

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: CA&R 116/14

Heard on: 23-03-2015

Delivered on: 04-05-2015

In the matter:

LEBOGANG ALFRED MFEKA

APPELLANT

And

THE STATE

RESPONDENT

Coram: Phatshoane J et Mamosebo AJ

JUDGMENT ON APPEAL

Phatshoane J:

1. Mr Lebogang Alfred Mfeka, aged 28, the appellant, was arraigned in the Magistrate Court for the district of Warrenton before Magistrate Mr E.J van der Westhuizen on a charge of assault with intent to cause grievous bodily harm. On 02 July 2012 he was convicted as charged and sentenced to three (3) years imprisonment, one (1) year of which was wholly suspended for a period of three (3) years on certain conditions. On 03 July 2012 the Court *a quo* granted him leave to appeal against his sentence only and was released on bail pending this appeal.

2. The factual background leading to the appellant's conviction paints the following picture. On 25 December 2011, around lunch time, the 20 year old Mr Lesego Moabi, the complainant, and his friend, Mr Dikgang Abel Mocumi, were seated at Lesego's residence when they saw the appellant in the street. He was accompanied by his girlfriend, Ms Lerato Moketsi, and Mr Kabelo Nicolaas Leeuw. The appellant gave Kabelo money to buy some beers for him. Lesego followed the appellant demanding that he pay him back the R10.00 he owed him. The appellant, in turn, insulted Lesego by his mother's private parts. Lesego retaliated by exchanging derogatory epithets with the appellant. Lesego then walked away. Kabelo also hurled some insults at Lesego and gave the appellant a bottle of beer. The appellant broke this bottle, accosted Lesego, stabbed him with its shard on the left arm, and ran away. Lesego was unarmed. He bled and was taken to Warrenton Hospital.
3. Dr P B Mokhua, a medical practitioner, examined Lesego on 25 December 2011 and completed the medical report (J88). He was not called to testify, however, his clinical findings are recorded as follows in the J88 which was admitted in evidence as exhibit "A" by consent: "Very large laceration on the left hand with possible tendon or nerve injury". It is further recorded that Lesego was referred to Kimberley Hospital for further management. The conclusion reached by the medical practitioner was that Lesego suffered a serious non- life threatening injury.
4. Lesego testified that he was admitted at Kimberly Hospital for four days. The observations made during the Court proceedings were that Lesego had a scar tissue with numerous surgical sutures on the left upper arm close to the elbow and that his wrist had bended. Lesego intimated that it was so bended due to the injury inflicted by the appellant. He was unable to lift his hand or use it properly.
5. The appellant is a first offender, unmarried with two minor children aged 5 and 6. At the time of the sentencing phase on 02 July 2012 he had, since 2011, been self-employed as a builder, earning R1000 per month and maintained his

children and his mother. He left school in Std 6 (Grade 8). With regard to the offence he committed he intimated that he made a mistake and asked that he be forgiven. Counsel representing him in the Court *a quo* urged that he receive a wholly suspended sentence as this would deter him from committing further offences. The Prosecutor was of the view that a thirty six (36) months term of direct imprisonment would be appropriate and sent a clear message to the community of Warrenton that crime does not pay or solve problems.

6. The appellant's grounds of appeal came down to the following:
 - 6.1 That the Magistrate failed to take into account his personal and mitigating circumstances.
 - 6.2 That the Magistrate overemphasized the seriousness of the offence, the interest of the society and the prevalence of the offence to the large exclusion of his personal circumstances.
 - 6.3 That the Magistrate erred in not taking into account that the injury sustained by Lesego was not life threatening.
 - 6.4 That the Magistrate misdirected himself by not considering other sentencing options and confined himself to the submissions made by counsel.
 - 6.5 That the sentence imposed is unduly harsh, shockingly inappropriate and was not blended with a measure of mercy.

7. The approach to sentencing by an appellate Court is well known and was reaffirmed as follows in *S v Kibido* 1998 (2) SACR 213 (SCA) at 216g-j:

"Now, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account (see *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684A - B; *S v Pillay* 1977 (4) SA 531 (A) at 535A-B). A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (*S v Fazzie and Others* (supra) at 684B - C; *S v Pillay* (supra) at 535E).

Furthermore, a mere misdirection is not by itself sufficient to entitle a Court of appeal 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 (see Trollip JA in *S v Pillay* (supra) at 535E - G)."

See also *S v Moswathupa* 2012 (1) SACR 259 (SCA) at 261d-f para 4, *S v Sadler* 2000 (1) SACR 331 (A) at 334h-335a para 8.

