oral argument counsel for the appellant conceded that the court a quo did not err in imposing the aforementioned sentence. It was a commendable submission in the circumstances. The respondent on the other hand lamented that the court a quo was too lenient to impose such a sentence. As there is no cross appeal to increase the sentence, the respondent is hamstrung to pursue the argument.

[9] It is settled law that sentencing is pre-eminently the discretion of the trial court. The court of appeal will ordinarily interfere with a sentence if:

“there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.” see: S v Bogaards 2013 (1) SACR 1 at paragraph 41.

[10] In this matter, I could not find any blemish indicating that the court a quo exercised its discretion improperly and/or unreasonably. The appellant attacked an unarmed minor child. The complainant sustained serious injuries as a result of that wanton attack. He is fortunate to be living to tell the tale simply because he mounted a

feisty defence of his life and limb. There is no justification to interfere with the sentence imposed in this regard. The appeal ought to fail.

[11] Accordingly I make the following order:

Count number one

11.1 The appeal against count number 1 is upheld.

11.2 Both conviction and sentence are set aside.

Count number two

11.3 The appeal against count number two (2) is dismissed.

11.4 Both conviction and sentence are confirmed.


M. A. MATHEBULA, J

I concur.


C. REINDERS, J

On behalf of the appellants:
Instructed by:

Mr. P. van der Merwe
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:
Instructed by:

Adv. N. Z. Nameka
Director: Public Prosecutions
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