IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, GRAHAMSTOWN)

Not Reportable

Case No: CA&R 61/2017

In the matter between:

THANDUXOLU MFOBO Appellant

and

THE STATE Respondent

JUDGMENT

NQUMSE AJ:

[1] The appellant was convicted in the regional court, East London of attempted murder. Following his conviction he was sentenced to twelve years imprisonment. He now appeals with the leave of this court against sentence only.

[2] The background facts underlying the conviction and the sentence pursuant to the conviction can be briefly summarized as follows.

[3] The complainant and the appellant were in a love relationship which was extant during the incident of appellant's attack on the complainant. On 12 August 2015 the complainant undertook a business trip from Pretoria to East London. She had made arrangements for appellant to pick her up at the East London airport and to be dropped off at her business offices that are in East London.

[4] In the late afternoon they both met at the hotel room in which the complainant was staying. According to the complainant, they sat on two different beds that were in the room. They had a discussion about issues that were affecting their intimate relationship. During their conversation the appellant intimated that he will remove himself from the complainant's life seeing that he was the one who is the problem in their relationship. Thereby he was effectively terminating their relationship.

[5] She further testified that whilst she was busy organizing her items putting them in the bag she was taking along to the conference dinner. The appellant stood up and came to stand in front of her demanding an answer to what he had said about removing himself from her life. Her response was that she was not sure. The appellant remarked and said that is what he wanted. He pulled her towards him as if they were hugging. As she was also hugging the appellant she felt as if something was tearing her back open. Upon realizing that she was being stabbed by the appellant she pleaded with him saying "I did not say I don't love you".

[6] Notwithstanding her pleas, the appellant inflicted a second stab wound on top of her right shoulder. When she realized that the appellant was persisting and was aiming to stab her on her chest area, she managed to escape and left in order to seek help. She got assistance and was taken to hospital. Due to the severity of her wounds, she was admitted at the hospital for eight days.

[7] The doctor who examined the complainant compiled a J88 form in which he recorded that the complainant sustained a gaping wound on her back that extended

30 – 35cm long. The severity of the injury on her back caused the collapse of one of her lungs.

[8] Constable Ngabazi who attended the scene described the knife which was handed over to him by the appellant in the complainant's room, as a new clasped knife which was approximately 12cm long. The blood stained knife was handed in as evidence.

[9] The appellant's evidence is that he remembers being in the hotel room of the complainant as well as the discussions they had, when the complainant was asking him questions about their relationship. He also remembers when she said he likes to leave without sorting out things. She blocked his way preventing him from leaving her room. He further testified that he suffered a black out and lost consciousness when the complainant insulted him saying she was earning more than him and also insulting him about his ill-health. But thereafter suffered a black out and regained his consciousness only after the complainant had fled and left the room.

[10] Whilst he admits that he may have injured the complainant he does not know where the knife that stabbed the complainant originated from. Neither does he know how the knife found its way into complainant's room.

[11] Against this background the magistrate found the appellant guilty of attempted murder.

[12] It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. 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 could have imposed, had it been the trial court. (See *S v Rabie,*[1] *S v Snyders*;[2] *S v Pektar*;[3] *S v Saddler*;[4] and *Director of Public Prosecutions, Kwazulu-Natal v P*[5])

[1] 1995 (4) SA 855 (A)
[2] 1982 (2) SA 694 (A); [2000] 2 All SA 396
[3] 1988 (3) SA 571 (A)

[13] In *S v Mtingwa en 'n Andere*,[6] it was held that the appeal court will be entitled to interfere with the imposed sentence if one or more of the recognized grounds are shown to exist, that the sentence is (1) disturbingly inappropriate; (ii) so blatantly out of proportion to the magnitude of the offence; (iii) sufficiently disparate; and (iv) is otherwise such that no reasonable court would have imposed it.

[14] Appellant's counsel submitted that the magistrate misdirected himself for finding that the attack was premeditated. It was a further misdirection by the magistrate to find that the knife used had been purchased with the intention to stab the complainant. In this regard he further submitted that the appellant could have been carrying the knife in his pocket for a purpose other than to stab the complainant. I find this submission disingenuous given that the appellant has denied bringing the knife into the complainant's hotel room and distances himself from any knowledge thereof. It is opportunistic for the appellant to want the court on appeal to accept that he did carry a knife on this fateful day but for some purpose other than to attack the appellant, whereas he chose not to proffer any explanation during the trial under what circumstances he acquired or ended up in possession of the knife during the trial.

[15] In response, counsel for the respondent submitted that the evidence of the knife as well as the description that it was a new knife, was not disputed at the trial and thus the magistrate did not misdirect himself to have reasonably found that the knife in question must have been acquired for the brutal attack of the complainant. That being the case, I do not find the deductions by the magistrate to arrive at the finding at which he did was farfetched. It is my view therefore that this finding does not constitute a misdirection.

[16] Counsel for the appellant makes heavy weather of the point that it had not been proved by the prosecution that the offence was premeditated. Consequently, it

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[4] 2000 (1) SACR 331 (SCA)
[5] 2006 (1) SACR 243 (SCA), 2006 (3) SA 515; [2006] 1 All SA 446.
[6] 1992 (2) SACR 1 (A)

was a misdirection for the magistrate to take this factor into account in sentencing the appellant.

