THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 515/2000

In the matter between :

SIMON MAKONDO Appellant

and

THE STATE Respondent

Coram: Howie, Streicher, JJA and Cloete, AJA

Heard: 9 November 2001

Delivered: 15 November 2001

J U D G M E N T

STREICHER JA:

[1] The appellant was convicted in the regional court on a charge of attempted murder and sentenced to 10 years' imprisonment. An appeal to the

Witwatersrand Local Division was unsuccessful and with the leave of that court the appellant now appeals to this court against both his conviction and sentence.

[2] It is common cause that a motor vehicle driven by the complainant ('complainant's vehicle') was involved in a minor collision with a motor vehicle ('the other vehicle'), in which the appellant was a passenger. The two motor vehicles were travelling in opposite directions and the collision occurred when they drove past one another. It is furthermore common cause that the appellant subsequently shot the complainant. The appellant's defence to the charge of attempted murder was that he acted in self-defence.

[3] The complainant, a detective in the South African Police Force, testified that the other vehicle did not stop immediately after the collision. As a result he executed a U-turn and followed it flashing his headlights for it

to stop. The other vehicle stopped approximately 500 metres down the road. He drove past it and stopped in front of it. When he alighted and walked towards the other vehicle the driver and his passenger were already standing outside their respective doors. Walking towards them, he drew his firearm, a 9mm pistol, as he did not know what to expect. The firearm was pointed towards the ground. An argument ensued during which he asked the driver and his passenger to accompany him to the police station but they refused. He did not tell them that he was a policeman. Eventually he put his firearm back in its holster and walked back to his vehicle. As he was doing so he heard two shots being fired. When he touched his back he realised that he had been hit. He turned around and asked why he was being shot at. A third shot was fired. He then collapsed. His girlfriend, Mrs Joyce Makola, who was a passenger in his vehicle, had by that time run away. As he was lying

on the ground he heard the footsteps of people running in the direction in which Joyce Makola had run. After a while he heard people getting into the other vehicle and when it drove past him he fired 15 shots, aiming at the tires of the other vehicle.

[4] The evidence of Joyce Makola, whom the court called as a witness, was, up to the point when she ran away, essentially to the same effect as that of the complainant.

[5] The appellant testified that the driver of the other vehicle, Mr Mashinini, stopped after the collision. Immediately thereafter he heard the sound of gunshots. Mashinini and he covered their heads and tried to hide. The complainant drove past them, stopped in front of them and alighted with a gun in his hand. When Mashinini tried to open his door the complainant fired in their direction. The appellant then realised that their lives were in

danger, opened the passenger door and returned the fire. The complainant slumped down and the firing stopped. Although the headlights of the other vehicle were shining on the complainant the appellant could not dispute the complainant's evidence that he was shot in the back. He got back into the other vehicle and asked Mashinini to drive to the police station. They left the complainant at the scene and drove away. No shots were fired at them while they were driving away.

[6] Mashinini testified that he heard gunshots while the complainant's vehicle was executing a U-turn. He closed (he probably meant to say 'locked') the door and hid underneath the dashboard. While the complainant's vehicle was driving past them he heard more gunshots. At that time the appellant was getting out of the vehicle. He then heard more shots being fired. When the gunfire stopped the appellant said that they should go

to the police station. They reported the matter to the police that same evening.

[7] At the trial photographs of the other vehicle were handed in by agreement. It is common cause that the photographs show a flat left front tire, a bullet hole in the front passenger door, a cracked windscreen and, along a straight line drawn from the bullet hole to the crack in the windscreen, damage to the cubby hole and to the dashboard of the vehicle. It is common cause that the damage was sustained during the incident. If the damage, other than the flat tire, was caused by the same bullet the bullet must have been fired at the vehicle by a person from a position on the passenger side of the vehicle slightly more to the rear of the vehicle than the bullet hole. (An application by the appellant to introduce ballistic evidence was abandoned during the hearing of the appeal.)

[8] The trial court found, correctly in my view, that the case against the appellant had been proved beyond reasonable doubt.

[9] The bullet hole in the front passenger door and the damage to the inside of the other vehicle are inconsistent with the appellant's version and consistent with the complainant's version. Counsel for the appellant submitted that the damage to the inside of the vehicle and the windscreen could have been caused by a bullet from the appellant's firearm or by the side view mirror which may have broken off during the collision. In my view this submission does not warrant serious consideration. He submitted, furthermore, that the damage was also inconsistent with the complainant's version in that the complainant testified that he fired at the other vehicle from behind while it was being driven away from him. It is correct that the complainant at one stage said that he never shot at the other vehicle from the

side but it should be borne in mind that he was badly injured at the time and that he testified that he could not say how far the other motor vehicle had progressed when he started firing. The real dispute during the complainant's cross-examination was that it was contended on behalf of the appellant and Mashinini that he shot at them from a position in front of their vehicle in the direction of their vehicle while they were stationary whereas the complainant said that it was only after they had pulled off that he started firing. On both versions the bullet hole and damage to the inside of the other vehicle could only have been caused by a bullet fired while the other vehicle was being driven away.

