



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A653/2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

8/6/2015

In the matter between:

MATHLODI DRUKKY NGWEPE

Appellant

and

THE STATE

Respondent

J U D G M E N T

MAKGOKA J et MUDAU AJ:

[1] The appellant was convicted in the regional court, Pretoria North, on two counts of attempted murder (counts 1 and 3); one count of assault with intent to do grievous bodily harm (count 2) and one count of assault (count 4). On 8 December 2008 he was sentenced as follows: 7 years' imprisonment on count 1; 2 years' imprisonment on count 2; 10 years' imprisonment on count 3; and 2 months' imprisonment on count 4. It was ordered that the sentences imposed on counts 2 and 4 should run concurrently with the sentence imposed on count 1. The effective sentence is therefore 17 years' imprisonment. The appellant was also declared unfit to possess a firearm. Aggrieved, the appellant appeals against that sentence, with leave of this court. In the main, the appellant contends that the trial court misdirected itself in not considering the severity of the cumulative effect of the sentence. The State supports the sentence.

[2] The facts giving rise to the counts faced by the appellant are these. The complainant and the appellant are husband and wife. They had been married for approximately 10 years at the date of sentencing. It appears that they had been experiencing marital problems before the incidents in issue. The first of the incidents occurred on an unidentified day in October 2001. This formed the basis of the first count of murder. The complainant requested money from the appellant to purchase some mealie-meal. This resulted in an argument between them, with the appellant accusing the complainant of being good for nothing except always asking for money. Later, when the complainant was in the toilet, the appellant followed her, holding a firearm. He fired four shots at her, two of which struck her at the back of her head. She managed to escape to a neighbour's house, who took her to the hospital for medical treatment, where she was admitted for two weeks. Upon her discharge from hospital, she stayed with a friend for about two weeks, as she was too scared to go home. Thereafter, she reported the matter to the police. She eventually returned home, as she had nowhere else to go.

[3] The second incident, of assault with intent to do grievous bodily harm, occurred on 7 March 2007 at approximately 21h00. The appellant wanted to send out one of their children to buy him some beer. The complainant objected to the idea, protesting that it was already late. The appellant became upset. He approached her where she was seated on a sofa, pulled and assaulted her with open hands and fists. She broke loose and ran into the street. As she ran away, the appellant broke a bottle with which he stabbed her on her hand and shoulder.

[4] The third incident formed the basis of the second attempted murder charge. It occurred on Good Friday, 6 April 2007. The parties were expecting guests at the house. However, there was no food except for mealie-meal. The appellant requested the appellant to go to the local butcher to buy some meat, as she prepared porridge. By 13h00, the appellant had not returned home. She became worried and went out of the house to look for him. She eventually traced him to his friend's house where she found him drinking liquor. He was also speaking on his cell phone. The appellant's car was also parked there. The appellant was angry that she had followed him. He threw a beer bottle at her. His friend had to restrain him. She turned and made her way back home. She used a footpath to get home.

[5] Shortly thereafter, as she was walking, the appellant and his friend came driving down the road next to the footpath. The appellant veered off the road and bumped into her. She landed on the windscreen of the car but fell off to the ground. The appellant however, drove over her. She sustained broken limbs. The appellant had to be restrained as he threatened to

kill her. She was eventually taken to hospital where she spent months recuperating from her injuries. Since the incident, she has not regained full use of her arm.

[6] The fourth and last incident, concerning assault, happened on 9 January 2008. On that occasion, she had received an agent's call to report for work. When she reported for duty, she could not carry out the task because of problems with her hands. She was then excused and returned home early. When she arrived home, she found the appellant inside the house in the company of an unknown woman. She enquired from the appellant as to what was going on. She also wanted to assault the woman. The appellant assaulted her. She ran out into the street. The appellant followed her and slapped her. He also threw a brick at her, but missed her.

[7] In its judgment on sentence, the trial court considered the gravity of the offences, and the personal circumstances of the appellant. He was 44 years old at the time of sentencing. He was married to the complainant and had three children. The appellant passed standard 5 but had a 3 year technical diploma. He was employed by Telkom as an operations manager. The appellant is a first offender.

[8] It was contended on behalf of the appellant that an effective sentence of 17 years' imprisonment is harsh and induces a sense of shock. It was further contended that the trial court should have taken into account that the appellant was not only a breadwinner, but a first offender who had pleaded guilty. Furthermore that, the trial court should have ordered that the sentences in respect of counts 1, 2 and 4 to run concurrently with the sentence of 10 years in respect of current 3.

