

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal no: **A202/2015**

In the matter between:

TEBOHO GEORGE SESING

Appellant

And

THE STATE

Respondent

CORAM:

MOLOI, J et CHESIWE, AJ

HEARD ON:

08 FEBRUARY 2016

DELIVERED ON:

25 FEBRUARY 2016

CHESIWE, AJ

- [1] The Appellant in this matter was convicted in the Bothaville District Court on a charge of assault to do grievous bodily harm and was sentenced to 18 (eighteen) months imprisonment, in terms of Section 276 (1) of Criminal Procedure Act 51 of 1977.

[2] Leave to appeal was granted by the trial court and the appeal lies only against the sentence.

[3] The facts of the matter are briefly as follows:

On the 7 March 2015, the complainant was at house number [1.....]. He was in the company of his girlfriend, Nonie Magelwe. Together with them was also Xolile Bam and Millicent.

The complainant was drinking alone and his girlfriend was drinking with her friends.

He had two bottles of beer and was busy drinking from one of the bottles when, the accused arrived. The complainant noted that the accused had already taken alcohol. The accused wanted to pour himself beer from the complainant's beer bottle. A struggle between them ensued. The accused hit the complainant with the full beer bottle, and struck the complainant on the left side of the face. The complainant sustained 5cm long laceration. He had to be sutured with 12 twelve stitches.

[4] During the trial, the Appellant, was at all times legally represented by Mr. Khambule. The Appellant pleaded not guilty and a plea explanation was not given.

[5] The Appellant appeals on the following grounds:-

The sentence is out of proportion with the facts in mitigation; the Appellant was also injured by the complainant; the court *a quo* erred in finding that the Appellant was the aggressor, because he also sustained an injury.

The court *a quo* erred in not properly taking the Appellant's personal circumstances into account, being:-

- a) Appellant's age,
- b) His children,
- c) His employment.
- d) He was attacked by the complainant.
- e) He only struck complainant once with the beer bottle.

[6] Mr. Reyneke on behalf of the Appellant, in the Heads of Argument and oral argument, before us submitted that, the court over-emphasised the seriousness of the crime. The court made no mention during the sentence of the Appellant's sobriety, although complainant testified that the Appellant was drunk or under the influence of alcohol.

[7] Mr. Reyneke submit that the intake of alcohol, clearly influenced the Appellant's blame-worthiness, as the Appellant acted out of the norm on the said day though there was no evidence of the extend of the appellants intoxication.

[8] Mr. Reyneke further submitted that there was no J88 submitted to prove the injuries of the complainant. In spite of the absence of J88, one must take cognisance of the gravity of the complainants injury, being hit with a beer bottle next to his eye, and sustaining a laceration of about 5cm long, which was sutured with 12 (twelve) stitches.

[9] Adv. Moroka on behalf of the Respondent argued that the court did not misdirect itself and that the appeal court should not temper with the sentence, because it was appropriate for the crime committed.

[10] Adv. Moroka submitted that the court *a quo* took into account the weapon used, and the sensitive area of the face targeted by the assault.

[11] She argued that the appellant is not a first offender. The appellant has previous convictions; one of theft, which is irrelevant in this instance; one of assault GBH and two counts of robbery.

Adv. Moroka argued that these convictions have an element of violence and are relevant for purposes of sentence in this case. She submitted that the appellant has not learned from this previous convictions and sentences imposed.

[12] Adv. Moroka submitted that the sentence by the court *a quo* was neither severe, nor shockingly inappropriate nor did the

magistrate misdirect himself in his finding. The Magistrate took into account the following:-

The personal circumstances of the Appellant: the seriousness of the offence; the prevalence of assault in the Magisterial District of Bothaville; the complainant was struck at a very sensitive area with the beer bottle. The kind of weapon used in the commission of the offence.

[13] Assault with intention to do grievous bodily harm is a very serious offence. The crime in that area is prevalent. The Appellant's previous convictions were relevant for purposes of sentence. It is trite law that the sentence of an accused must be balanced between the interests of society, the offence and the personal circumstances of the accused. **S v Rabie**, 1975 (4) SA 855 (A) at 866 A-C;

[14] The interests of the public must be protected. I am of the view that the sentence handed down by the court *a quo* is an appropriate sentence for the offence committed. The trial court did not misdirect itself in any manner during sentencing.

Rex v Dhlumayo and Another 1948 (2) SA 677 (A) at 706.

“Where there has been no misdirection on fact by that court, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.”

- [15] The questions which the court is called upon, is to determine whether the sentence imposed is in accordance with justice. It is trite law that numerous decided cases of the SCA, has it been decided that the appeal court can only interfere with the sentence where when the sentence is:

Disturbingly inappropriate and induces a sense of shock: **S v De Jager & Another**, 1965 (2) SA 616 (A)

Totally out of proportion to the magnitude of offence;

Vitiated by misdirection if the misdirection is serious: **S v Kibido**, 1998 (2) SACR 213 (SCA) or improperly exercised: **S v Anderson** 1964 (3) SA 494

- [16] It is trite law that the sentence of an accused must be balanced between the interest of society, the nature and seriousness of the offence and the personal circumstances of the accused. **S v Banda and Others** 1991 (2) SA (BGD) on 355 A; **S v Rabie** 1975 (4) SA 855 (A).

- [17] It is also trite law that a Court of Appeal will only interfere with the sentence if it is not suitable or if an irregularity occurred during sentencing. The test for interference is (a) whether the discretion of the case that court has been judiciously and properly exercised; (b) whether the sentence imposed is vitiated by shockingly irregularity or misdirection or is inappropriate.

[18] **S v Malgas** 2001 (1) SACR 469 SCA at 478 D-E.

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the quantum 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 ...”

It is clear from *Malgas* (*supra*) that the powers of a court of appeal to interfere in a sentence imposed by that court are clearly circumscribed. See **S v Botha** 1998 (2) SACR 206 (SCA) and also **S v Barnard** 2004 (1) SACR 191 (SCA). It follows that this court is not at large to interfere with the sentence imposed by the trial court.

[19] The trial court correctly exercised its discretion in a fair and reasonable manner and that the sentence imposed is appropriate and fair.

[20] In view of the aforesaid, I am not persuaded that the court *quo* misdirected itself or that the sentence is shockingly appropriated.

[21] In the circumstances, I would make the following order:-

1. The Appeal in respect of sentence is dismissed.

S. CHESIWE, AJ

I concur

K.J. MOLOI, J

On behalf of Appellant: JD Reyneke
Instructed by:
Legal Aid
Bloemfontein

On behalf of Respondent: Adv. MMM Moroka
Instructed By:
Director of Public Prosecution
Bloemfontein

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