Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE DIVISION OF THE HIGH COURT
HELD AT KIMBERLEY

Case No: **CA&R 32/2023**
Heard on: **06/11/2023**
Delivered on: **24/11/2023**

In the matter between:

RONNIE DE KOKER Appellant

and

THE STATE Respondent

Quorum: Phatshoane AJP et Mamosebo J et Olivier AJ

JUDGMENT ON SENTENCE

MAMOSEBO J

[1] Following a plea of guilty on 06 November 2018, the appellant was convicted on three counts. Count 1: murder with *dolus eventualis* as a form of intent; Count 2 attempted murder and Count 3: arson. The appeal is directed only against sentence.

[2] Williams J sentenced the appellant as follows: 18 years' imprisonment on Count 1(murder); two years imprisonment on Count 2 (attempted murder) and two years' imprisonment on Count 3(arson). The sentence imposed on Count 3 was ordered to run concurrently with the sentence on Count 1. This means that the appellant is effectively serving an imprisonment term of 20 years. The contention by the appellant is that a sentence of 20 years for murder, attempted murder and arson under these circumstances is shockingly harsh as it does not take into account the cumulative effect thereof.

[3] The question that stands to be answered is whether Williams J erred in not ordering the two years' imprisonment in count 2 (attempted murder), to run concurrently with the eighteen years imprisonment for murder in count 1 and thereby overlooked the cumulative effect of the sentence.

[4] A summary of what transpired, extracted from the appellant's plea in terms of s 112(2) of the Criminal Procedure Act, 51 of 1977, is that: The appellant and the deceased, Loraine Andrews, were in a love relationship and had lived together for a period of two years before the incident. The deceased was also involved in a love relationship with the complainant in the attempted murder count, one Johannes Gouws. On 24 February 2018, after knocking off from work, the appellant found the deceased and Gouws at the deceased's home. That made him angry and he purchased petrol at a filling station. He returned to the deceased's residence, gained entry and found them sleeping. He doused them with that petrol and set them and the place alight. He was alive to the fact that the deceased and Gouws could die as a result of this action but reconciled himself with that fact. Gouws managed to escape unscathed but the deceased died from her burns. Only the room that they occupied was damaged by the fire.

[5] The deceased's 20-year-old son, Mohigan Andrews, was the only witness in this trial to clarify aspects that the State and the defence did not agree on. According to him (Mohigan), the deceased had vacated the house she shared with him, his younger sister and the appellant about two weeks before the incident. She had obtained a protection order against the appellant and went to live at the house where she was set alight.

[6] The appellant's personal circumstances considered by the trial court were the following. He is 38 years old, unmarried with two children from a previous relationship. The children are minors and staying with their mother. His highest qualification is Grade 8 (Standard 10). He is a self-taught builder and has worked in that capacity earning R3000.00 per week until his arrest. He had three previous convictions, one of which was relevant to the matter before the trial court, namely, a contravention of the terms of the domestic violence interdict for which he was convicted during 2014, before his relationship with the deceased.

[7] His legal representative during the trial, Mr Van Tonder, submitted the following as mitigating circumstances. That he pleaded guilty thereby showing remorse for his actions. He was found guilty of murder with a form of intent being *dolus eventualis.* The three offences emanate from a love triangle. Mr Van Tonder had conceded that the aggravating factors far outweigh the mitigating factors. The only other aspect argued by Mr Van Tonder and not supported by Mr Steynberg, for the appellant, was that if the sentences are not ordered to run concurrently it would have serious parole implications for the accused because he would have to serve the full term on the murder count first and thereafter start serving

the sentence on the attempted murder count. No substantial and compelling circumstances were found to exist by Williams J.

[8] The following are aggravating circumstances. That the deceased died a horrible and painful death after suffering 72% burns over her body over a period of two weeks. The deceased was 40 years old and in her prime years. She was a mother of three children aged 20, 12 and 8 years who have been deprived of their mother's love and nurturing. They now live with relatives. The trial court also considered the prevalence of gender-based violence against the backdrop of the appellant's peculiar circumstances. The fact that the deceased had to obtain a protection order against the appellant and even went to the extent of leaving her own children just to escape from him but he was not deterred.

[9] Bosielo JA in *S v Mokela*[1] succinctly remarked*:*

"[9] It is well established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court, on how or when the sentence is to be served. The limited circumstances under which an appeal court can interfere with the sentence imposed by a sentencing court have been distilled and set out in many judgments of this court. See S v Pieters 1987 (3) SA 717 (A) at 727F – H; S v Malgas 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) para 12; Director of Public Prosecutions v Mngoma 2010 (1) SACR 427 (SCA) para 11; and S v Le Roux and Others 2010 (2) SACR 11 (SCA) at 26b – d."

[1] 2012 (1) SACR 431 (SCA) para 9

[10] I deal with Mr Steynberg's reliance on both *Mokela*[2] and *Dlamini*[3] to illustrate why they do not support him in the submissions in *casu.*

In *Mokela*, the appellant was convicted in the regional court of robbery with aggravating circumstances (count 1) and attempted murder (count 2) following a plea of guilty. He was sentenced to a term of 25 years imprisonment for robbery and a term of five years' imprisonment for attempted murder. The regional magistrate ordered that the sentence imposed in respect of count 2 should run concurrently with the sentence imposed in respect of count 1. The SCA emphasised the importance of judicial officers to give reasons for their decision. It also found it unjudicial to interfere with an order made by another court particularly where such an order is based on the exercise of a discretion without giving reasons. The SCA remarked that the regional magistrate had exercised a discretion when ordering that the sentences imposed should run concurrently and the High Court did not furnish any reasons for its decision to set aside the order by the regional magistrate. The SCA further found that the evidence shows that the two offences were linked in terms of locality, time and protagonists. The High Court did not show that the regional magistrate had failed to exercise the discretion properly or judicially. I find that the facts in *Mokela* are distinguishable.

