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

Case Number: A259/2023

Heard on: 27 August 2024

Delivered on: 27 August 2024

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE: 2024-08-27

SIGNATURE

In the matter between:

DION KGOTSO MOIMA

Appellant

and

THE STATE

Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 27 August 2024.

JUDGMENT

STRIJDOM J

[1] This is an appeal against the appellant's sentence by the regional magistrate Benoni, on 5 July 2022 (the trial court). The matter is before this court after leave to

appeal was granted by this court on petition, in terms of section 309C of Act 51 of 1977.

[2] The appellant was convicted on one count of attempted murder (count 1) and one count of assault with intent to do grievous bodily harm (count 2).

[3] On 5 July 2022 the appellant was sentenced to ten years imprisonment on (count 1) and five years imprisonment on (count 2), which was ordered to be served concurrently in terms of section 280(2) of Act 51 of 1977.

A brief factual matrix

[4] The complainant in count 1, K[...] S[...], testified that the appellant and his father are neighbours to him. On 21 August 2020, around 21:00, he together with his sister and her children were watching television when he heard the sound of a brick on the roof. He went out and found the appellant holding a brick. When the appellant saw him, he ran away. He went to enquire why the appellant was throwing a brick on the roof and the appellant approached him with a golf stick.

[5] The appellant blocked the complainant at the gate and repeatedly hit him with the golf stick. The father of the appellant arrived and held the complainant. Thereafter the appellant hit the complainant on the head with the golf stick. The complainant lost consciousness as he was bleeding. He was admitted in hospital where he regained consciousness. He was a patient in hospital for one week. As a result of the incident he still suffers from headaches.

[6] The complainant in the second count, T[...] S[...], at the time a 16 year old female, testified consistent with the complainant in count 1. She testified that she followed the first complainant, Mr S[...] (her uncle), after a stone was thrown on the roof. She saw the appellant was in possession of a golf stick and was fighting with her uncle. The father of the appellant threw the golf stick away, after the father participated in the altercation. The appellant managed to retrieve the golf stick. Whilst the father held her uncle, the appellant hit her uncle repeatedly on his body and head with the golf stick. The attack proceeded until the uncle also lost consciousness and the golf stick had broken.

[7] She further testified that the appellant approached her and hit her with his open hands repeatedly. The father of the appellant also kicked her.

[8] The complainant Mr S[...] sustained two wounds on the left side of his head. When he arrived at the hospital, he was intubated, connected to a ventilator and had a hemothorax to the right lung (the whole side of the lung was filled with blood). He was admitted to ICU after a CT scan determined a significant head injury.

[9] The following personal and/or mitigating factors were placed on record by the appellant:

9.1 At the time of the offences the appellant was 18 years old. His date of birth is September 2001.

9.2 The appellant was unmarried and had no children. His highest qualification was a grade 11 and at the time was attending initiation in becoming a traditional leader.

9.3 The appellant was a first offender with no history of violent behaviour.

[10] The regional magistrate took into consideration the following aggravating factors:

10.1 The complainant in count 1 sustained severe injuries as a result of the assault on him;

10.2 The prevalence of these type of offences;

10.3 The appellant showed no remorse; and

10.4 The interests of the aggrieved victims.

[11] The main submissions of the appellant can be summarised as follows:

11.1 The presiding officer failed to consider the personal circumstances of the appellant;

11.2 The presiding officer misdirected him/herself in over-emphasising the interest of the complainants when imposing the sentence.

11.3 The sentence is out of proportion with the facts and so excessive that it induces a sense of shock.

[12] The crux of an appeal against sentence is not whether the sentence was right or wrong, but whether the trial court, in imposing that sentence exercised its discretion properly and judicially. The misdirection must be of such a nature, degree of seriousness that directly or by inference it can be said that the court did not exercise its discretion at all or exercised it improperly.

[13] A court's judgment does not necessarily have to mention all the factors that were considered, and it has been settled since *R v Dhlumayo* 1948 (2) SA 677 (A) that no judgment can be all-embracing.

[14] It is evident from the learned magistrate's judgment on sentence that she considered all the mitigating and aggravating circumstances. The following was stated in the judgment:

"Now when determining an appropriate sentence, the Court has a duty to consider all the circumstances of the case, the accountability, including the factors traditionally taken into account such as personal circumstances of the accused, the seriousness of the offence and the interest of the community."¹

¹ *Vide*: Record: Judgment on sentence page 157

[15] The learned magistrate also considered the main purpose of punishment namely prevention, retribution, reformation and deterrence.² In my view the court *a quo* properly balanced the four aims of sentencing.

[16] In order to determine whether the sentence is so unreasonable, the court of appeal must ask itself which sentence it would have imposed as original sentencing court.

[17] On a conspectus of all the mitigating and aggravating circumstances as well as the nature of the offence, I am of the view that there is no great disparity between the sentence that this court would have imposed and the sentence imposed by the trial court and that the sentence by the trial court must therefore be left unchanged. I am also of the view that the sentence is not “startlingly” or “disturbingly” inappropriate.

[18] In the result, the appeal against sentence is dismissed.

J.J. STRIJDOM
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree

A.C. BASSON
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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² *Vide*: Record: Judgment on sentence page 158

FOR THE APPELLANT: ADV. L. AUGUSTYN

INSTRUCTED BY: Legal Aid

FOR THE RESPONDENT: ADV. R. KRIEL

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 27 August 2024