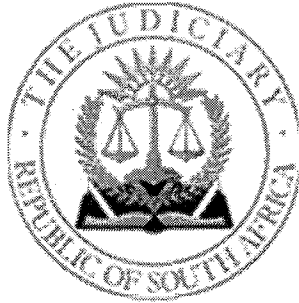


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A251/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
7/9/2018 DATE <i>[Signature]</i> SIGNATURE	

In the matter between:

MALEYA MAKGOTHO
ABEL MAKHURAFirst Appellant
Second Appellant

and

THE STATE

Respondent

J U D G M E N T

MAHALELO, J:

[1] The appellants appeared before the Regional Magistrate of Roodepoort charged with the following; kidnapping (appellant 2 only) and assault with intent to do grievous bodily harm. They were legally represented and pleaded not guilty. On 18 May 2017, the first appellant was convicted of assault with intent to do grievous

bodily harm and the second appellant was convicted of kidnapping and assault with intent to do grievous bodily harm. On 22 August 2017 they were each sentenced to 5 years' imprisonment in terms of Section 276(1)(i) of Act 51 of 1997, the two counts having been taken as one for the purpose of sentence in respect of the second appellant. With the leave of the trial Court the appellants appeal against conviction and sentence.

BRIEF OVERVIEW OF THE FACTS AND EVIDENCE

[2] The facts underlying the conviction are briefly as follows. Ms Manavhela, the complainant, testified that she knew the first appellant from 24 March 2017 when he proposed love from her and she did not accept. On the same day she consumed alcohol with the first appellant at a tavern and spent that night at his place. In the morning when she woke up she put on his underwear and took the second one with her without his permission and left whilst he was still sleeping. On the day of the incident he had gone to fetch her jersey from her friend known as Papiki who was a DJ at Sithole's tavern. It was late at night. She waited for Papiki to finish after which he was to accompany her home. Whilst seated there, the first appellant approached her and requested her to leave with him and she refused.

[3] The first appellant left and came back in the company of the second appellant and the second appellant grabbed her by her clothes and pulled her forcefully out of the gate of the tavern. At that stage the first appellant walked behind them until they reached his room. Inside the first appellant's room she was assaulted by both appellants. The first appellant assaulted her with open hands on her head and the

second appellant hit her with fists and open hands on her face. The first appellant then brought a pressing iron and plugged it in. When it was hot the second appellant took it and burnt her on her cheek. This he did whilst she was screaming and crying. During the assault the second appellant further kicked her. People came knocking at the door as a result of her screams but the appellants refused to open. She then told the first appellant that she would go and fetch his other underwear and the cell phone, he then opened for her. She testified further that she had lied to the first appellant that she had his cell phone because she wanted them to open for her. She was injured on her left cheek and her upper lip was swollen. Thereafter she went home and reported the incident to her brother and later to her sister.

[4] Germina Manavhela testified that she is the older sister and guardian of the complainant. She told the Court that the complainant was brought to her house by her brother on 25 March 2017. She observed that she had a triangular burn wound on her left cheek and the outer layer of the skin was peeling off and her mouth was swollen. The complainant informed her that she was assaulted by the two appellants. She took her for medical examination on 27 March 2017.

[5] The medical examination by Dr Tukhelo Ramakula recorded as usual on the J88 form, revealed that the complainant presented with 3 X 5 centimetre burn wound under her left eye on the cheek. The doctor described the injury as being unique because it was triangular in shape and was consistent with the history furnished by the complainant that she was assaulted and burnt with an iron on her left cheek. According to Dr Ramakula the burns were superficial and in different stages of healing. Dr Ramakula also observed that the complainant's upper lip was swollen.

[6] According to Dr Ramakula, it is possible that the injuries were inflicted on the complainant on 25 March 2017 as part of the burns were healing and others were still red and inflamed. He concluded that the state of healing of the burn wounds was consistent with the history given and that it was possible that falling onto a hot iron could cause the same burn marks.

[7] Both appellants testified and denied that they assaulted the complainant. The first appellant denied that he kidnapped the complainant. He testified that he is friends with the second appellant and the complainant was his girlfriend at the time. He added that the complainant slept at his place on more than one occasion before the incident and she stole his underwears, money and a cell phone. Both the appellants testified that the complainant followed them to the first appellant's place voluntarily because she wanted them to buy her a beer. The appellants stated that the complainant sustained the injuries on her left cheek and upper lip when she fell on top of the second appellant who was in possession of an iron busy ironing a jersey.