[11] In *Dlamini* the appellant was convicted in the regional court on three counts of robbery, the possession of an unlicensed firearm and ammunition committed in 2002 and theft of a car stolen in 1999. He was sentenced to a term of 45 years direct imprisonment. The appeal was only against sentence. The minority judgment penned by Cachalia JA found that there was a single intent to rob the three different women of their vehicles and other possessions and that the taking of their property was one continuous transaction following a single threat of violence

[2]Supra at para 11
[3]S v Dlamini 2012 (2) SACR 1 (SCA)

directed at the three women simultaneously. This conclusion was reached following the test enunciated in *Maneli*[4]. However, in the majority judgment, Majiedt JA, then, disagreed with the conclusion that there was a duplication of convictions as found by Cachalia JA. The majority judgment agreed with para 33 of the minority judgment which was to the effect that the most serious misdirection by the magistrate was his failure to consider the cumulative effect of the sentences. In as far as the duplication of charges is concerned, the majority judgment concluded that three separate counts of robbery were committed against the three women based on the application of the single intent, continuous transaction test.

[12] The reliance in *Mokela and Dlamini* by Mr Steynberg is misplaced. The trial court's remarks are quoted in relevant part:

"In fact, in my view, an appropriate sentence on the murder charge here should be one of more [than] fifteen years imprisonment. And whereas the attempted murder of Mr Gouws had resulted in no harm to him he may very well have suffered the same fate as the deceased had he not somehow managed to awake from his sleep and escape the fire. In fact, the accused had admitted to dosing him with petrol as well. The sentence imposed should, in my view, reflect the value placed on the life and integrity of Mr Gouws."

[13] Section 280 of the Criminal Procedure Act, 51 of 1977 (CPA) stipulates as follows regarding cumulative or concurrent sentences:

"(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, ***the court may sentence him to such several punishments for such offences or, as the case may be, to the***

[4]S v Maneli 2009 (1) SACR 509 (SCA) para 8.

punishment for such other offence, <u>as the court is competent to impose.</u>

(2) ***Such punishments, when consisting of imprisonment, shall commence the one after the expiration****, setting aside or remission of the other, in such order as the court may direct,* ***<u>unless</u> the court directs that such sentences of imprisonment shall run concurrently.*** (Own emphasis added).

[14] A court retains a discretion to order the concurrent running of the sentences. This does not come automatically. As evident from s 280(1) a court may impose any sentence that it is competent to impose for each committed offence. Unless a court directs that the sentences should run concurrently, the offences shall commence one after the expiration of the other.

[15] In *S v Kibido*[5] Olivier JA held:

"Now, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function ***the trial court has a wide discretion*** *in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account (see S v Fazzie and Others 1964 (4) SA 673 (A) at 684A - B; S v Pillay 1977 (4) SA 531 (A) at 535A - B). A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (S v Fazzie and Others (supra) at 684B - C; S v Pillay (supra) at 535E).*

[5]1998 (2) SACR 213 (SCA) at 216g - j

Furthermore, a mere misdirection is not by itself sufficient to entitle a Court of appeal to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably (see Trollip JA in S v Pillay (supra) at 535E - G).”

[16] Mr Steynberg conceded that the sentences imposed on each count are themselves not shockingly harsh or disproportionate. The contention is based on the fact that the sentences should have been ordered to run concurrently failing which their cumulative effect becomes shockingly harsh and inappropriate. It was further contended that the offences were inextricably linked in terms of time and space. In the unreported judgment of *Langa*[6], Potterill AJA, writing for a unanimous court, pronounced:

“The only other ground of appeal against sentence is that the sentences should have been ordered to run concurrently because the two offences were closely connected in space and time. Section 280(2) of the CPA provides a sentencing court with the discretion to make an order that sentences run concurrently. A court of appeal can only interfere with the exercise of that discretion if it is satisfied that the sentencing court misdirected itself or did not exercise its discretion judicially. Absent such proof, this court has no right to interfere with the exercise of the exercise of the discretion of the court a quo.”

[17] I am not persuaded that the two years’ imprisonment in respect of the attempted murder count, which the trial court ordered that it run consecutively, is out of kilter with what this Court would have imposed for the said offence. The offences that the appellant was sentenced for are all of a very serious nature. The sentences imposed are justifiable

[6]Langa v The State (640/16) [2017] ZASCA 2 (23 February 2017) at para 13

and in the interests of justice. There is no misdirection on the part of the trial court which justifies interference on the imposed sentence. In the absence of any misdirection, this appeal stands to be dismissed.

[18] Accordingly, I make the following order:

The appeal against sentence is dismissed.

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MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Phatshoane AJP and Olivier AJ concur in the judgment of Mamosebo J

For the Appellant	Mr H Steynberg
Instructed by:	Legal Aid South Africa
For the Respondent:	Adv R Makhaga
Instructed by:	The Director Public Prosecutions