8. In his two pages long sentence the Magistrate states that Lesego lost some of the use of his left arm and alluded to the prevalence of crime (general deterrence). He concluded:

"I will take into account that you are 28 years old, that you fathered two children aged 5 and 6, that you are a healthy person, that you are a builder, that you earn about a R1000 per month. According to you, you have got dependants, it is the children as well as your mother. Your level of education is standard 8. Your attorney asked that I should impose a suspended sentence and the prosecutor asked that I should send you directly to jail. I am of the opinion that the following is a proper sentence. The accused is sentenced to undergo three years imprisonment of which one year is suspended for three years on condition that the accused is not convicted of assault with intent to do grievous bodily harm or any offence which constitutes a competent verdict to assault with intent to do grievous bodily harm committed within the period of suspension and which he is sentenced to a term of imprisonment without the option of a fine and I am going to find you to be unfit to possess a firearm."

9. The Magistrate made reference to the well-known triad in *S v Zinn* 1969 (2) SA 537 (A) at 540G – H in imposing sentence. As more fully appears from his brief reasoning he listed the appellant's personal and mitigating circumstances and intimated, without more, that he is taking them into account. In my view the Magistrate paid mere lip service to the appellant's mitigating circumstances. This failure amounts to a material misdirection which warrants interference with the sentence imposed.
10. Mr Cloete, the defence counsel urged, in the event the sentence was to be upset, that the appellant receive a suspended sentence or that the matter be remitted to the Court *a quo* for consideration of imposing a sentence in terms of s 276(1)(h) of the Criminal Procedure Act, 51 of 1977 (the CPA), (correctional supervision). Ms Mabaso, for the State, is of the view that there is no merit in the appeal and stands to be dismissed.
11. There can be no doubt that assault with intent to cause grievous bodily harm is a serious offence. As was held in *S v McMillan* 2003 (1) SACR 27 (SCA) at

34f-g para 10 perceived consistency of punishment was an unmistakable requirement of justice. It disallows the imposition of sentences entirely out of keeping with sentences in comparable cases. It holds true that each case should be judged on its own merits and that the circumstances of the cases differ. However, the sentences imposed in similar cases would always provide a useful guide. In *S v Singh* 2002 (2) SACR 562 (SCA) the appellant had been convicted of assaulting the complainant, who he claimed was his girlfriend, by breaking a glass and cutting her on the chin with it and later assaulting her by punching her. He was a first offender, with dependent children; he committed the offence while in a jealous rage and when intoxicated. The attack was not premeditated. The injury inflicted on the complainant was a severe one, which left a scar, and she required further medical treatment. His sentence of four years' imprisonment, subject to the provisions of s 276(1)(i) of the CPA, was confirmed on appeal.

12. Another case in point is *S v Eales* 1991 (1) SACR 160 (N) where the appellant had been convicted in a Magistrates' court, *inter alia*, of assault with intent to do grievous bodily harm in that he had, in an unprovoked attack in a hotel, struck the complainant more than one blow on the head with a beer glass, causing severe injury. The attack caused wounds to the complainant's face, the scars of which he would carry for the rest of his life. The appellant was sentenced to three years' direct imprisonment. On appeal the sentence was altered by suspending one year of the three years' imprisonment for five years on certain conditions.
13. There was certainly no genuine empathy or remorse shown by the appellant for his misdemeanour. While he says that he made a mistake by stabbing Lesego, he maintained that he had not yet made peace with him. He instigated the insults following Lesego's demand that he return his R10.00. Lesego was unarmed when the appellant attacked him. He was years older than Lesego who was still attending school when the incident took place. He ought to have played an exemplary role than to be involved in a street brawl with Lesego. Although Lesego did not sustain a life-threatening injury it was nevertheless still a serious wound which kept him in hospital for four days. These are serious

aggravating circumstances which cannot be ignored. Therefore, to the extent that the Magistrate concluded that a custodial sentence was appropriate, he cannot be faulted.

14. It was argued on the appellant's behalf that the alcohol that both of them drank led to their exchange of insults and that there was a measure of provocation which was fuelled by these insults. I cannot agree because, in their own words, they were moderately under the influence of alcohol and there is no evidence that the appellant lost control of his emotions due to his alcohol consumption as his counsel sought to argue.
15. The fact that the appellant had no previous brushes with the law, was gainfully employed and contributed towards the wellbeing of his children and his mother are all positive and weighty extenuating factors. At the age of 28 he has some good prospects of rehabilitation and some window of hope must be left open for him. Nothing on the evidence led suggests that he has a propensity for violence or is a danger to society. In addition, the offence appears to have been perpetrated in a spur of the moment. I am therefore of view that a reduced custodial sentence is called for.
16. In the result:

Order:

1. The appeal is upheld.
2. The sentence of the Court *a quo* is set aside and replaced with the following:

"The accused is sentenced to two (2) years imprisonment, one (1) year of which is suspended for three (3) years on condition that the accused is not convicted of an assault to the person of another committed during the period of suspension and for which offence he is sentenced to a period of imprisonment without the option of a fine."

Phatshoane J

I concur:

Mamosebo AJ

On behalf of the Appellant	Adv P. J. Cloete
Instructed by	Kimberley Justice Centre
On behalf of the Respondent	Adv J.S. Mabaso
Instructed by	Director of Public Prosecutions