IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: A 145/2019

(1)REPORTABLE: Yes

(2)OF INTEREST TO OTHERS JUDGES: Yes

(3)REVISED

27 February 2020

DATE SIGNATURE

In the matter between:

MAKAMU THABANG **Appellant**

and

THE STATE **Respondent**

Summary: Appeal against sentence. Principles guiding interference by the appeal court with trial court's decision restated. Sentences in multiplicity of offence to run consecutively in terms of section 280 of the CPA. Trial court has discretion to order sentences in multiplicity of offences to run concurrently. Factors to take into account in considering appropriateness of sentence relating to personal circumstances of accused- the period of detention awaiting trial, and concurrency of sentences.

JUDGMENT

Molahlehi J

Introduction

[1] This is an appeal against the sentences of imprisonment imposed on the appellant in the Magistrate Court for the District of Johannesburg Central held at Orlando (the court below) on 26 August 2017.

[2] The appellant was charged with three counts; one of robbery with aggravating circumstances and two of attempted murder. He was acquitted on the charge of robbery with aggravating circumstances. On the charges of attempted murder, he was convicted and sentenced as follows:

- Count 1 attempted murder 5 years imprisonment.
- Count 2 attempted murder 5 years imprisonment.

[3] The appellant, who was legally represented pleaded not guilty to both charges.

The issues for consideration

[4] The issue for consideration concerns sentencing principles with the focus on whether or not it was appropriate in the circumstances to impose consecutive sentences on each of the two convictions. Put in another way, the essential issue for

determination in the present proceedings is whether the court below exercised its judicial discretion properly and fairly in imposing the sentences referred to above consecutively and not making them to run concurrently. In this respect, the appellant contends that the court below ought to have made the sentences on the two convictions to run concurrently.

[5] The appellant further complains that the court failed to take into account his personal circumstances and the period he was incarceration awaiting trial.

[6] As alluded to earlier the appeal, which is before this court with leave of the court below, is only on sentence. The State opposes the appeal.

The brief background facts

[7] The incident that led to the charges against the appellant happened on New Year's Eve. It is common cause that both the appellant and the complaints drank alcohol in the early hours of that day. They were all celebrating the New Year's day.

[8] The complainants arrived at their home in those early hours of the morning to find the appellant playing music very loudly from his car. An argument arose between the appellant and the complainants about the loud volume of the music.

[9] The first complainant, Mr Ghadi testified that during the morning in question the appellant tried to speak to him but could not hear nor understand what he was saying and thus ignored him.

[10] It would appear that the appellant was offended by this as he suddenly attacked Mr Ghadi, from behind and stabbed him several times. He suffered multiple severe injuries as a result. He was hospitalized and had to undergo an operation.

[11] The second complainant, Mr Calvin Mabuya, testified that he was stabbed twice on the left side of his chest by the appellant.

[12] The version of the appellant, who is a tenant where the incident occurred, confirmed that a conflict between him and the complainant arose concerning the loud music played from his car. His sister-in-law joined him in his shack and informed him that the appellant assaulted her.

[13] According to the appellant, Mr Mabuya took out a knife with the apparent intention of stabbing him. He (the appellant) managed to knock off the knife from his hand, took it and stabbed him.

[14] Mr Ghadi reprimanded Mr Mabuya who was dragging the sister-in-law of the appellant at the time. After that, Mr Ghadi slapped the appellant on the face. A brawl ensued between the appellant and the two complainants.

[15] The essence of the appellant's defence was that in stabbing the complainants, he was acting in self-defence.

[16] The sister-in-law, known as Nthabiseng, testified on behalf of the appellant.

[17] She was one of the people who were seated in the yard celebrating the New Year's Day when the complainants arrived. She confirmed that the conflict arose when the appellant was told that his music was too loud and it was in particular between the appellant and Mr Mabuya. At some point, the two were hitting each other with bare hands until Mr Ghadi produced a knife and attempted to stab the appellant.

The legal principles

[18] The basic principle when dealing with sentencing on appeal is that the appeal court will not readily interfere with the sentence imposed by the lower court. The appeal court will, however, interfere with the sentence where it is found that the sentence is vitiated by misdirection or is disturbingly inappropriate. In that instance, the appeal court will interfere and consider sentence afresh.[1]

[19] The broad principles governing the approach to dealing with sentencing on appeal are summarized as follows in S v Rabie:[2]

a. The court should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court;

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[1] Zimila v S (1179/16) [2017] ZASCA 55 (18 May 2017).

[2] 1975 (4) SA 855 (A) at 857 D-F.

b. The court should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised, and
c. The sentence is vitiated by irregularity or misdirection or when it is disturbingly inappropriate.

[20] It is trite that the test on appeal is not whether the trial court was wrong but whether it exercised its discretion properly.[3] The guiding principles in dealing with an appeal concerning sentencing were restated in S v Malgas,[4] as follows:

> "A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of the sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate."

