IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: **AR208/2022**

In the matter between:

SNETHEMBA DLAMINI **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Mossop J (Seegobin J concurring)

Heard: 24 February 2023

Delivered: 24 February 2023

ORDER

On appeal from: Ixopo Regional Court (sitting as court of first instance):

1. The appeal against the sentences imposed upon the appellant in respect of counts 1 and 2 is refused, subject to what is stated in paragraph 2 below;

2. The sentence imposed on count 2 is to run concurrently with the sentence imposed on count 1.

JUDGMENT

Mossop J (Seegobin J concurring):

[1] On 25 June 2020, the appellant pleaded not guilty in the Ixopo Regional Court on a count of attempted murder (count 1) and a count of kidnapping (count 2). On the same day, he was convicted on count 1 of assault with intent to do grievous bodily harm and on count 2 he was convicted of assault, both of which convictions are competent verdicts to the principal charges that he faced. He was sentenced to seven years' imprisonment on count 1 and 12 months' imprisonment on count 2. The sentences imposed were to run consecutively.

[2] Dissatisfied with these sentences, the appellant applied for leave to appeal against them from the court a quo. He was granted leave to do so.

[3] The facts that led to the imposition of the two sentences that form the basis of this appeal are that the appellant and the complainant on count 2, Ms Lindelwa Jili (Ms Jili), were at one stage in a relationship with each other. Indeed, they had had a child together. Ms Jili had, however, moved on with her life and in her evidence described the complainant on count 1, Mr Christopher Jamarie (Mr Jamarie), as 'my husband'. On the evening of 29 November 2019, Ms Jili went to Mr Jamarie's home in the Ixopo area and found him standing at the gate to his property. The appellant then arrived, with a towel covering his head. He greeted them and then instructed that they enter Mr Jamarie's dwelling. The appellant then grabbed Ms Jili's arm and began pulling her, as if he was going to take her away from the scene. Mr Jamarie came to her assistance and asked the appellant where he was taking Ms Jili. The response that he received was that the appellant stabbed him with a knife. He was stabbed in his arm, his chest and his back. He collapsed at the scene and apparently recovered consciousness in hospital, where he was compelled to remain for two weeks while his injuries were treated.

[4] Ms Jili tried to flee from the appellant but had not gone very far when, as she described it in her evidence, ‘I get stuck on the wire’. The appellant came after her, grabbed a hold of her and dragged her away from Mr Jamarie’s residence against her will. Despite Ms Jili trying to get help from a passing motorist, it was not forthcoming and she was compelled to go with the appellant. She begged him repeatedly to release her and even offered to tell a lie later and say that it was not the appellant that had stabbed Mr Jamarie. Where Ms Jili was actually taken to is not entirely clear. She seemed to indicate that she ended up near a hospital. At around daybreak she finally persuaded the appellant to take her to another place where, as she put it, ‘there were other ladies’ and she was released. She found the experience most stressful and collapsed at work the next day and then had to be taken to hospital, where she remained for two days.

[5] The appellant denied that he was the person who had attacked and stabbed Mr Jamarie and, essentially, claimed that the version of Ms Jili and Mr Jamarie was a concoction intended to falsely implicate him in the matter. He also claimed to be in a relationship with another woman and claimed that he was with her on the date in question. He thus raised an alibi as a defence. Finally, he suggested that Ms Jili had visited him in prison and had apologised to him for implicating him and had offered to withdraw the charges against him, a fact that Ms Jili strongly refuted.

[6] The court a quo rejected the appellant’s alibi defence, correctly in my view, and found him guilty on the competent verdicts to the two charges that he initially faced.

[7] There can be little doubt that the attack upon Mr Jamarie was unnecessary and was brutal. He suffered serious injuries that detained him in hospital for a lengthy period. That he was struck with murderous intent seems all too likely. The appellant was fortunate that he was not convicted of attempted murder. He escaped that possibility only because the State led no expert medical evidence on the injuries suffered by Mr Jamarie. That Mr Jamarie survived is perhaps due more to good fortune than to good planning. Quite why these unfortunate events occurred, and what the appellant hoped to achieve by taking Ms Jili with him against her will, is difficult to comprehend.

[8] Ms Hulley, who appears for the appellant, submits that the court a quo misdirected itself by not considering the cumulative effect of the two sentences that it imposed upon the appellant. Section 280(1) and (2) of the Criminal Procedure Act 51 of 1977 (the Act) reads as follows:

'(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.'

[9] Ms Hulley drew our attention to the matter of *S v Mokela*,[1] where the Supreme Court of Appeal stated that a failure to consider evidence establishing that two offences were 'inextricably linked in terms of the locality, time, protagonists and, importantly, the fact that they were committed with one common intent' could amount to a misdirection. Such evidence may call for the two sentences that are to be imposed to be ordered to run concurrently.

[10] It is so that the court a quo did not refer to section 280 of the Act nor did it specifically address the cumulative effect of the sentences that it imposed. It is, however, well established that the power of an appellate court to interfere with a sentence imposed by a lower court is limited. In *S v Rabie,*[2] the Appellate Division noted that punishment is 'pre-eminently a matter for the discretion of the trial court', and that an appeal court 'should be careful not to erode such discretion'. Consequently, a sentence imposed by the trial court may only be interfered with where it is 'vitiated by irregularity or misdirection or is disturbingly inappropriate'. However, even where a sentence is not shockingly inappropriate, an appellate court is entitled to interfere, or at least consider, the sentence afresh, if there has been a material misdirection in the exercise of the sentencing discretion. As was stated in *S v Kgosimore,*[3] the critical enquiry is whether there was a 'proper and reasonable

[1] *S v Mokela* [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) para 11.
[2] *S v Rabie* 1975 (4) SA 855 (A) at 857D-E.
[3] *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10.

exercise of the discretion' by the trial court. In the absence of a finding to the contrary, an appeal court has no power to interfere.

[11] As regards the sentence on count 1, I am unpersuaded that the sentence imposed is inappropriate. It correctly reflects the seriousness of the offence. The sentence on count 2 is perhaps more severe than I would have thought to be just, given the facts that the court a quo found to be proved. That, however, is not the test. As Maya DP stated in *S v Hewitt*:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty.'[4] (Footnote omitted.)

[12] It appears to me that the criteria referred to in *Mokela* are present in the events that we are called upon to consider. The two offences seem to be inextricably linked to each other, are connected with regard to locality and time of occurrence and, further, appear to have been committed with a common intent. While I am of the view that the sentence on count 2 is slightly robust, I find that there is no basis for this court to interfere with it or with the sentence imposed on count 1. I am, however, of the view that the court a quo did not take the cumulative effect of the sentences it imposed into account. In the circumstances, this court may intervene.

[13] In the circumstances, I would accordingly propose the following order:

1. The appeal against the sentences imposed upon the appellant in respect of counts 1 and 2 is refused, subject to what is stated in paragraph 2 below;
2. The sentence imposed on count 2 is to run concurrently with the sentence imposed on count 1.

[4] *S v Hewitt* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 8.

_____

MOSSOP J

I agree and it is so ordered.

_____

SEEGOBIN J

APPEARANCES

Counsel for the appellant	:	Ms A Hulley
Instructed by:	:	Legal Aid 187 Hoosen Haffejee Street Pietermaritzburg
Counsel for the respondent	:	Mr R Singh
Instructed by	:	National Prosecuting Authority. Pietermaritzburg
Date of Hearing	:	24 February 2023
Date of Judgment	:	24 February 2023