

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A247/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 28 April 2021 E van der Schyff

In the matter between:

KEVIN MUNSAMY

1ST APPELLANT

ARSHAD ISMAIL

2ND APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] The appellants were charged in the Regional Court for the Division of North-Gauteng held at Benoni on charges of attempted murder, the discharge of a firearm in a built-up area or any public place, and the handling of a firearm under the influence of a substance which has an intoxicating or narcotic effect. They pleaded not guilty but were convicted on all counts and sentenced to an effective term of seven years' imprisonment. Although the appellants' legal representative indicated at the conclusion of the trial that he had instructions to appeal both conviction and sentence, the appellants approached the Regional Court with an application for leave to appeal against the sentence only. Leave to appeal was granted.
- [2] The main grounds of appeal are that the sentencing court did not balance the recommended forms of sentencing as outlined by two probation officers and failed to apply the 'triad of Zinn' when it exercised its judicial discretion and that the court's reliance on the provision of Part IV of Schedule 2 Act 105 of 1997 that prescribes the implementation of a minimum sentence, was misplaced.

Legal principles applicable when considering an appeal against sentence

- [3] The correct approach to an appeal on sentence is succinctly stated in *S v Malgas*¹

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to

¹ 2001 (1) SACR 469 (SCA) at 478D.

consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate."

- [4] *In casu*, the record reflects that the Regional Court Magistrate was of the view that as far as the first count, attempted murder, is concerned that the charge fell in the ambit of Schedule 2 of Part IV of the Criminal Law Amendment Act 105 of 1997. This was a material misdirection because Part IV refers to 'an offence involving assault, when a dangerous wound is inflicted with a firearm, other than an offence referred to in Part I, II or III of this Schedule'. The facts presented in court did not indicate that any wounds were inflicted when the appellants discharged their firearms. Although the Regional Court Magistrate considered whether there were compelling and substantial circumstances to deviate from imposing a prescribed minimum sentence, the focus of such an inquiry differs substantially from an inquiry where a court must determine an appropriate sentence without having to find reasons not to apply a minimum sentence. In the result, this court would not usurp the trial court's sentencing discretion when it steps in to reconsider the sentence imposed for the attempted murder.
- [5] The second ground of appeal revolves not around the sentences imposed itself, but on the cumulative effect of the sentences that were not ordered to run concurrently. This resulted in a term of seven (7) years effective imprisonment which the appellants submit is strikingly inappropriate.

The sentencing court's approach

- [6] The Regional Court Magistrate correctly held that a sentence must satisfy the aims of legal punishment, which includes retribution for the offence committed, rehabilitation of the offender, deterrence of would-be offenders from committing similar offences, and prevention of continued criminal conduct by the perpetrator. He emphasised from the onset that, in his view, rehabilitation 'starts with admission, unqualified admission of guilt.' The fact that neither of the appellants showed any remorse, or admitted their conduct, carried much weight when the sentence was determined. Based on the absence of any indication of remorse, the sentencing court held that it is difficult to support the argument that the accused, as they were before the trial court, were capable of rehabilitation. The court expressed the view – 'maybe in the long run but not as it stands today.'
- [7] When considering the appellants' personal circumstances, the Regional Court Magistrate took issue with the pre-sentencing reports. He stated that if the reports are considered, the appellants seemed 'like white angels walking the streets,' but if they were such exemplary police officials, they would not have been convicted. An incident where one of the accused was involved in a motor vehicle accident while under the influence of liquor during a year-end function disputed his claim to an exemplary record, said the Magistrate. A negative aspect of the reports pointed out by the Regional Court Magistrate is that the appellants' superiors were not engaged when the reports were compiled. The Regional Court Magistrate acknowledged that both appellants contribute to other dependants' livelihood. Accused 1 joined the SAPS nine months before the incident. Accused 2 recently burned his hand while assisting his landlord to put out a fire on a stove. It is indicated in the pre-sentence report that he is a helpful person where he stays. Both are first offenders.
- [8] As to the gravity of the offense, the Regional Court Magistrate stated that he got the impression that the appellants do not realise the seriousness of their

conduct. They fired shots at an 18-year-old who was on the dam fishing, and they are fortunate that they missed. However, they also endangered other people's lives because the N12 Highway is situated next to the dam. They were just fortunate that none of the bullets ricocheted and/or struck someone driving past on the N12. The fact that both appellants are members of SAPS was found to be aggravating. Members of SAPS are required to serve the public, and no one was served while the appellants, under the influence of alcohol, used their service pistols to fire at an innocent member of the public. 'In a moment of madness,' said the Regional Court Magistrate, the appellants tarnished the reputation of members of the SAPS. He equated the conduct of the appellants to police officials committing serious crimes.