[9] It is trite that sentence lies as a sole discretion of the trial court. See *S v Rabie* 1975 (4) SA 855 (A) at 857D-E; *S v Pieters* 1987 (3) SA 717 (A); *S v Kibido* [1998] 3 All SA 72 (A); *S v Botha* 1998 (2) SACR 206 (SCA); *S v Kgosimore* 1999 (2) SACR 238 (SCA); *S v Barnard* 2004 (1) SACR 191 (SCA). The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See generally: *S v Petkar* 1988 (3) SA 571 (A), *S v Snyder* 1982 (2) SA 694 (A) and *S v Sadler* 2000 (1) SACR 331 (SCA) and *Director of Public Prosecutions, KZN v P* 2006 (1) SACR 243 (SCA) para 10. As to the nature of the misdirection which entitles a court of appeal to interfere, the following was stated in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F:

‘Now the word ‘misdirection’ in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court’s decision on sentence.’

[10] It is trite that if the offences committed are of a serious nature, as in this case, the interests of the offender must be considered less (as compared to the other competing interests within the triad referred to in *S v Zinn* 1969 (2) SA 537 (A)). The scourge of domestic violence must be dealt with effectively by the State and society, and, if necessary by the courts (*S v Baloyi* 2001 (1) SACR 81 (CC) 87; *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) paras 12, 13; *S v Roberts* 2000 (2) SACR 522 para 20; *S v Ferreira and others* [2004] 4 All SA 373 (SCA)).

[11] Equally, it is a salutary practice that if an accused is sentenced in respect of two or more related offences, the accepted practice is that the sentencing court should have regard to the cumulative effect of the sentences imposed in order to ensure that the total sentence is not disproportionate to the accused’s blameworthiness in relation to the offences in respect of which he or she has to be sentenced. See *S v Mpofo* 1985 (4) SA 322 (ZHC) at 324G-J; *S v Coales* 1995 (1) SACR 33 (A) at 36e-f; *S v Mhlakaza and another* 1997 (1) SACR 515 (SCA) at 523g-h; *S v Seventer* 2002 (2) SACR 400 (C) at 404j-405a-b.

[12] The learned regional magistrate was alive to the above practice, for he ordered the sentences imposed in counts 2 and 4 to run concurrently with the sentence in count 1. But that amounted to paying lip-service to the practice, for those sentences (2 years and 2 months, respectively) had no significant effect, with the result that the cumulative effect being an effective 17 years’ imprisonment remains disturbingly disproportionate.

[13] Undoubtedly, the offences of which the appellant was convicted are grave. The most aggravating factor is obviously the fact that the offences were committed in a domestic setting. Domestic violence, of which women and children bear the brunt, is an abominable offence in that the victims are often helpless and suffer in silence. The appellant has not shown any remorse. Instead, he sought to blame the complainant for his conduct. This was clear during the plea stage, when he sought to plead guilty, but did not unequivocally admit

all the elements of the offences. Instead, he sought to justify his violent conduct towards the complainant. This resulted in the trial court entering a plea of not guilty on his behalf. His lack of remorse manifested itself throughout the trial.

[14] Despite this, an effective sentence of 17 years is, in our view, disturbingly disproportionate in the circumstances of the case. There is certainly a striking disparity between the sentence imposed by the trial court and that which we, had we each sat as the trial court, would have imposed. By failing to consider the cumulative effect of the sentence, the trial court committed a misdirection. This entitles us to interfere with the sentence and impose what we consider to be an appropriate sentence in the circumstances. We would retain all the sentences imposed in respect of each count. However, to ameliorate the overall impact, we would order that the 5 years of sentence imposed in respect of count 1, as well as the whole of the sentences imposed in counts 2 and 4, should run concurrently with the sentence imposed in respect of count 1.

[15] In the result we make the following order:

1. The appeal against the sentence is upheld to the extent set out below;
2. The sentence imposed by the trial court is set aside and in its place the following is substituted:

‘The accused is sentenced as follows:

Count 1: 7 years’ imprisonment.

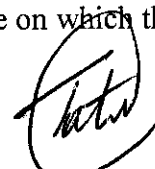
Count 2: 2 years’ imprisonment;

Count 3: 10 years imprisonment.

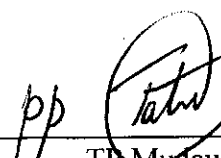
Count 4: 2 months’ imprisonment.

It is ordered that 5 years imposed in respect of count 1, as well as the whole of sentences imposed in counts 2 and 4 is to be served concurrently with the sentence imposed in respect of count 3. The effective sentence is therefore 12 years imprisonment.’

3. In terms of section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentences are ante-dated to 8 December 2008, being the date on which the sentences were imposed.



TM Makgoka
Judge of the High Court



TP Mudau
Acting Judge of the High Court

Date heard: 24 February 2015

Judgment delivered: 7 June 2015

APPEARANCES

For the appellant: Adv. M. C. Ndalane

Instructed by Legal Aid South Africa

For the State: Adv. CP Harmzen

Instructed by National Director of Public Prosecutions, Pretoria.