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[3] . S v Romer 2011 (2) SACR 153 (SCA) para 22-23.

[4] 2001 (1) SACR 469 (SCA)

[21] In S v Boards,[5] the Constitutional Court held:

> "[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with the sentence imposed by courts below is circumscribed. It can only do so where 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. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

[22] In considering whether to interfere with the decision of the trial court the appeal court will consider whether in imposing the sentence the lower court followed the guiding principles known as "the triad" set out in S v Zinn. [6] In that case the court held that in imposing a sentence "what has to be considered is the triad consisting of the crime, the offender, and the interest of the society." These factors are to be equally considered, and that focus should not be on one over the others.[7] The other principles which the sentencing court need to take into account in sentencing the offender are the following: (a) the sentence imposed must not be disproportionate to the offence, (b) the personal circumstances of the offender, (c) the interest of the society, (d) prevention of crime, (e) rehabilitation of the offender, and (f) protection and retribution.[8]

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[5] 2013 (1) 1 SACR (CC).
[6] 1969 19969 (2) SA 537 (A).
[7] See S v Holder 1979 (2) SA 70 (A).
[8] Dodo v S 2001 (3) SA 381 (CC).

[23] Concerning the interest of the society a sentence should serve the public interest and not the community interest and this incorporates punishment that serves as a deterrence to would-be offenders.[9]

[24] I now proceed to deal with the challenge against the judgement of the court below by the appellant.

Awaiting trial detention period

[25] The period of detention of an accused person pre-sentencing is, as stated in Radebe v S,[10] one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified. The court at paragraph 14 of its judgment said the following:

> "The period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified."

[26] In assessing whether the period of incarceration before sentencing the following should be considered; the condition affecting the accused whilst in detention and the reason for the prolonged detention.

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[9] See S v Makwanyane [1995] (2) SACR 1 (CC).

[10] (A03/2017, 374/04/2016) [2019] ZAGPPHC 406; [2019] 3 All SA 938 (GP); 2019 (2) SACR 381 (GP) (10 July 2019) ..

[27] There is no evidence in the present matter, indicating that the appellant suffered any hardship consequent the six months detention while awaiting trial and finally the sentence. There is also no evidence of blaming either party for the delay. The record shows that initially, the applicant elected not to apply for bail. He later applied for it but never prosecuted it further.

[28] In light of the above, I find no basis to fault the court below in the approach it adopted in dealing with the period of detention of the appellant while awaiting trial. And thus, the point raised by the appellant in this regard stands to fail.

Should sentences run concurrently?

[29] As alluded earlier in this judgment the contention of the appellant is that the sentence imposed by the court below was inappropriate because the two sentences were not made to run concurrently.

[30] The general principle set out in section 280 of the Criminal Procedure Act (the CPA), is that multiple imprisonment are to be served consecutively unless the sentencing court directs otherwise. Section 280(2) of the CPA provides that punishments consisting of imprisonment shall commence one after the other, "unless the court directs that such sentences of imprisonment shall run concurrently. The default position is thus that multiple sentences are to be served consecutively rather than concurrently. The question of whether the sentences are to be served concurrently is discretionary.

[31] The starting point in sentencing in multi offences, as I see it, is whether an appropriate sentence is imposed for each of the sentences. And then, the question to answer is whether the cumulative effect of the sentences imposed reflects the totality of the criminal conduct, the circumstances in which the offences were committed, the period between when the offences were committed , the area or arrears where the offences were committed. Where two offences, as is the case in the present matter, are committed during the course of a single incident and involving more than one person, it seems to me that the correct approach to adopt would be to order that the sentences for both offences should run concurrently.

[32] In Marota v The State,[11] the court in dealing with the issue of whether sentences imposed should have been made to run concurrently said:

> "[16] Ordinarily it is desirable when an offender has been convicted of offences that are inextricably linked in terms of time and location that the cumulative effect of the sentences imposed must be brought to the fore.[12]

[33] In the present matter, the court below did not articulate its reasons for making the sentences run consecutively. The Counsel for the state contended that the reason for not making the sentences to run consecutively can be determined from

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[11] (300/15) [2015] ZASCA 130 (28 September 2015).

[12] See also Ngcobo v S (1344/2016) 2018 ZASCA 06 (23 February 2018).

the proper reading of the judgment. The reason for not making the sentences to run concurrently was, according to her, because the court considered imposing a sentence higher than the two sentences imposed. She, in this respect, argued that the court had indicated that ordinarily, it should have imposed a sentence effectively of 15 to 20 years.

[34] I do not agree with the above proposition. As indicated earlier in this judgment the issue of whether the sentences are to run consecutively or concurrently is a matter of discretion to be exercised judicially. The court is thus called upon to give reasons for which ever approach it adopts in sentencing an accused.