[9] The Regional Court Magistrate said:

'It is very clear what happened here. You were with these ladies at the dam whether they were informers or not, under the influence of alcohol, drinking with them and impressing them with your firearms, service pistols, and as I have said many a time in this Court, alcohol with firearms and women in the same place is a recipe for disaster as it happened on the day in question.'

[10] The Regional Court Magistrate accepted the evidence led by superiors of the appellants during the trial that members of the Crime Intelligence Unit are allowed to use alcohol while on duty to connect with their informants. However, he emphasised that members are still required to be responsible, and the appellants were not responsible on the day in question. In determining whether compelling and substantial circumstances exist which would enable the court to deviate from the prescribed minimum sentence it erroneously held to apply, the sentencing court affirmed that the appellants' behaviour could not be condoned and found no such circumstances to exist. Although the court acknowledged that the sentence imposed on all the counts amount to seven

years' direct imprisonment, it did not set out reasons for not allowing the sentences to run concurrently.

Evaluating the sentencing court's approach

- [11] It is trite that an accused person's state of intoxication is a factor to be assessed in sentencing as it is relevant to blameworthiness. Lowe J stated *Mpongoshe v S* (CA24/2019) [2020] ZAECHGHC 8 (11 February 2020) that the effects of the intake of alcohol on an appellant (accused) have always been considered when imposing a sentence.
- [12] Wessels J, as he then was, stated in *Fowlie v Rex* 1906 TS 505 on 511, 'It would be absurd to say that if a man in his cold, sober senses did the act he should be punished with no greater severity than the man who did it whilst under the influence of liquor'. That there should be a difference in the degree of punishment has been recognised in almost every system of jurisprudence. In the *Digest*, 48.49.11, we find the distinctions drawn between the punishment of a sober man and of a man who had been drinking; and Matthaeus says (*de Criminibus*, p. 33): *Ebrius aliquo mitius puniri debet quia non proposito sed impetu delinquit*. Although a man may not be so drunk as to be excused the commission of a crime requiring special intent, yet he may have been so affected with liquor that his punishment should be softened.' This view was upheld, amongst others, in *S v Ndlhlovu* (2) [1965] 4 All SA 462 (A) and *S v M* 1994 (2) SACR 24 (A).
- [13] We are of the view that the mere fact that the sentencing court did not consider that although the use of alcohol cannot be pleaded as an excuse, it mitigates the punishment (*R v Bourke* 1916 TPD 303 at 306), is a misdirection. The court regarded the appellants' intoxication as an aggravating circumstance because they are members of the SAPS despite accepting the evidence that it is tolerated, and sometimes unavoidable, for members of the crime intelligence unit to use alcohol while engaging with informers. The effect of liquor to 'arouse

sense and inhibit sensibilities' (*S v M supra* 29H-I), which may diminish the responsibility of the offended, cannot be ignored.

- [14] In addition, we consider that the same conduct underpins the conviction on all three charges. Although the nuanced differentiation between the charges does not render it a duplication of charges in the strict sense of the word, the same incident gave rise to a conviction on all three charges. The appellants did not engage in one act and then proceeded to engage in further criminal conduct. The trial court held that they fired three shots at the complainant who was in his canoe on the dam that is situated in a built-up area while under the influence of alcohol. To effectively punish these as separate actions, is in our view, contrary to what is dictated by a common-sense approach in view of the fundamental requirement of fairness, and a misdirection.
- [15] In the final instance, we considered that the sentencing court seems to have regarded the appellants' perceived lack of remorse as an aggravating factor when it reasoned that rehabilitation 'starts with admission, unqualified admission of your guilt. If a person cannot admit to his guilt which is the first step toward rehabilitation, the rehabilitation can hardly take place'. The Supreme Court of appeal held in *Hewitt v S* 2017 (1) SACR 309 (SA) at par [16] that lack of remorse is not an aggravating circumstance. Although it is accepted that the absence of remorse lessens the chance of rehabilitation, the court misdirected itself in finding that the absence of remorse inevitably leads to the conclusion that the appellants are incapable of being rehabilitated. Remorse is not the singular determining factor as to whether a convicted person will be able to rehabilitate.
- [16] In the result, we are of the view that it is justified for this court to step in and reconsider the sentence imposed in totality.

