

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

26 March 2025
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DATE

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SIGNATURE

APPEAL NO: A06/2024
DPP REF: 2023/023
CASE NO: SH 701/2020

In the matter between:

RADEBE, FANI

APPELLANT

and

THE STATE

RESPONDENT

CORAM: KUNY et MOOSA JJ

JUDGMENT

MOOSA J:

Delivered: This judgment is handed down electronically by circulation to the parties/their legal representatives by email and uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be Wednesday, 26 March 2025.

INTRODUCTION

[1] This is an appeal against the sentence of 10 (ten) years imprisonment imposed upon the appellant by the Regional Magistrate – Roodepoort.

[2] The appellant enjoyed legal representation during the proceedings and pleaded guilty to the charge of assault with intent to do grievous bodily harm read with section 1 of Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997; was convicted on 31 May 2023 and sentenced on 20 September 2023 to 10 (ten) years imprisonment.

[3] The aforementioned offence falls within the ambit of Part III of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended in that the complainant was under the age of 16 years at the time the offence was committed. Upon conviction, the offence attracts a minimum sentence of 10 (ten) years imprisonment for a first offender.

[4] Aggrieved with the sentence imposed, the appellant noted an appeal; and was subsequently granted leave to appeal against the sentence imposed upon him.

CAUSES OF COMPLAINT

[5] The appellant argues that the trial court overlooked material aspects in the evidence placed before it prior to sentencing the appellant, including, *inter alia*:

- [a] By failing to take into account that the appellant pleaded guilty to the charge, and that this fact is indicative of remorse on his part.
- [b] By failing to take into account that the appellant had tendered his apology to the victim's mother who was present in court, and to the victim who was absent.

- [c] By failing to take into account that the appellant indicated his willingness to relocate from his place of residence where he was staying with the victim, in order to be as far away as possible from the victim and his family.
- [d] By failing to take into account that the appellant was the sole bread winner and was responsible for taking care of his family. Further, not placing sufficient emphasis upon the fact that the appellant was financially supporting his family, despite his actions on the day in question.
- [e] By failing to take into account and not placing due emphasis upon the fact that the appellant was under the influence of alcohol at the time when he committed the crime.
- [f] By failing to take into account the existence of substantial and compelling circumstances that would have warranted a justification to deviate from imposing the prescribed minimum sentence.
- [g] Submitting that the trial court failed to take into consideration the fact that the appellant spent a period of 2 (two) years and 10 (ten) months in custody pending the finalisation of his trial, when imposing sentence.
- [h] Further arguing that the failure by the trial court to take into account the time spent by the appellant in custody, renders the sentence imposed disproportionate; and would therefore entitle this Court to interfere.

THE LAW

[7] It is trite that the circumstances in which a court of appeal may interfere in sentencing discretion of a lower court are limited. There must be either a material misdirection by the trial court or the disparity between the sentence of the trial court and the sentence of 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”.¹

[8] In **S v Anderson 1964 (3) SA 494 (A) 495 D-E** Rumpff JA (as he then was) stated: *“Over the years our Courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interests of justice require it.”*

[9] In **S v Rabie 1975 (4) SA 855 (A)** at 857 D – E the following was stated: “In any appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal –

- (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and;
- (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if

¹ S v Malgas 2001 (1) SACR 469 (SCA) at 478 d - g

the discretion has not been 'judicially and properly exercised'.

The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".

[10] In **S v Kgosimore 1999 (2) SACR 238 SCA** it was held that the approach of a Court of appeal on sentence should be the following: *"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true enquiry. (Cf S v Pieters 1987 (3) SA 717 (A) at 727 G – I). Either the discretion was properly and reasonable exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so"*.

[11] In **S v Malgas 2001 (1) SACR 469 (SCA) at 478 D – G** the Court applied a broadened scope for the interference and held that: *"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". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or*

because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned”.

ANALYSIS

[12] Having due regard to the aforementioned principles set out by the case authority it is clear that the Court of Appeal has a very limited scope to interfere with the discretion of the trial court. The Court of Appeal is in any event able to interfere with the trial Court on sentence in respect of a finding as to substantial and compelling circumstances even in the absence of material misdirection or a failure of the exercise of discretion.²

[13] For the purpose of the appeal, it is necessary to determine as to whether, having due regard to the totality of the evidence, the court *a quo* imposed a sentence which was appropriate and in accordance with justice and equity, and one that is in accordance with what the Supreme Court of Appeal would approve. Put differently, was it a just sentence that was imposed upon the appellant.

[14] It is axiomatic that the determination of an appropriate sentence is a matter that has to be determined on a case by case basis, and that the merits and circumstances of each and every case differ.

[15] I now turn to the second cause of complaint of the appellant. In **S v Radebe 2013 (2) SACR 165 (SCA)** the following was stated: “*In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced.*”

[16] In **S v Dlamini 2012 (2) SACR 1 (SCA)** at para 41 the court said the

² S v Tafeni 2016 (2) SACR 720 at 723

following: *...the better approach, is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining sentence, in respect of the charge of this nature, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years imprisonment). The test is not whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one...*

[17] In **Director of Public Prosecutions North Gauteng: Pretoria v Gcwala and Others 2014 (2) SACR 337 (SCA)** the Supreme Court of Appeal finally definitively held that *“... not only in relation to cases where minimum sentences have been prescribed by the legislature, but in all cases where a court is considering the justness of the sentence to be imposed: the sentencing court should consider in all cases whether the period of imprisonment proposed is proportionate to the crime committed, taking into account, for that purpose, the period spent in custody awaiting trial.”*

[18] In **S v Patrick Clive Bailey 2013 (2) SACR 533 (SCA)** at paragraph 20 the following was stated: *“What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court’s exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.”*

[19] The appellant has been sentenced to 10 (ten) years imprisonment. It is clear that this sentence has been ordained by the Act as opposed to the ordinary sentencing regime.