[35] In my view, saying that it could have imposed 15 to 20 years does not assist in the determination of whether the sentences of five years for each of the offences is appropriate or not. It could mean that if the court had decided to impose the 15 to 20 years imprisonment, it could have done so by imposing that period on each of the attempted murder convictions.

[36] In my view, the court below over emphasizes the seriousness of the offence above other factors relevant to the consideration of whether the sentences should be made to run consecutively or concurrently. The court below overlooked the totality of the circumstances that led to the offences been committed. The complainants were not innocent bystanders in what ended up in the invasion of their bodily integrity. I need to pause and say, whilst the conduct of the complainants in the whole brawl is

not that of innocent bystander, that did not justify the brutal attack on their bodily integrity.

[37] The version of the appellant is that one of the complainants had a knife in his hand and tried to stab him with it. He managed to knock it off his hand and after that launched his attack on the two complainants with the same knife.

[38] There is no doubt that the offences that the appellant was charged with are inextricably linked in terms of time and location. The two attempted murders occurred at the same place and relatively at the same time. They happened in the circumstances where there was alcohol involved and as stated above, where the complainants were not innocent spectators.

[39] In my view, the court below failed to take into account the totality of the facts and the circumstances in which the commission of the offences took place. This is a substantial misdirection which justifies interference with the decision of the court below. The effective sentence of ten years imposed by the court is in the circumstances inappropriate and unfair.

Consideration of personal circumstances in sentencing

[40] The appellant contends in his appeal that the court below failed to take into account his personal circumstances in sentencing him to effectively ten years imprisonment.

[41] The approach to adopt when dealing with the issue of weighing personal circumstances in relation to sentencing was set out in S v Vilakazi,[13] where the court said:

> "In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again. While that can never be confidently predicted his or her circumstances might assist in making at least some assessment."

[42] The personal circumstances of the appellant as appear from the record are the following: - at the time of his sentence he was 33 years old, married with three children, has matric qualification, was employed as a security guard, spent six months in custody awaiting the matter to be finalized, and further that alcohol played a role in the commission-of the offences.

[43] It is quite clear that in considering the sentence to impose the court below took into account all the above personal circumstances of the appellant. In this

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[13] (576/07) [2008] ZASCA 87; [2008] 4 All SA 396 (SCA) ; 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) (3 September 2008)

respect, and more importantly, the court took into consideration that in imposing a custodial sentence the dependents of the appellant would be deprived of his support as a husband, father and a breadwinner for the family.

[44] The court was also alive to the circumstances within which the incident that led to the conviction of the appellant occurred. The offences occurred in a situation where alcohol, on both the side of the appellant and that of the complainants, played a significant role.

[45] The seriousness of the offences was also taken into account. The attack on the complainants was categorized as "the savage barbaric" and of a "sustained nature," which resulted in multiple stab wounds inflicted on the complainants.

[46] Although the previous conviction of the appellant involved rape the court, correctly, took that into account. Rape, by its very nature, involves invasion and disregard of the other persons' physical integrity in the same way as attempted murder, using a knife would do. It should be noted that the complainants suffered multiple stab wounds.

[47] It was for the above reasons that the court below found the appellant to be a violent person who is also a danger to the society and thus needed to be removed from the community.

[48] In the circumstances the criticism that the court below failed to take into account the personal circumstances of the appellant in imposing the sentences of five years on each of the offences stands to fail.

Conclusion

[49] In my view, the court below misdirected itself in sentencing the appellant to two consecutive five years sentences on both convictions of the attempted murder. The appropriate sentence in the circumstances ought to have been five years effectively. The aggregate sentence of ten years is too harsh a punishment that does not serve the interest of justice nor the society. The sentence does not strive to effect a proper balance that has a due regard to all the objects of sentencing.

[50] In light of the above discussion the appeal stands to succeed.

Order

[51] I propose the following order:

1 The sentence impose on the appellant on 26 August 2017 by the Magistrate Court for the District of Johannesburg Central held at Orlando is set aside and substituted in its place by the following sentence:

a. Count 1 attempted murder – 5 years imprisonment.

b. Count 2 attempted murder- 5 years imprisonment.

2 The sentences in counts 1 and 2 above shall run concurrently.

3 The appellant shall effectively serve a period of 5 years imprisonment.

4 The sentence imposed above is antedated to 26 August 2017.

E Molahlehi

JUDGE OF THE HIGH

COURT,

JOHANNESBURG

I agree

Manoim AJ

JUDGE OF THE HIGH

COURT,

JOHANNESBURG

Representatives:

For the Appellant: L Musekwa

Instructed by: Legal-Aid South Africa

For the State: N Kowlas

Instructed by:

Heard: ~~27~~ 18 February 2020

Delivered: ~~26~~ 27 February 2020.