IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A157/2008

DATE: 15 AUGUST 2008

In the matter between:

LUCKY PILIKANE APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

MOOSA, J

Appellant has been convicted in the Regional Court, Wynberg, on a charge of attempted murder and sentenced to seven years imprisonment. The appellant now comes on appeal to this court, having been granted leave to appeal against the sentence only.

The grounds of appeal in respect of sentence are firstly, that the sentence is shockingly inappropriate, given the appellant's youth and secondly, that the magistrate erred in not considering other sentencing options with the emphasis being on rehabilitation.

The court *a quo* in granting the leave to appeal against the sentence said:

> "I think seven years imprisonment fits in perfectly well with this type of reckless shooting in a neighbourhood where a person is injured, but I will indeed grant the application as I cannot with a clear conscience state that there is no chance that another Court cannot come to a different decision regarding the sentence."

The Court *a quo* in refusing bail pending the appeal said:

> "The Court is, however, of the opinion that there is no chance that any other sentence than direct imprisonment will be imposed on appeal if the sentence is not confirmed on appeal. If the High Court interferes with this Court's sentence, I respectfully submit that the only other sentence would be slightly shorter than seven years."

Although the appellant pleaded not guilty to the charge of attempted murder, he made certain written admissions in terms of Section 220 of the Criminal Procedure Act 51 of 1977, which effectively amounted to a plea of guilty. In such written

admissions he said:

> "I admit that on or about the 24th day of September 2006 and at or near Gugulethu in the Regional Division of the Western Cape, I did unlawfully and intentionally attempt to kill Michael Msadu, a male, by shooting him with a firearm and wounding him in the leg."

In the written admissions, the appellant goes on further to explain the events leading to the shooting:

> "The events leading to this incident were that I had a fight with Michael and he and his friends shot at me a week before this particular incident. So when I later confronted him, I was armed and when he moved, I shot at him. I admit that I was not sure whether he was armed or not, but I shot at him nevertheless. I know and admit that I should have foreseen that the bullet could have resulted in his death..."

Michael Msadu ("Michael") admitted in his evidence that there was an altercation between him, his family members and the appellant a week prior to this particular incident, during which

a firearm was produced by him and his family members. It appears, therefore, that there was some form of confrontation a week earlier.

From the evidence it appears that the appellant only discharged one bullet, which hit Michael in the finger and the hip. The bullet ricocheted and hit Thomzama Zama Biko ("Thomzama"). It is common cause that they did not suffer any permanent injuries. The bullet, however, is still lodged in the body of Thomzama. The appellant was found not guilty on another charge of attempted murder relating to Thomzama.

Adv **De la Rey**, who appeared before us, submitted that the trial court did not properly consider that appellant was a first offender and a youth, that the magistrate placed insufficient weight on these factors when considering sentence. Adv **Maartens**, in my view, correctly pointed out that in view of the appellant's youth and the fact that he is economically active and contributes to the household, that more information concerning his personal circumstances should have been placed on record. He suggested a probation officer's report would have of been of assistance.

It appears that at the time of the incident the appellant was 20 years old and as such a youthful offender. He was also a first

offender. He effectively pleaded guilty. There was a previous confrontation between the appellant and the complainant and members of his family. In such confrontation the complainant or members of his family produced a firearm. There is no evidence that complainant suffered any permanent injuries.

In S v Jansen in 1957 (1) SA 425 (A) at 427H - 428A, the learned judge said the following:

> "In the case of a juvenile offender, it is above all necessary for the Court to determine what appropriate form of punishment, in the peculiar circumstances of the case, best serves the interests of society as well as the interests of the juvenile. The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society."

Similar sentiments were expressed by Steyn, J in S v Adams, 1971 (4) SA 125 (C) at 126H:

"Die regspleging verg steeds die grootste voorsorg en versigtigheid by die vasstelling van 'n geskikte straf, maar dit verg dit in 'n besondere mate waar met jeugdiges gehandel word. Die moontlikheid van hervorming is by die jeug soveel meer aktueel en die gevolg van 'n onoorwoë uitoefening van 'n diskresie deur die voorsittende beampte kan soveel meer onherstelbare skade meebring in die geval van 'n jeugdige."

The presiding magistrate, when granting leave to appeal, was alive to the possibility that the sentence could be shortened on appeal. Adv **Maartens**, for the State, expressed similar views when he submitted that it is undesirable that a juvenile who is a first offender should be sentenced to seven years imprisonment, but said that the sort of conduct displayed by appellant should be firmly discouraged.

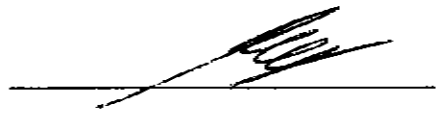
I agree with Adv **De la Rey** that the appellant was convicted of a very serious offence. This offence attracts a minimum sentence of five years imprisonment in the absence of substantial and compelling circumstances to the contrary. However, the appellant was not informed that the provisions of the General Law Amendment Act, 105 of 1997 would apply. In the circumstances, the provisions would not apply, see S v

Ndlovo, 2003 (1) All SA, 66 (SCA) at page 71F - G. In any event, even if the provisions of this Act did apply, there are sufficient factors in favour of the appellant to qualify as substantial and compelling circumstances to depart from the prescribed minimum sentence.

I also agree with Adv **De la Rey** that the presiding magistrate did not give sufficient weight to the fact that the appellant was a juvenile and a first offender; he essentially pleaded guilty; showed a degree of remorse; there was no premeditation; there was an element of provocation; he was economically active and contributed to the household expenses. These circumstances should have impelled the magistrate to consider imposing a shorter sentence or suspending a portion of the sentence. In that regard I am of the view that the magistrate misdirected himself.

In the light of all the circumstances I think an appropriate sentence would be a term of imprisonment because of the seriousness of the offence, and a portion suspended because he is a juvenile and a first offender. The suspended portion of the sentence would serve as a sword of Damocles to discourage him from repeating the offence.

It is ordered that 3 (THREE) YEARS OF THE 7 (SEVEN) YEARS IMPRISONMENT IMPOSED ON THE APPELLANT BE SUSPENDED FOR A PERIOD OF 5 (FIVE) YEARS ON CONDITION THAT HE IS NOT CONVICTED DURING THE PERIOD OF SUSPENSION OF MURDER, ATTEMPTED MURDER OR ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM.



MOOSA, J

I agree.

OLIVIER, A J