[17] What is patently clear is that the attack was not preceded by an overt action or display of anger by the appellant. He remained calm and pounced on complainant when she least expected the callous attack on her.

[18] The objective evidence that the magistrate considered is that the knife which was not a fixed bladed knife was already unclasped when the appellant entered complainant's room. He also found that there was nothing to suggest that the complainant would not have been able to see appellant if he had unfolded it in front of her.

[19] If regard is then had to the accumulative effect of the facts preceding the attack as well as the fact that the appellant had armed himself before entering the room of complainant. I am persuaded by counsel for the state that the actions of the appellant were premeditated and thus the magistrate has not misdirected himself in this regard.

[20] Whilst it may be so, that the appellant may have been disturbed emotionally when he stabbed the complainant. There is however, no shred of evidence that suggests that he was in a "heightened" emotional state. Instead his actions were surreptitious, far from a person who is enraged or who was livid. Even if it can be accepted that the appellant had experienced some level of emotional state which I accept there must have been, I do not think that this court would have been entitled to interfere with the sentence of the magistrate purely on that ground alone.

[21] I turn now to deal with the appropriateness of the sentence imposed. In aggravation the state introduced a victim impact statement that was handed in by agreement. This statement was deposed to by the complainant who related the events of the fateful day and how she feels betrayed by someone who professed to love her. Someone who she regarded as her protector but turned out to be her killer. She further explained the negative impact this has had on her children and the

psychological trauma she is contending with owing to fears and nightmares that have beset her since the ordeal.

[22] She also revealed the exorbitant medical bills which exceeded the amount of two hundred thousand rand that she had to pay for the various medical experts that are attending to her severe injuries. She laments the fact that she is yet to recover from her lungs who are both affected as a result of the stabbing.

[23] The upshot of her victim impact statement is that what had befallen her on that fateful day has changed her life completely.

[24] In mitigation of sentence under oath the appellant stated that he is 45 years of age with no previous convictions. He is a teacher at Gubenxa Junior Secondary School in Elliot. He is a widow with two children aged 5 and 7 years respectively. He is also responsible for their education and wellbeing. Due to a protection order against him by the complainant, his apology was limited to a telephone call in which he asked for pardon.

[25] In imposing sentence the trial court took into consideration the appellant's personal circumstances. It also took into consideration the gravity of the crime, the seriousness of the injuries sustained by the complainant and the psychological effects the crime has brought to bear on the victim and her children. The court was also astute to the interest of society and the clarion call for the courts to be responsive to the scourge of violence against women. The court also took into account that the appellant is not the primary caregiver of his two minor children.

[26] The difficult task that always confronts a judicial officer when it comes to the imposition of the appropriate sentence is expounded by Friedman J, in *S v Banda and Other*[7] as follows:

> "The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one

[7] 1991 (2) SA 352 (BGD) at 355 A - B

element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the courts is sound and is incompatible with anything less."

[27] Whilst it is so, that the attack on the complainant is viscous and brutal, causing her immense suffering. And even though I am of the view that the appellant's conduct was sufficiently reprehensible to fall within the category of sentences that should reflect the disapproval of our courts given the scourge of violence against women. Nevertheless I am of the view that the sentence imposed is excessive and therefore warrants interference.

[28] As it was stated in *Mtingwa*[8] and the cases already referred to above, the appeal court will be entitled to interfere with the imposed sentence if it finds it to be disturbingly inappropriate. This principle was restated in *S v Nkomo*[9] that if the appeal court finds that the sentence is disturbingly inappropriate, it will follow as a matter of course that the sentencing discretion was not properly applied.[10]

[29] That being the case in this matter, this court is at large to impose a sentence it considers appropriate under the circumstances.

[30] Counsel for the appellant has argued that it was not imperative for the appellant to be sentenced to a prison term but that the court should have considered other available options for sentencing. Although in his address before us he changed and conceded that a jail term is deserved albeit for a lesser term of imprisonment.

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[8] *Supra*
[9] 2007 (2) SACR 198 (SCA)
[10] See also *S v Romer* 2011 (2) SACR 153 (SCA)

[31] Given the severity of the injuries sustained by the complainant, the lack of contrition by the appellant save the once off telephone call he made to the complainant, which in my view can only amount to a halfhearted apology (in this regard see S v Matyityi[11]). If regard is also had to the tenacity of violence against women especially from men in whom they put their trust a custodial sentence is the most appropriate under these circumstances. Be that as it may, I am of the view that a sentence of twelve years seems to be excessive.

[32] In the result I make the following order:

1. The appeal against sentence succeeds.
2. The sentence imposed is set aside and substituted with a sentence of ten (10) years imprisonment.
3. The sentence is antedated to 10 February 2017.

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V M NQUMSE
ACTING JUDGE OF THE HIGH COURT

I AGREE

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N G BESHE
JUDGE OF THE HIGH COURT

Counsel for the appellant : Mr. D Geldenhuys

Instructed by : Legal Aid Board

Grahamstown

[11] 2011 (1) SACR 40 (SCA)

Counsel for the respondent	:	Adv. Sinclair
Instructed by	:	Director of Public Prosecutions Grahamstown
Date heard	:	27 February 2019
Date judgment delivered	:	12 March 2019