Principle to apply in the sentencing process

- [17] In the pursuit to impose an appropriate sentence, the so-called *Zinn*-triad remains the most prominent principle.² The Appeal Court, as it was then referred to, held in *State v Zinn*³ that 'What has to be considered is the triad consisting of the crime, the offender and the interests of society.' As a result, the interests of society, the gravity of the offence, retributive aspects, rehabilitation and deterrence need carefully to be considered and balanced when an appropriate sentence is determined. If one of the components are excessively stressed an imbalance is created. It is important to mention that case law highlights the emergence of an additional factor, namely the interests of the victim.⁴
- [18] The question is whether direct imprisonment is the only sentence that would (i) take account of the interests of the victim by acknowledging the harm done to him, (ii) inflict punishment on the offenders so that the scales of justice are balanced (retribution); (iii) cause the offenders to reconsider their way and not commit similar crimes in future (deterrence); (iv) cause other people in society from refraining to commit similar crimes because they witness the offender's punishment and fear suffering a similar fate (deterrence); (v) contribute to the improvement of the offender and thus assist both offenders and the society (rehabilitation).
- [19] It cannot be denied that society is abhorred by the mere thought of a person shooting in the direction of another person, more so if the shooter is a police officer under the influence of alcohol, who for the laughs of it shoots in the direction a canoeist who happens to be an 18-year-old man, and the setting of the incident is a built-up area. However, to equate the commissioning of this crime, on the facts accepted by the trial court, to police officers using their service pistols to commit serious crimes, like hijacking, is not correct. The trial court itself classified the incident as occurring 'in a moment of madness' and observed that the appellants do not seem to grasp the seriousness of their

² A van der Merwe *Sentencing* SACJ (2015) 3 415-429, 415.

³ 1969 (2) SA 537 (A) 540G.

⁴ *S v Matyityi* 2011 (1) SACR (SCA) 40 at para [16].

conduct. There is no evidence of any premeditated actions. It was correct to hold that an appropriate sentence should reflect the gravity and seriousness of the offense, but as Holmes JA held in *S v Rabie* 1975 (4) SA 855 at 862G-H, 'Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.'

- [20] It is trite that imprisonment has several objectives. Offenders are punished by being deprived of their liberty. Their incarceration keeps them from committing further crimes while they are in prison and, in theory, allows them to be rehabilitated during their period of imprisonment. The goal of rehabilitation is to address the underlying factors that led to criminal behaviour and by so doing, reducing the likelihood of re-offending. However, this objective is generally not met by imprisonment. On the contrary, evidence shows that prisons rarely rehabilitate individuals but tend to further criminalise individuals, leading to re-offending and a cycle of release and imprisonment, which does nothing to reduce overcrowding in prisons or build safer communities.⁵ It also needs to be acknowledged that the current Covid-19 pandemic renders inmates more vulnerable to contracting the virus and places an additional strain on correctional institutions. The community is protected when convicted persons are removed from society. However, protecting the community from an offender does not necessarily require imprisoning the offender, and this purpose may be fulfilled through the imposition of other sentencing orders. We are of the view that the facts of this case do not support a finding that the appellants are a danger to society that calls for the protection of the community through their incarceration as a specific aim of the sentence. The imposition of a fine, coupled with a suspended sentence, will cause the appellants to experience the consequences of their actions while they would avoid the harmful effects of incarceration. It will, likewise, have a less severe impact on the appellants' dependants than their incarceration will have. A fine is punitive and deterrent in its aim and stresses offender accountability. It demands of the offender to

⁵ United Nations Criminal justice assessment toolkit - Custodial and Non-Custodial measures: Alternatives to Incarceration" (2006).

pay his debt to society. The deterrent effect of a suspended sentence needs no elucidation.

Application of the legal principles to the facts

- [21] In order to have regard to the gravity of the offense, it is necessary to have regard to the facts that underpinned the convictions. *In casu*, the complainant was shot at while he was canoeing on the Lakefield Dam, on the afternoon of 9 November 2017. Three shots were fired in his direction. The accused are two police officers from the Germiston Crime Intelligence Unit. Although they denied shooting at the complainant, or at all, the court evaluated the evidence and found that the state has proved their guilt beyond a reasonable doubt. It was also proven that they were under the influence of alcohol when the offense was committed. The appellant's legal representative conceded that the court was correct to convict the appellants of attempted murder but argued that the conduct was 'mainly an act of stupidity.' The offences are serious, but the evidence does not indicate that it was premeditated. The appellants acted in the spur of the moment while under the influence of alcohol.
- [22] Pre-sentencing reports were obtained. Regarding the first appellant, Ms. M. Modise, a probation officer, proposed that correctional supervision should be considered an appropriate sentence. Mr. TP Ndobe, a registered professional social worker, proposed correctional supervision, a suspended sentence, or a fine imposition. Both the social workers based their recommendations on the facts that their investigations revealed regarding the personal circumstances of the appellants. We noted the Regional Court Magistrate's criticism of the pre-sentencing report because, amongst others, the appellants' superiors were not consulted with, Captain Mchunu, the commanding officer of the appellants and Lieutenant Colonel Mashile testified during the trial at the insistence of the court. Neither of them provided any information from which it can be deduced that the appellants have a negative employment record.
- [23] From Ms. Modise's report, it is gleaned that:

