IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A209/2012

DATE: 10 AUGUST 2012

In the matter between:

ZOLANI WANANA MKALIPI Appellant

and

THE STATE Respondent

J U D G M E N T

DAVIS, J

Appellant was charged with attempted murder in relation to events that occurred on 15 October 2010 and to which I shall make reference presently.

He was 19 years old at the time when he shot the complainant outside a shebeen in Nyanga. He was arrested on 16 October 2010. It was impressed upon us, that he remained in custody until the disposition of the case which amounted to a period of over a year. He was convicted and sentenced to a term of imprisonment of seven years.

He approaches this Court on appeal only on sentence with

leave of the Court.

Briefly, the facts upon which he was convicted can be summarised thus: the appellant was making a series of uninvited advances towards the complainant's niece. It is common cause that they were in a shebeen and that a considerable amount of alcohol had been consumed. The complainant, given his unwelcome conduct, was then evicted from the shebeen. Finally, when the complainant's niece left the shebeen, she was in a very drunk state. The appellant grabbed her together with the assistance of a third person and effectively sought to abduct her. At that point, the complainant intervened and the appellant produced the firearm, shot the complainant, very seriously injuring him.

It is noteworthy that the appellant had contended that he had an alibi that evening; that he had not had anything to do with the events in question and that he was not responsible for the complainant being shot in the chest which caused the complainant to be hospitalised for almost two months.

So much for the brief factual matrix of the case. In relation to the factors which are traditionally taken into account in sentencing, the appellant was 19 years old at the time, unmarried and unemployed. He left school in standard 7. No

previous convictions were proved against him. The magistrate took into account the fact that he was a relatively young man and that youth may well have played a part in this violent and senseless act and further noted that the appellant had already spent one year in custody and further he could be treated as a first time offender.

The magistrate, in dealing with the sentence, made some pertinent observations. He said:

> "The complainant did not do anything to the accused. The accused just shot him for trying to help his niece. The complainant was injured and almost lost his life...He is not fully recovered, he will live with that wound for the rest of his life. He is fortunate to be alive and you are fortunate that he did not die otherwise you would have been standing here for murder."

The magistrate was also aware of the importance of calibrating the sentence which would take count of the important considerations of the interests of the community. Thus he said:

> "The people are looking at the Court with a keen

interest. They are looking at the Courts to impose appropriate sentences to the offenders. If too lenient sentences are imposed then people like yourself the society will lose confidence in the legal system and will be inclined to take the law into their own hands."

In this case it is debatable whether in fact it was effectively an eight year sentence because of the year in which the appellant spent in custody, however, the denial of the appellant to any responsibility for this act and the very senseless nature thereof is indicative, of not only the seriousness of this offence, but the importance of having recourse to the observations of the magistrate in this regard.

It is trite that youth is a consideration that should be taken into account in the determination of a suitable sentence. It is also correct that a period of custody, as in an awaiting trial prisoner, is an important consideration which should be taken into account.

But these have to be considered against all the facts including the seriousness of the offence, the interests of the community and that of the victim who, in this particular case merely intervened in order to safeguard the life, bodily and

psychological integrity of somebody who was under serious attack from the appellant.

This of course necessitates the usual difficulty in these cases when an appeal court interfere with a sentence.

The basic principle was set out some years ago in S v Pieters 1987(3) SA 717(A) 727. See also S v Sadler 2000(1) SACR 331(SCA) para 8 in which it was clearly stated that the Court may not interfere with the sentence unless the Court on appeal is convinced that the discretion which was exercised by, in this case the magistrate, was so exercised improperly or unreasonably.

In this case it appears that there is no basis for suggesting that a period of imprisonment for seven years for attempting to murder somebody who intercedes innocently on behalf of a third party and constitutes no threat, or act with violence or aggression towards the attacker is an inappropriate sentence or one that induces any sense of shock or inappropriateness.

For these reasons, therefore, I would **DISMISS** the appeal.

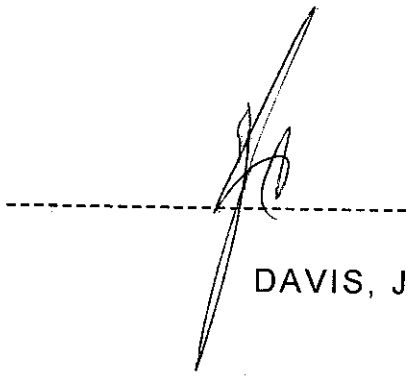
I agree.

DOLAMO, AJ

/RV

/...

It is so ordered.



DAVIS, J