



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

Case No: A458/2013

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

1 April 2014

EJ FRANCIS

In the matter between:

MTAMBO, NKANYISO

Appellant

and

THE STATE

Respondent

JUDGMENT

FRANCIS J

1. The appellant appeared in the Johannesburg Regional Court on 18 October 2012 and was charged with two counts of assault with the intent to do grievous bodily harm. He was legally represented and was convicted of both counts on 19 October 2012. He was sentenced to 3 years imprisonment on count 1 and 2 years imprisonment on count 2. The sentences were not ordered to run concurrently. He was sentenced to an effective five years imprisonment and was also declared unfit to possess a firearm.
2. The appellant was granted leave to appeal against sentence only by the trial

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court.

3. The appellant was charged with two counts of assault with the intention to do grievous bodily harm after he had stabbed two complainants with a broken bottle on 27 May 2012 at the corner of Twist and Plein Street, Johannesburg. He had stabbed the first complainant Zodwa Jeanette Madondo with a broken bottle on her head, right hand and arm. When the second complainant Nokwethemba Thabethe came to the first complainant's assistance, he stabbed her with the same bottle neck on her arm. The appellant pleaded not guilty. The two complainants testified for the state and their medical reports were handed in as evidence. The appellant testified in his own defence. He was duly found guilty of both counts and was sentenced to an effective 5 years imprisonment.
4. On appeal, it was contended that the trial court misdirected itself by not taking into account the cumulative effect of sentence, particularly in view of the fact that the offences were closely linked, by attaching insufficient weight to the fact that the appellant was a first offender, that the assaults were not pre-planned but happened in the spur of the moment, that he was heavily intoxicated when he attacked the complainants, that they did not suffer any life threatening injuries that he had a stable employment and that he had handed himself over to the police, and by over-emphasising the seriousness of the offences and their prevalence in the community at the expense of the appellant's personal circumstances.

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6. Sentencing is inherently within the discretion of a trial court. This court's powers to interfere with the trial's court's discretion in imposing sentence are limited unless the trial court's discretion was exercised improperly. The essential enquiry in an appeal against sentence is not whether the sentence was right or wrong, but whether the court exercised its discretion properly and judicially. If the discretion was exercised improperly, this court will interfere with the sentence imposed. There must be either a material misdirection by the trial court or a gross disparity between the sentence which the appeal court would have imposed had it been the trial court. This Court can interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate. In this regard see *S v Salzwedel and others* 1999 (2) SACR 586 at 588 A – B.

6. It is trite that when a court considers an appropriate sentence the seriousness of the offence, the interest of the accused, as well as the interest of the society ought to be taken into account. In imposing the sentence that the trial court took into account that the appellant was a first offender and due to the seriousness of the offence a fine would not be a suitable sentence. The court took into account the seriousness of the offences and imposed the sentence that it did.

7. The crucial issue that arises in this matter is whether the court *a quo* should have ordered that the sentence of 2 years imposed on count 2 should run concurrently with the 3 year sentence on count 1. The trial court when

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imposing the sentence said the following about the question of concurrently:

“On the first count and the second count the court has decided that there would be no reason for the sentences to be served concurrently. They must be served separately and the accused is declared unfit to possess a firearm.”

Section 280 of the Criminal Procedure Act 51 of 1977 (the CPA) deals with

cumulative or concurrent sentences. Section 280(2) grants the court a

discretion to direct that such sentences of imprisonment to run concurrently.

The cumulative effect of sentences must always be borne in mind and

concurrently served sentences may prevent an accused from undergoing a

severe and unjustified long effective term of imprisonment. In this regard see

S v Whitehead 1970 (4) SA 424 (A) 438F – 440.

8. It is trite that a court must consider the cumulative effect of a sentence and reduce the total of period of imprisonment so that it is proportionate to the total moral blameworthiness of the perpetrator. In *S v Motswathupa* 2012 (1) SACR 259 (SCA) at paragraph 8 at page 263, it was held that a court must not lose sight of the fact that the aggregate penalty must not be unduly severe, when dealing with multiple offences. It is trite that sentencing courts in all the divisions of our courts have been enjoined to have regard to the nature of the offences and where there is a close connection or similarity between the offences involved or where there is a close connection in time and place and in intention with regard to the offences involved, then usually the counts are taken as one for purpose of sentence or the sentences are ordered to run concurrently. See also *State vs Kruger* 2012 (1) SACR 369 SCA and *S vs Mathebula* 2012(1) SACR 374 SCA. In the present case there is such an

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overlap. Firstly there is a conjoining as to time and place of the offences. The assault charges flowed from the same incident. The trial court gave no reasons why it did not consider whether the sentences should run concurrently. The sentences should in my view have been ordered to run concurrently.

9. The court *a quo* misdirected itself in not ordering that the sentences should have run concurrently with each other.
10. For the above reasons the following order is made:
 - 10.1 The appeal is upheld.
 - 10.2 The sentence imposed by the trial court is set aside and replaced with the following:
 - “10.2.1 The accused is sentenced as follows:
 - (a) 3 years imprisonment on count 1.
 - (b) 2 years imprisonment on count 2.
 - (c) The sentence imposed on count 2 is to run concurrently with the sentence imposed on count 1.
 - (d) The effective sentence is 3 years imprisonment.
 - (e) The accused is declared unfit to possess a firearm
 - (f) The sentence is antedated to 19 October 2012.”

Francis J
FRANCIS J
JUDGE OF THE HIGH COURT

I agree

Mokgoathle
MOKGOATHLENG J
JUDGE OF THE HIGH COURT

FOR APPELLANT : M BOTHA OF LEGAL AID SOUTH AFRICA
FOR RESPONDENT : M PAPACHRISTOFOROU OF DIRECTOR
OF PUBLIC PROSECUTIONS
DATE OF HEARING : 18 FEBRUARY 2014
DATE OF JUDGMENT : 20 FEBRUARY 2014