

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

30 JULY 2015

DATE

[Handwritten Signature]

SIGNATURE

31/7/15

APPEAL No: A44/2013

In the matter between:

DAVID SELUMA

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

MOLOPA-SETHOSA J

[1] The Appellant was arraigned in the District of Wonderboom, held at the Mamelodi Magistrate's Court on the following charges:

[1.1] Count 1: Assault,

[1.2] Count 2: Crimen Iniuria,

[1.3] Count 3: Assault.

[2] The appellant pleaded guilty on all counts. The state accepted the plea as was tendered by the appellant, and he was subsequently convicted on 27 July 2011 on his plea of guilty aforesaid on counts 1, 2 and 3 respectively.

[3] The appellant was sentenced on 27th July 2011 as follows:

[3.1] Count 1 [Assault (common)] 6 months' imprisonment;

[3.2] Count 2 [Crimen Iniuria] 4 months' imprisonment;

[3.3] Count 3 [Assault (common)] 6 months' imprisonment. The effective sentence is 16 months' imprisonment.

[4] On the 29th of September 2011 the appellant brought an application for leave to appeal against sentence before the learned magistrate *a quo* and such leave to appeal against sentence was granted on the same date [29th September 2011].

[5] The appellant also applied on the same date [29th September 2011] to be released on bail pending the outcome of the appeal, and the appellant was released on warning.

- [6] The appellant was legally represented throughout the trial proceedings in the court *a quo*.
- [7] With regard to *count 1*, the appellant admitted having assaulted the complainant, who is his wife, on the 12th of November 2010 by hitting her once with a belt.
- [8] With regard to *counts 2 and 3*, which occurred on the 17th of April 2011, the appellant admitted that he insulted the complainant, thereby violating her dignity. He also admitted having assaulted the complainant by slapping her with open hands.
- [9] From the record it appears that the state proved the following previous convictions against the appellant, [although the SAP69 is not attached to the record, the appellant admitted the previous convictions]:
- [9.1] 18 April 1989- robbery; he was sentenced to a fine of R100 or 50 days' imprisonment;
- [9.2] 28 April 1993-assault; he was sentenced to a fine of R50 or 50 days' imprisonment.
- [10] The personal circumstances of the appellant which were placed on record were as follows:

[10.1] the Appellant was employed;

[10.2] he was married to the complainant;

[10.3] he maintained the complainant as well as the minor children;

[10.4] he had an alcohol problem;

[10.5] he was remorseful of his conduct, hence he pleaded guilty to all counts;

[10.6] from the charge sheet it appears that the appellant was **47 years old** when charged on 18 April 2011.

[11] The appellant appeals against the severity of the sentence and contends that that the factual basis, circumstances and background to the offences were not adduced in the court *a quo*. That the legal representative and presiding officer failed to record the above mentioned for purposes of sentence. That this information was highly relevant in determining an appropriate sentence.

[12] In essence the appellant contends that the failure by the court *a quo* to properly take the above information into account resulted in a sentence which the cumulative effect thereof cannot be seen as a proportional sentence. That the sentence imposed by the court *a quo* is shockingly severe, as the sentence of 16 months imprisonment only caters for *retribution and general deterrence* as aims of sentence, and that *rehabilitation and individual deterrence* was not afforded any consideration during the imposition of sentence.

[13] The appellant contends that the court *a quo* misdirected itself as follows during the evaluation of the nature and seriousness of the offence *in casu*:

[13.1] That the court *a quo* emphasized the previous convictions of the appellant as aggravating factors. That these convictions are respectively 22 years and 18 years old [18 April 1989 and 28 April 1993 respectively]; and that had the appellant applied for the quashing of these previous convictions, then the Director-General of Justice and Constitutional Development, would have issued a certificate to this effect.

[13.2] That the substantial period that had lapsed between these convictions and the current offences, does not justify the inference that the Appellant is inherently violent.

[13.3] That the court *a quo* erred further in stating that ‘the household of the appellant cannot be described as normal, due to his extreme behaviour’. That no evidence was adduced that shows extreme behaviour by the appellant. That it is also uncertain which conduct the court *a quo* categorized as *extreme*.

[13.4] That the court *a quo* erred further in referring to a protection order against the appellant, and that the contravention thereof is an aggravating factor. That this was not the charges preferred against the appellant, nor was the existence of the order, or contravention thereof proven. I may just mention that in his plea explanation the appellant does mention the existence of the protection order; surely

the respondent/state did not see a need to lead evidence to prove such as this was not in dispute.

