



SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 933/20

In the matter between:

ALFRED MSEBENZI NHLAPO

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Nhlapo v The State* (933/2020) [2022] ZASCA 72 (25 May 2022)

Coram: Ponnann, Makgoka and Carelse JJA and Makaula and Savage AJJA

Heard: 03 May 2022

Delivered: 25 May 2022

Summary: Criminal appeal against sentence – special leave to appeal granted only against the sentence of ten years' imprisonment for attempted murder – cumulative effect of sentences relevant – sentence on one count cannot be viewed in isolation from the others – no warrant for interference – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw J and Manamela AJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Savage AJA (Ponnan, Makgoka, Carelse JJA and Makaula AJA concurring):

Introduction

[1] The appellant was convicted in the regional court, Ermelo (Mpumalanga) of theft of a firearm (count 1), possession of a firearm and ammunition in contravention of ss 3 and 90 of the Firearms Control Act 60 of 2000 (counts 2 and 3) and attempted murder (count 4). He had pleaded guilty to the first three counts and not guilty to the fourth. On 19 January 2010, he was sentenced to terms of imprisonment for three years, five years and one year on counts 1 to 3, respectively, and 10 years' imprisonment on count 4. The sentences on counts 1 to 3 were ordered to run concurrently with the sentence imposed on count 4. The effective sentence was thus 10 years' imprisonment. In addition, the appellant was declared unfit to possess a firearm.

[2] The appellant's application for leave to appeal was dismissed by the trial court. With the leave of the high court, obtained on petition to it, the appellant appealed to the Gauteng Division of the High Court, Pretoria (the high court). The appeal was against his conviction on count 4, being the attempted murder, and the sentence of ten years' imprisonment imposed pursuant thereto. The appeal was dismissed. Subsequently, the appellant was granted special leave by this Court to appeal only against the sentence imposed in respect of count 4.

Background facts

[3] The matter emanates from events which took place on 1 January 2008 at Morgenzon, Mpumalanga. The appellant was drinking alcohol when he had an altercation with another man about a girlfriend. The appellant held a beer bottle in his hand, while the other man had a grass cutter. The appellant left the scene and went to his parents' home, where he stole a firearm belonging to his father, which had been locked in a safe.

[4] The appellant returned to the scene of the earlier altercation. He was aggressive and, on meeting the complainant, asked him if he wanted to die. Although the complainant remained silent, the appellant fired one shot at him. Following this, he warned the complainant that he would not miss again. The appellant then attempted to fire a further shot while pointing the firearm at the complainant and his cousin, but the firearm jammed.

[5] In considering an appropriate sentence, the magistrate had regard to the relevant mitigating and aggravating circumstances. The appellant's personal circumstances were considered, including that he was 26 years old, unmarried with a six-month-old child, lived with his parents, had passed grade 9 and was employed, earning R3 500 fortnightly. Although alcohol was found to have played a role in the commission of the offences, the seriousness of the offences and the appellant's failure to desist from his criminal conduct, despite an opportunity for reflection to do so, were weighed against him. In addition, regard was had to his previous convictions, for housebreaking, escaping from custody and obstruction of justice, and his failure to comply with a sentence of correctional supervision. The court found that a sentence of direct imprisonment was appropriate, with the terms of imprisonment imposed in respect of the first three counts ordered to run concurrently with the 10 years' imprisonment imposed on count 4.

[6] On appeal, the high court confirmed the conviction and found that there was no misdirection in the sentencing of the appellant. It recognised that sentencing was the prerogative of the trial court and found that the sentence imposed was not shockingly inappropriate or vitiated by misdirection. The appeal was therefore dismissed.

[7] The appellant thereafter applied to this Court for special leave to appeal. The two judges who considered the petition granted special leave to the appellant to appeal to this Court solely against the sentence of 10 year's imprisonment imposed on count 4. Counsel for the appellant conceded in argument before this Court that the sentence of 10 years' imprisonment imposed on count 4 could not be viewed in isolation particularly where, as here, the sentences imposed in respect of the first 3 counts had been ordered to run concurrently with that imposed in respect of count 4. However, the sentence imposed for the attempted murder was said to be unduly harsh and, as a result, to induce a sense of shock given the appellant's relative youthfulness and his capacity for rehabilitation. In support of this contention reliance was placed on various authorities in which sentences of three and five years had been imposed for attempted murder;¹ where alcohol played a role in the commission of the offence; where there had been evidence of provocation; and where no injury had been sustained.² It goes without saying that whilst previous judgments on sentencing do indeed serve a useful purpose, each case falls to be decided on its own unique facts.³

Discussion

[8] The sentence imposed in respect of count 4 concerned a crime which, with the remaining three offences committed, formed part of one criminal transaction. The trial court correctly took account of the cumulative effect of the sentences imposed in ordering that the sentence of nine years' imprisonment in respect of the first three counts be served concurrently with the sentence imposed in respect of count 4. All relevant factors, including the mitigating and aggravating circumstances which existed, the appellant's prior criminal record, the seriousness of the crime committed, and society's interest were appropriately considered.

[9] Sentencing is pre-eminently a matter for the discretion of the trial court. An appeal court should be careful not to erode such discretion unless it has not been judicially exercised, or the trial court misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so disproportionate or shocking

¹ *S v Skhosana* [2018] ZAGPJHC 13. See the case of *Mokela v S* [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) in which a sentence of five years was also imposed for the same crime.

² *S v Ntsime* [2005] ZANWHC 30 paras 38 and 39.

³ See for example *Sv Sinden* 1995 (2) SACR 704 (A) at 708A; *S v D* 1995 (1) SACR 259 (A) at 260e.

that no reasonable court could have imposed it.⁴ In this matter, the sentence of 10 years' imprisonment arose consequent upon the trial court's proper exercise of its discretion, with which no interference by this Court is warranted. It follows for these reasons that the appeal must fail.

Order

[10] The following order is made:

The appeal is dismissed.

K M SAVAGE
ACTING JUDGE OF APPEAL

⁴ *S v Rabie* 1975 (4) SA 855 (A) at 857E-F. See also *Bogaards v S* [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) para 41 and *S v Anderson* 1964 (3) SA 494 (AD) at 495D.

APPEARANCES

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