- (i) The first appellant was born on 20 September 1983;
- (ii) He is married, and has one child;
- (iii) He is employed by the SAPS;
- (iv) He is regarded as a trustworthy and responsible person by his friends and family;
- (v) He has no previous convictions, and no pending matters against him;
- (vi) In her view, the first appellant does not understand the seriousness of his offence. She also opined that due to the seriousness of the offences and the deterrent message that a sentence should be sent to the community, a suspended sentence was in her view unsuitable.

- (i) From Mr. Ndobe's report, it is gleaned that:
- (ii) The second appellant was born on 20 February 1990;
- (iii) His family and friends describe him as a 'good' and 'humble', 'non-violent' person;
- (iv) He is in a cohabitative relationship, and has one child;
- (v) His family is dependent on him;
- (vi) He is a first offender;
- (vii) In his view, the second appellant's age and history indicate that he is a good candidate to be rehabilitated, and that correctional service or a suspended sentence would be a suitable sentence.

[24] When sentence was argued in the court *a quo* the prosecutor indicated that the state does not object to the reports and accept that the accused are suitable candidates for correctional supervision. Counsel for the respondent likewise conceded that sentences must run concurrently and that a suspended sentence might be appropriate in the circumstances.

[25] We are of the view that although the appellants were convicted of serious offences, that sufficient factors exist that indicate that direct imprisonment is not the only appropriate option for a sentence. It is a mitigating factor that both

accused are first offenders and aggravating that they are members of the SAPS. The court also must consider that the appellants' commanding officer testified that members of the Crime Intelligence Unit are allowed to sometimes consume limited amounts of alcohol when enticing informers. *In casu*, the limits of consumption were, however, exceeded and this is no-doubt an aspect that will also be considered during the internal disciplinary proceedings. The effect of the alcohol consumption and concomitant intoxication can however not be ignored when punishment is meted out. The court also must consider that the appellants are unfit to possess a firearm. This fact, itself, will gravely affect the appellants' employment prospects, and is a factor that needs to be taken into consideration. If a custodial sentence is suspended on condition that the appellants attend to the root cause of the crimes, the abuse of liquor, while also ordered pay a substantial fine, the chances of rehabilitation improve, while society is being paid its dues.

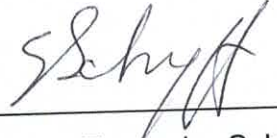
- [26] The order granted in this appeal does not affect or suspend the court *a quo*'s finding that both accused remain unfit to possess a firearm.

ORDER

In the result, the following order is made:

1. The appeal against sentence is upheld to the extent that the sentences imposed are substituted with the following:
2. The counts are taken together for purposes of sentence.
3. Each accused is sentenced to pay a fine of R12 000,00 (Twelve Thousand Rand), by way of two payments of R6 000,00 (Six Thousand Rand) each, the first to be paid on or before 30 June 2021, the second on or before 31 August 2021;
4. In addition, each accused is sentenced to two years imprisonment which is wholly suspended for a period of three years on the following conditions:
 - 4.1. That the accused is not found guilty of attempted murder or any other offence of which violence towards another human being is an element, having been committed during the period of suspension, for which he is sentenced to imprisonment without the option of a fine;

4.2. That each accused attends a minimum of 6 (six) consecutive sessions at a branch of Alcoholics Anonymous of their choice. The first session to commence on or before 1 June 2021. Written confirmation of attendance must be obtained and retained.'



E van der Schyff

Judge of the High Court, Gauteng

I agree



T Raikane

Acting Judge of the High Court, Gauteng

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture it will be sent to the parties/their legal representatives by e-mail. The date for hand-down is deemed to be 28 April 2021.

Counsel for the appellant:

Adv. ME Tshole

Instructed by:

Wiseman S Khalishwayo Attorneys

Counsel for the respondent:

Adv. C Pruis

Instructed by:

State Attorney

Date of the hearing:

14 April 2021

Date of judgment:

28 April 2021