[13.5] That the court *a quo* erred in stating that the problem in the household of the appellant '*has been brewing for quite some time*'. There is no evidence to support this finding; the incidents herein occurred twice within a period of a 6 months interval. No other evidence was adduced that this was a continuing problem.

[13.6] That the court *a quo* erred in equating the nature of the offences *in casu*, to that of the '*slaughtering of women and children*'. No comparison can be drawn between this statement and the appellant's conduct.

[13.7] Further, that contrary to the address by the prosecutor, there is no evidence that the offences were committed in the presence of the minor children.

[14] Counsel for the appellant submitted that the above mentioned misdirections unjustifiably increased the appellant's moral blameworthiness which resulted in the over-emphasis of the seriousness of the offences *in casu*.

[15] Counsel for the appellant submitted that the court *a quo* ought to have considered the following factors as mitigating, which would have reduced the appellant's moral blameworthiness:

[15.1] The Appellant ought to have been considered a first offender without a history of violence;

[15.2] The Appellant pleaded guilty to all counts and accepted responsibility for his conduct;

[15.3] The Appellant's sincere remorse can be inferred from the above mentioned;

[15.4] The Appellant has been in stable employment for a period of 28 years at Transnet;

[15.5] He maintained the complainant as well as the minor children;

[15.6] The Appellant also disclosed to the court that the cause of the animosity between him and his wife was the use of alcohol. The Appellant acknowledged the problem and requested assistance.

[15.7] The degree of violence implicit to the Appellant's actions is severely limited, and as such only minor injuries could have been inflicted.

[15.8] The Appellant had spent a period of approximately one and a half month in custody before he was released on bail pending the trial. Thereafter the Appellant spent another two months serving the imposed sentence before he was granted leave to appeal. The cumulative period of 3 and half months already constitutes an undeserved period, which served as retribution only.

[16] On the other hand, the state supports the sentence imposed by the court *a quo*.

[17] It is trite that the imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where it is convincingly shown that such discretion was not judicially and properly exercised and that the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. See generally: *S v Rabie* 1975 (4) SA 855 (A); *S v Snyder* 1982 (2) SA 694 (A); *S v Sadler* 2000 (1) SACR 331 (SCA); and Director of Public Prosecutions, *KZN v P* 2006 (1) SACR 243 (SCA) para 10; *S v Blignaut* 2008 (1) SACR 78 (SCA) at 81f-83f. In *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G it was held that:

“A court of appeal was entitled to interfere with a sentence imposed by a trial court in a case where the sentence is ‘disturbingly inappropriate’, or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably.”

- [18] The general approach to be followed by a Court of Appeal with regards to sentence is set out as follows in *S v Pieters* 1987 (3) SA 717 (A) at 727:

“Met betrekking tot appelle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie Hof beklemtoon dat vonnisoplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie Hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk dat hy die diskresie wat aan hom toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te stel: daar is ruimte vir hierdie Hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike of onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appelle teen vonnis beheers.”

- [19] In the case of *S v Pillay* 1977 (4) SA 531 (A) at 535 E-G, the court held that:

“....the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court 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."

[20] The learned magistrate, in sentencing the appellant stated that:

[20.1] the household of the appellant cannot be described as normal, due to his extreme behaviour. As contended by the appellant, no evidence was adduced that shows extreme behaviour by the appellant; further, it is also uncertain which conduct the court *a quo* categorized as *extreme*.

[20.2] the problem in the household of the appellant 'has been brewing for quite some time'. From the record there is no evidence to support this finding. The incidents herein seem to have occurred twice within a period of a 6 months' interval. No other evidence was adduced that this was a continuing problem.

[20.3] the learned magistrate, further, in sentencing the appellant equated the nature of the offences herein to that of the '*slaughtering of women and children*'. On the evidence on record, no comparison can be drawn between this statement and the appellant's conduct. There is basically no basis for such utterances.

[20.4] contrary to what was stated by the prosecutor, that the offences were committed in the presence of the minor children, there is no evidence at all that the offences were committed in the presence of the minor children, and the court *a quo* seem to have considered this as a fact.

[21] It is trite that in the consideration of sentence, the trial court has to consider a totality of factors, including the traditional triad, consisting of the nature of the offence, the personal circumstances of the appellant, and the interests of the society. In **S v Nkosi 2012 (1) SACR 87 (GNP)**, it was held that:

“....in imposing sentence there is still a need to maintain a healthy and proper balance between the interests of society, the nature of the offence and the offender. Aggravating of sentences to combat increasing prevalence of a particular crime must not lead to an inevitable negation of the accused's personal circumstances...”

