

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: A11/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MAZENZELE ISAAC NGWENYA

Appellant

And

THE STATE

Respondent

HEARD ON: 23 MAY 2022

CORAM: MOLITSOANE, J et LITHEKO, AJ

JUDGEMENT BY: LITHEKO, AJ

DELIVERED ON: 27 MAY 2022

INTRODUCTION

[1] The appellant, legally represented in the Magistrates Court for the district of Lindley, pleaded guilty on one count of contravention of section 17 (a) read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act 116 of 1998. He was sentenced on the 22nd November 2020 to three years' imprisonment. He appeals against the sentence with leave of this Court.

BACKGROUND

[2] In his statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977, which the Respondent accepted and was admitted into evidence as exhibit “A”, the appellant admitted that:

2.1 On the 3rd March 2020 the complainant obtained an interim protection order and it was confirmed on the 7th April 2020.

2.2 The order prohibited him from assaulting, raping, harassing, threatening or murdering the complainant.

2.3 The order was served upon him and on the 26th April 2020, while it was in force, he contravened it by threatening to harm the complainant.

2.4 He did not have lawful excuse for his actions.

[3] The court *a quo* convicted the appellant based on the above admissions. There was no explanation regarding the nature of the harm wherewith the complainant was threatened.

THE GROUNDS OF APPEAL

[4] The appellant attacks the sentence on the following grounds:

4.1 The court *a quo* over-emphasised the seriousness of the offence.

4.2 The court *a quo* over-emphasised the interests of society at the expense of the personal circumstances of the appellant.

4.3 The court *a quo* did not give proper weight to the following personal circumstances of the appellant:

4.3.1 That he is 40 years of age;

4.3.2 He has a 21-year-old dependent child;

4.3.3 He attended school up to Grade 7;

4.3.4 He is a self-employed electrician.

4.4 Another court might have imposed a different sentence.

4.5 The court *a quo* failed to consider the sentence of the appellant in a balanced manner.

THE LEGAL POSITION

[5] Sentencing is a matter within the discretion of the trial court.¹ A Court of Appeal can interfere with the sentence imposed only if it is shown that the trial court misdirected itself to such an extent that its decision on sentence is manifestly wrong or is so disproportionate or shockingly inappropriate that no reasonable court could have imposed it.²

[6] In the case of *S v Pieters*³ at 734 G-H the following is stated:

“Die bepaling van ‘n spesifieke tydperk van gevangenisstraf in ‘n gegewe geval kan nie volgens enige eksakte, objektief-geldende maatstaf geskied nie, en daar kan dikwels ‘n area van onsekerheid bestaan waarbinne menings oor die gepaste terwyn van gevangenisstraf geldeglik kan verskil”

[7] The purposes of punishment are deterrence, prevention, rehabilitation and retribution.⁴

¹ *R v Mapumulo* 1920 AD 56 at 57.

² *S v Bogaards* 2013 (1) SACR 1 (CC) at paragraph 41.

³ 1987 (3) SA 717 (A).

⁴ ASS Terblanche: *A Guide to Sentencing in South Africa* (3rd Edition) at 171 *et seq.*

[8] Ms Kruger, appearing for the appellant, argued that the sentence of direct imprisonment is shockingly inappropriate. She submitted that, based on the personal circumstances of the appellant, the seriousness of the offence and the interests of the community, a wholly suspended sentence would have been appropriate and in the interests of justice.

[9] Mr. Komane for the Respondent argued that although the nature of the harm wherewith the appellant threatened the complainant was not disclosed, it was sufficiently serious to cause her to report the matter to authorities. He argued that a wholly suspended sentence would not be appropriate. He was of the view however that, notwithstanding his initial support for the sentence appealed against, in the light of fact that the appellant was in custody from the 22nd November 2020 until he was released on bail on the 22nd June 2021 pending appeal, a reduction of the sentence to twelve months' imprisonment would be appropriate in the circumstances.

[10] Although contravention of a protection order is a serious offence, deserving of severe punishment as it was held in *Mudau v S*⁵, punishment meted out ought to fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.

[11] In the case of *S v Dzukuda and Others, S v Tshilo*⁶, the Constitutional Court held that the right to a fair trial required “*a procedure which does not prevent any factor which is relevant to the sentencing process which could have a mitigating effect on the punishment to be imposed from being considered by the sentencing court*”.⁷ It follows that any factor which may have a mitigating effect must necessarily be dealt with in sentencing.

[12] The appellant made it clear to the court *a quo* upon his first appearance that he intended to plead guilty to the charges preferred against him. In the case of *S v*

⁵ (547/13) [2014] ZASCA 43 (31 March 2014), unreported, at paragraph 6.