[20] In **S v Kibido 1998 (2) SACR 213 (SCA)** at 216 g - I Olivier JA enunciated the trite principle as follows when an appellate Court considers sentence on appeal:

"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 Motshathupa 2012 (1) SACR 259 (SCA) at para 4, S v Sadler 2000 (1) SACR 331 (A) at 334-335 para 8-9; S v Rabie 1975 (4) SA 855 (A) at 857D – F; S v Malgas 2001 (1) SACR 469 (SCA) at 478, para 12, S v Sadler 2000 (1) SACR 331 (A) at 334-335 para 8-9.³

[21] It is clear from a dispassionate reading of the judgment on sentence that despite the court *a quo* being well aware of the fact that it was required to weigh and balance a variety of factors to determine a measure of moral as opposed to legal blameworthiness of an accused, it did not place sufficient emphasis and

³ Setholo v S 2017 (1) SACR 544 (NCK)

give due weight to the particular circumstances of this case, the principles as set out in **S v Zinn 1969 (2) SA 537**, and did not carefully consider the personal circumstances of the appellant.

[22] To this end, having carefully considered the record of proceedings, it is clear that the court *a quo* failed to take proper account and place due emphasis and sufficient weight upon the following facts, which if properly considered and weighed would have qualified as substantial and compelling circumstances, and which would have caused it to deviate from the imposition of the prescribed minimum sentence, to wit:

- [a] The appellant was a 55 (fifty five) year old male, who pleaded guilty to the charges.
- [b] He was the sole breadwinner of his family and gainfully employed at Checkers Hyper as a merchandiser.
- [c] He spent almost 3 (three) years in custody whilst awaiting the finalisation of the trial and sentence proceedings.
- [d] The appellant apologised for his unbecoming behaviour to the mother of his child, who was present in court, as well as to his daughter, who was not present in court at the time of the sentencing proceedings.
- [e] The offence was committed whilst he was under the influence of alcohol.
- [f] The appellant assaulted the complainant, by choking her, after she provoked him and physically assaulted him in his genital area, and which caused him severe pain and embarrassment.
- [g] The appellant was extremely remorseful for his actions on the day in question, and undertook to relocate from his family in order to prevent further contact with them.

[23] I am reminded that it was held in the matter of **DPP v Gcwala (295/13) [2014] ZASCA 44**, that the period spent in custody by a prisoner awaiting trial is a factor to be considered in determining whether substantial and compelling circumstances exist such that a prescribed sentence may be departed from. To this end, it is clear that the trial court erred when it held that time spent in custody is no longer important.

[24] The remarks by Holmes JA in **S v Ndhlovu 1965 (4) SA 692 at 695 C – E** are pertinent when he stated as follows: *“Intoxication is one of humanity’s age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do. On the other hand, intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness as, for example, when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a fell design. In the result, in seeking a basic principle in regard to intoxication and extenuation in murder cases, it is neither necessary nor desirable to say more than that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence one is weighing the frailties of the individual with the evil of his deed”*.

[25] Accordingly, having due regard to the aforementioned and the dictates of justice, it is clear in my mind that the failure by the court *a quo*, to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection. Furthermore, in my view the misdirection is 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.

[26] In the circumstances, this finding calls for an interference by this Court regarding the sentence so imposed upon the appellant, as the court *a quo* was incorrect in concluding that there were no substantial and compelling circumstances present, which would ultimately cause it to deviate in the imposition of the prescribed minimum sentence.

[27] In **S v Monyane & others 2008 (1) SACR 543 (SCA)** the Supreme Court of Appeal held that it would interfere with sentences imposed by a trial court only where the degree of disparity between the sentence imposed by the trial court and the sentence the appellate court would have imposed was such that interference was competent and required.

[28] I pause to mention that I have carefully considered, and am not unmindful of the fact that the appellant has two previous related convictions, one for an assault in 2010 for which he received a R 500.00 (five hundred rand) fine and for murder in 2012 in respect of which he was sentenced to 7 (seven) years imprisonment wholly suspended on condition that he was not convicted of the same offence during the period of suspension.

[29] I have balanced these factors with the totality of the evidence that has been led during the pre-sentence proceedings, when determining an appropriate sentence to be imposed upon the appellant.

[30] Accordingly in my view, the sentence imposed, in all the circumstances including the period spent in detention prior to conviction and sentencing, is one that requires interference. It follows that the appeal against the sentence must succeed.

ORDER

[31] In the result, I make the following order:

- [a]. Condonation for the late filing of the appellant's heads of argument is hereby granted.
- [b] The appeal against the sentence is upheld, and the sentence of 10 (ten) years imprisonment is hereby set aside.
- [c] The appellant is sentenced to 10 (ten) years imprisonment of which 4 (four) years imprisonment is suspended for a period of

5 (five) years, on condition that the appellant is not convicted of any offence of which assault of any nature is an element.

[d] The sentence is ante-dated to Wednesday, 20 September 2023.

[REDACTED]

C I MOOSA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG
WEDNESDAY, 26 MARCH 2024

I agree:

[REDACTED]

S KUNY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG
WEDNESDAY, 26 MARCH 2025

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Date of Hearing:

16 September 2024

Date Judgment Scribed:

13 December 2024

Date Judgment handed down:

26 March 2025