[8] This appeal turns on whether the appellants are guilty of the offences they are charged with. The question to be answered is whether the learned magistrate misdirected himself in his factual findings that the State proved the guilt of the appellants beyond a reasonable doubt.

[9] The complainant is a single witness. It is trite that the evidence of a single witness should be treated with caution. A conviction will normally follow only if the evidence is substantially satisfactorily in every material respect or if there is

corroboration. It is clear from the judgment of the court *a quo* that the learned magistrate was alive to the need to evaluate the evidence in its totality. As the version of the appellants is in conflict with the evidence presented by the state witnesses, the trial court correctly considered the probabilities and improbabilities which emerged in both the state and the defence case as well as the credibility of all the witnesses who testified. The magistrate considered the totality of the evidence including the evidence of the complainant's sister who testified that she observed burn wounds on the complainant's left cheek which were peeling off and oozing when the complainant arrived at home.

[10] The court *a quo* critically evaluated the complainant's evidence and after considering the totality of the evidence and in light of the injuries sustained by the complainant rejected the appellants' version that the complainant fell on top of the first appellant who was holding a hot iron in his hand. The magistrate found that the version of both appellants is not reasonably possibly true and correctly rejected it. I agree with his finding more so that the appellants failed to explain how the complainant fell onto a hot iron with her left cheek. I am satisfied that the guilt of the appellants has been established beyond a reasonable doubt. I am mindful of the fact that in *S v Francis*¹ it was held that the powers of a court of appeal to interfere with the findings of fact of a trial are limited bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness. In the absence of any misdirection the trial court's conclusion, including its acceptance of witnesses' evidence is presumed to be correct.

¹ 1991(1) SACR 198 (A)

[11] A court on appeal will only interfere if the court *a quo* has misdirected itself materially on either the facts or the law. I have read the judgment of the magistrate and I have carefully analysed the evidence. I come to the conclusion that the trial court exercised the necessary caution in its approach to the complainant's evidence and that there was no misdirection. I am therefore not at liberty to interfere with the court *a quo*'s finding. The appellants' appeal against conviction stands to fail.

SENTENCE

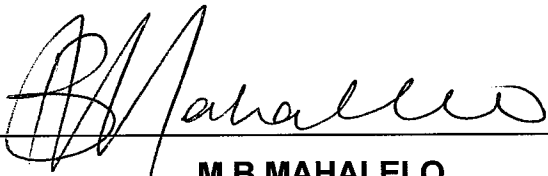
[12] With regard to sentence both appellant alleged that the sentence of five years' imprisonment in terms of section 276(1)(i) of the CPA is disproportionate given the circumstances of the case, so a lesser sentence ought to have been imposed. It would be appropriate to state the principles when an appeal Court is asked to interfere with a sentence imposed by the trial Court. Sentencing is pre-eminently a matter within the discretion of the trial Court. The discretion must be exercised judicially. An appeal court will interfere only if the sentence is vitiated by an irregularity or a misdirection, or is one which no reasonable Court would have imposed. In other words, whether there is a striking disparity between the sentence imposed and that which the appeal Court considers appropriate. If there was a misdirection, whether it is of such a nature or degree of seriousness that shows that the trial Court did not exercise its discretion at all or exercised it improperly or unreasonably. See *S v Collet* 1990 (1) SACR 465 (A).

[13] There are aggravating factors in this matter. Both appellants took the law in their own hands. They inflicted serious injuries on the complainant's face. She is left

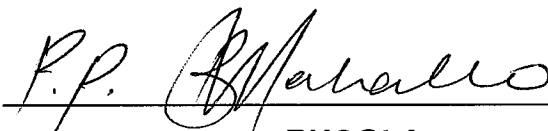
with life- long scars on her face. The learned magistrate took into account the principles applicable to sentencing and arrived at a just sentence. The sentence imposed does not instil a sense of shock in us and is not inappropriate. I would dismiss the appeal on sentence.

[14] In the result the following order is made.

14.1 Appeal against Conviction and Sentence by both appellants is dismissed.


M B MAHALELO
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:


U BHOOLA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

For the appellant	Adv M Buthelezi
Instructed by	Legal Aid South Africa
For the respondent	Adv I Bayat
Instructed by	Director of Public Prosecutions, Gauteng

Date of hearing 02/08/2018

Judgment delivered on 07/09/2018