[10] The complainant's evidence that he was hit in the back was never disputed although, on the appellant's version, that could not have happened. Moreover, on the appellant's version he should have been able to

categorically deny that he shot the complainant in the back as the complainant was illuminated by the headlights of the other vehicle. Yet, he declined to do so but submitted that the complainant's evidence in this regard could not be accepted as he testified that he had been shot three times whereas there was only one wound in his back. However, it is clear from the appellant's evidence as a whole that he could not say how many times he had been hit but only that three shots were fired and that when he touched his back he established that he had been hit.

[11] The appellant's version is improbable. If Mashinini had stopped immediately after the collision there would have been no reason for the complainant to start firing shots at them or in the air, to stop in front of them, get out of his vehicle and continue firing at them. It is even more improbable that he would have done so in the glare of the headlights of the other vehicle,

making him an easy target should any of the occupants of the other vehicle wish to shoot him.

[12] The trial court accepted the evidence of the complainant and of Joyce Makola. Counsel for the appellant submitted that the trial court erred in doing so in that there were contradictions and other unsatisfactory features in their evidence. In my view, the trial court cannot be faulted for having accepted their evidence. To the extent that there are such contradictions and unsatisfactory features they are not material.

[13] In the circumstances the appellant was correctly convicted of attempted murder and it only remains to consider the appeal against the sentence imposed.

[14] On appeal to it the court *a quo,* quite correctly, stated that a court of appeal is not at liberty to interfere with the exercise of a discretion in

imposing a sentence unless it is satisfied that the discretion had not been exercised judicially; that the trial court considered the seriousness of the offence, the interests of society and the personal circumstances of the appellant; and that it could find no misdirection on the part of the trial court.

[15] Before us the appellant contended that the trial court misdirected itself by overemphasizing the interests of society and by considering it bound by the sentences the community expected the courts to impose. In sentencing the appellant the trial court did say that 'the community prescribes to a large extent to the courts what they expect to be done', 'that the court must obviously listen to what the community expects of certain offences and sentences in certain instances' and that 'the only sentence in the eyes of the community and the eyes of our legal system would be direct imprisonment'. However, it would in my view be unfair to the trial court to interpret these

statements to mean that it considered itself bound by the sentence the community expected it to impose. More so in the light of the fact that the trial court expressly said that the expectations of the community cannot be considered in isolation and then proceeded to consider the personal circumstances of the appellant. The interests of society and the expectations of the community are relevant considerations and the trial court cannot be criticized for having referred to those considerations. Nevertheless, if there is an unreasonable disparity between the sentence imposed and the sentence which this court considers appropriate, interference is required.

[16] The appellant is 43 years old and is a first offender. For the last ten years he has been employed by an oil company as a sales representative. He is married and has three children. Two of them are at school and the third one is still a baby. He is the only breadwinner. He committed a very serious

crime. He shot the complainant in the back while he was walking away from him causing the complainant to be hospitalized for weeks. He does not contend that he did not intend to kill the complainant. Fortunately for the complainant and the appellant his attempt was unsuccessful. After having shot the appellant and the appellant having collapsed, he did not investigate whether the appellant's life could still be saved but abandoned the appellant on the scene. However, there are some mitigating factors to which the trial court did not refer. The offence was not premeditated and the appellant was probably in a highly agitated state when he fired at the complainant. That agitated state would in all probability have been brought about by the collision, through no fault of the appellant, between the two motor vehicles; by the complainant having approached the appellant and Mashinini with a gun in his hand without having been given a reason to draw a gun; and by an

ensuing argument about the cause of the collision. Those are mitigating factors that should have been taken into account. Whether they were does not appear from the trial courts' judgment.

[17] The indiscriminate use of firearms and violence against fellow human beings is an evil in our society which calls for drastic action. Society is entitled to protection against such use of firearms and violence and quite legitimately expects the courts to treat offenders harshly.

[18] Having regard to the aforesaid considerations as well as the appellant's personal circumstances, no other sentence than a custodial sentence for a substantial period would have been appropriate. However, having regard to the mitigating factors referred to above and the fact that the appellant is a first offender at the age of 43 I would have suspended a

material portion of the sentence imposed by the trial court. The disparity is of such magnitude that inference is necessary.

[19] It follows that this court must impose the sentence which it considers appropriate.

The following order is made:

1 The appeal against the appellant's conviction is dismissed.

2 The appeal against the sentence imposed by the trial court is upheld and the following sentence is substituted for the sentence imposed by the trial court:

'Ten years imprisonment of which 3 years are suspended for a period of five years on condition that the accused does not commit a crime involving unlawful and intentional violence against another human being in respect of which a sentence of

one year's imprisonment or more without the option of a fine is imposed.

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P E Streicher
Judge of Appeal

Howie, JA)
Cloete, AJA) concur