[22] The court *a quo* misdirected itself during the imposition of sentence. The court *a quo* over-emphasized the seriousness of the offence by considering irrelevant factors which are not applicable herein; the court *a quo* further ignored the personal circumstances and inherent mitigating factors in favour of the Appellant. In my view, from what was said by the court *a quo*, as alluded to above, the court *a quo* failed to take sufficiently into consideration the personal circumstances of the appellant, as well as the circumstances of the commission of the offences. With regard to the personal circumstances of the appellant, the following point should be made: It is one thing to recite the personal circumstances of an accused. It is another to fuse those circumstances in the consideration of sentence. Unfortunately, in the present case, like many emanating from the lower courts, personal circumstances of the appellant were simply recited without considering how they should impact on sentence. That amounts to paying lip service to this component of sentencing.

[23] The offences which the appellant have been convicted of remain serious indeed. Violence against women is rife and prevalent; further it does appear that there was a protection order issued against the appellant, though details thereof were not dealt with at all. There seems to have been alcohol abuse on the part of the appellant, who mentioned in mitigation that he wanted to address the problem and become a better person. These are all legitimate considerations. But our sentencing ethos enjoins a sentencing court to carefully balance these against the personal circumstances of the appellant, lest an imbalanced sentence results.

[24] There are instances where, due to the seriousness of the offence, it is required that the elements of retribution and deterrence should come to the fore, and that the rehabilitation of the offender will consequently play a smaller role (*S v Swart 2004 (2) SACR 370 at 378c-e*). In my view, the circumstances of the present case do not lend themselves to that approach. The offences are indeed serious, but the circumstances of their commission are equally important in considering an appropriate sentence, as are the personal circumstances of the appellant. Compare for example, *S v Ndlovu 2007 (1) SACR 535 (SCA)* para 13, where the Supreme Court of Appeal cautioned against imposing uniform sentences that do not distinguish between the facts of cases and the personal circumstances of offenders.

[25] The factors mentioned above should have been accorded due weight. They were not, and in failing to do so, the trial court misdirected itself. In my view, it is the type of misdirection contemplated in *S v Pillay* 1977 (4) SA 531 (A) 535E-F, it being ‘*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.*’ This warrants interference by this court. This court is therefore at large to consider sentence afresh and impose what we deem appropriate in circumstances.

[26] Considering all the relevant factors, I am of the view that a period of 3 months’ imprisonment each on counts 1; 2 and 3, with a further (12) twelve months imprisonment, wholly suspended for a period of (5) five years on condition that the accused is not again found guilty of an offence of assault common and/or with intent to do grievous bodily harm; crimen iniuria or the violation of a protection order, committed during the period of suspension. The term of 3 months imprisonment on counts 2 and 3 are ordered to run con-currently. This will satisfy the aims of punishment, be fair to the society and the appellant in the sense that he has an opportunity for rehabilitation.

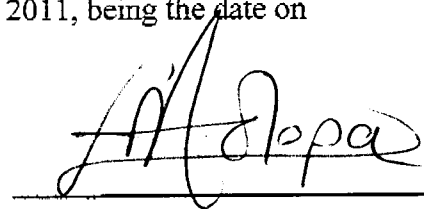
[27] In the result the following order is made:

1. The appeal against the sentence is upheld to the extent set out below;
2. The sentence imposed by the court *a quo* is set aside and the following is substituted for it:

'On **Count 1**: the accused is sentenced to (3) three months imprisonment, plus a further (12) twelve months imprisonment, wholly suspended for a period of (5) five years on condition that the accused is not again found guilty of an offence of assault (common), assault with intent to do grievous bodily harm, crimen iniuria and the violation of a protection order, committed during the period of suspension.

On **Count 2** the accused is sentenced to three (3) months imprisonment. On **Count 3** the accused is sentenced three (3) months imprisonment. In terms of section 280 (2) of Act 51 of 1977, the court orders that the (3) months imprisonment imposed on count 2 shall run concurrently with the (3) months imprisonment imposed on count 3.'

3. In terms of section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentence is ante-dated to 27 July 2011, being the date on which the appellant was sentenced.



L M MOLOPA - SETHOSA J
JUDGE OF THE HIGH COURT

I agree



D DOSIO AJ
ACTING JUDGE OF THE HIGH COURT

It is so ordered.