⁶ 2000 (4) SA 1078 (CC).

⁷ At paragraph 12.

Matyityi⁸ the SCA said the following regarding factors to be considered in determining the genuineness of an accused person's contrition:

"It is to the surrounding actions for the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the deed, what has since provoked his or her change of heart, and whether he or she does indeed have a true appreciation of the consequences of those actions".

[13] The court *a quo* neither enquired into the precise nature of the harm that was threatened nor established, upon conviction, what motivated the appellant to commit the deed and what has since provoked his change of heart. It would have been helpful to do so in the circumstances especially taking into consideration the very early stage of the proceedings at which he disclosed his intention to admit guilt. Without the answers to those pertinent questions, it is difficult to appreciate the appropriateness of the sentence imposed on the appellant. It appears that a simple question such as, "why did you do it", would probably have elicited an answer which would have placed the court *a quo* in a better position to properly determine the blameworthiness of the appellant and thereby justify the sentence imposed.

[14] A comparison of sentences imposed in cases of contravention of section 17(a) of the Act is necessary to determine the sentence that would reflect a proper consideration of the triad of sentencing and achieve the appropriate purposes of punishment.

[15] In the case of *S v Qhekisi*⁹, the accused, whose mother obtained a protection order against him prohibiting him from assaulting, threatening, insulting or verbally

⁸ 2011 (1) SACR 40 (SCA) at paragraph 13.

⁹ (166/2015) [2015] ZAFSHC 182 (17 September 2015).

abusing her, and had a year-old previous conviction for contravening the same order, assaulted her mother by hitting and injuring her on the head with a cup. He swore at her calling her by hers and her mother's private parts, saying she is a bitch and he wants to kill her, was sentenced to a maximum imprisonment term of five years.

[16] In the case of *S v Mbonde*¹⁰, the accused was convicted of contravention of a protection order in terms of which she was prohibited from visiting the complainant's place. Having visited the complainant without his consent, she insulted the complainant's partner. She had two previous convictions, one of *crimen injuria* and the other of assault with intent to do grievous bodily harm which were 4 years and 2 years old respectively. She was sentenced to two years' imprisonment, half of which was suspended for three years on conditions.

[17] In case of *S v Ndiye*¹¹, the accused, in contravention of a protection order prohibiting him from, *inter alia* assaulting the complainant, assaulted her by slapping her several times and hitting her with a fist, grabbing her and kicking her. He was sentenced to 18 months' imprisonment which was wholly suspended for five years on conditions.

[18] Considering that each case has to be dealt with on its own facts, a cursory look at the facts of the above cases reveal that the degree of violence displayed by the accused and their abuse of the complainants was more serious than what obtains in this case.

[19] Taking into account the personal circumstances of the appellant stated above, the nature of the contravention of which he was convicted and the interests of society together with the following factors:

19.1 That the appellant was incarcerated following his conviction from the 22nd November 2020 to the 22nd June 2021 (a period of nine months) when he was released on bail pending appeal,

¹⁰ (CA & R251/2015,86/2015) [2015] ZAECHC 93 (17 September 2015).

¹¹ (CA & R244/2018) [2018] ZAECHC 103 (25 September 2018).

19.2 The fact that the court *a quo* did not consider the fact that the appellant pleaded guilty and took the court *a quo* into his confidence from his first appearance, even before he obtained legal representation, which in my view was one of the main mitigating factors which, in the circumstances of this case, had to be dealt with,

19.3 His previous convictions were older than 14 years, and

19.3 The sentences in the cases referred to above,

I am of the view that the court *a quo* did not properly exercise its discretion in sentencing the appellant. The sentence induces a sense of shock and for that reason the appeal has to succeed.

ORDER

[18] In the premises, I would make the following order:

1. The appeal against sentence is upheld.
2. The sentence imposed by the court *a quo* is set aside and it is substituted with the following sentence:
 - 2.1 The appellant is sentenced to 18 months' imprisonment, half of which is suspended for a period of two years on condition that the appellant is not convicted of contravention of section 17(a) of the Domestic Violence Act 116 of 1998 committed during the period of suspension.
 - 2.2 The order in terms of section 103 (1) of the Firearms Control Act, 60 of 2000 is confirmed.
 - 2.3 The above sentence is antedated to the 22nd November 2020.

M.S LITHEKO, AJ

I concur

P.E MOLITSOANE, J

For the Applicant: Ms S Kruger

Instructed by: Legal Aid South Africa
BLOEMFONTEIN

For the First Respondent: Adv T Komane

Instructed by: Office of the Director of Public Prosecutions
BLOEMFONTEIN

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