

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case no: A176/2024

In the matter between

M[...] F[...]

Appellant

and

THE STATE

Respondent

Coram: Naidoo J *et* Daniso J

Heard: 12 May 2025

Delivered: 19 May 2025

Summary: Appeal – criminal law – appeal against sentence – appellant a minor when offence committed – matter finalised without a pre-sentence report – 10 years direct imprisonment inappropriate – set aside and substituted with two years’ imprisonment – appeal upheld.

ORDER

1 The appeal against the sentence in this matter is upheld and the order of the court a quo is set aside and substituted with the following:

‘The accused is sentenced to two years’ imprisonment’

2 In terms of s 282 of the Criminal Procedure Act 51 of 1977, the sentence of two years’ imprisonment is antedated to 3 August 2023

JUDGMENT

Naidoo J (Daniso J concurring)

[1] The appellant was charged with one count of attempted murder in the Bloemfontein Regional Court. He pleaded guilty and was sentenced to 10 years' imprisonment on 3 August 2023. The appellant approaches us with the leave of the High Court, after his petition to the Judge President of this Division was successful. The appeal lies only against his sentence.

[2] The appellant's grounds of appeal against the sentence are, in essence, that the court erred in:

- a. not taking into account that 10 years' imprisonment is strikingly inappropriate;
- b. not recognising that it induces a sense of shock and is out of proportion to the totality of the accepted facts in mitigation;
- c. not taking account of his age, namely that he was 16 years old at the time of commission of the offence, and his personal circumstances being an element of rehabilitation;
- d. not taking account of the fact that the appellant is a first offender and that he pleaded guilty on 12 May 2023
- e. sentencing the appellant without the benefit of a pre-sentence report, thus ignoring his personal circumstances which would have informed the sentence imposed on him.

[3] The appellant and complainant (who was 15 years old at the time), were involved in a quarrel that turned physical. According to the appellant's statement in terms of s 112 of the Criminal Procedure Act 51 of 1977, in amplification of his plea of guilty, the appellant alleged that he drew a knife that he had in his possession and stabbed the complainant. It

is common cause that he stabbed the complainant four times. He then fled the scene, but was apprehended and arrested. After recording his plea of guilty on 12 May 2023, the court a quo remanded the matter for a pre-sentence report by a social worker to 19 June 2023. On that date the report had not been completed, due to the unavailability of a social worker to deal with the matter. It was then remanded to 3 August 2023.

[4] On the latter date, the prosecutor informed the court that the social worker tried to make contact with the appellant and his mother twice, on the 19th and 21st July 2023, but did not find them at their address. On the third occasion, being 26 July 2023, the social worker went to the appellant's house, accompanied by the investigating officer, and found the appellant and his mother there. An appointment was made for the appellant and his mother to see the social worker on 28 July 2023. It seems that the social worker did not find them at their house on that agreed day. She drove around the area looking for them, but still could not find them, so she left. The social worker completed her report, concluding that the appellant was not taking the matter seriously, and was wasting government resources which could have been utilized for those really in need of such resources.

[5] The court merely confirmed that the social worker had contacted the legal representative and that the appellant had heard what the social worker reported on. The court then pronounced that the social worker took all reasonable steps to secure a meeting with the appellant, but was not successful in doing so. The court hence directed that the sentencing of the appellant proceed without the pre-sentence report. The matter was finalized accordingly with the court imposing a sentence of 10 years' direct imprisonment on the appellant.

[6] It is well established in our law that absent a misdirection, irregularity or error in law, an appeal court will not lightly interfere with sentence. This trite principle has been well settled in our law, and was succinctly enunciated 50 years ago in the oft quoted case of *S v Rabie* 1975 (4) 855 (A) at 857, where Holmes JA said:

'1. In every 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 the discretion has not been "judicially and properly exercised".

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

This principle was subsequently re-iterated in the much-quoted case of *S v Malgas* 2001

(1) SACR, 469 (SCA) at 478 para 12, where the court remarked that:

'... A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. . . '.

[7] As alluded to earlier, the appellant was a 16-year old scholar at the time the offence was committed, and eighteen years old when he pleaded guilty. He was single, had no children and was a first offender. His highest school qualification was grade 8. The appellant alleged that he did not return to school after the incident, as the investigating officer had told him that returning to school might be construed as threatening to the complainant. He was then obliged to do odd jobs in order to earn a living.

[8] The court's robust approach in this matter is evident in the manner in which it interacted with the appellant and his legal representative. When the attorney submitted that the appellant had not returned to school because the police advise him against it, the court asked the attorney twice whether she believed that the police would say that, before remarking that the court should not put the attorney 'in a spot'. The court then

asked the appellant if he had heard what the social worker said, without pursuing the matter further. There is no indication on the record that the court asked either the appellant or his attorney for any explanation or reason for the appellant's failure. The attorney attempted to implore the court not to interpret his failure as lack of respect for the court but was cut short and asked not to testify from the Bar.

[9] The court also appeared to regard negatively the appellant's failure to testify in mitigation. The court indicated that it did not believe that the appellant had intended to plead guilty from the outset, as submitted by his attorney. The court's remarks at page 25 line 20 to page 26, lines 1-3 bear this out. I point out that other than the allegation that the complainant was stabbed four times, there was no evidence on record as to the circumstances under which the injuries were sustained or the seriousness of the injuries. It was the duty of the state to place this evidence before the court in aggravation, especially as the state submitted how serious the offence was and advocated for direct imprisonment as opposed to a suspended sentence or correctional supervision.

[10] The court was clearly aware of the importance of the pre-sentence report and articulated that awareness when addressing the appellant about his failure to keep the appointments with the social worker tasked with preparing the pre-sentence report. It is also difficult to see how the court concluded that the appellant is a person who did not present a positive prognosis for rehabilitation, when no evidence was presented to the court in this regard. It is a trite principle that in sentencing a child the court must consider the best interests of the child as provided for in section 28(2) of the Constitution. In this matter, it is clear that when arriving at the imposed sentence, the element of individualization was not taken into account due to the absence of the pre-sentencing report. It is understandable that the court felt annoyance and frustration at the delays in the matter, but the failure to see that the appellant himself was a child, clearly immature and in need of guidance to rehabilitate himself is, in my view, reason for this court to intervene. It was expected of the court to obtain a full explanation from both the accused and his mother for their failure to keep their appointments with the social worker in order to enable her to complete the pre-sentence report. A remand one

more time to obtain the pre-sentence report, in order to sentence the appellant appropriately, would, in my view, have been the appropriate course of action. The failure to obtain a pre-sentence report in this matter is a misdirection and another reason for this court to intervene. It remains the duty of the presiding officer to ensure that all available facts are properly enquired into in order that the most appropriate sentence can be imposed

[11] It has become a trite principle of law and legal practice that young offenders are to be treated differently to adults and that detention of a child should be a measure of last resort, and only for the shortest possible time. Rehabilitation of offenders, especially youthful offenders has been emphasized. The provisions of the Child Justice Act 75 of 2008 and the Constitutional imperatives of ensuring that the interests of a child are paramount and that detention of a child should be the last resort were ignored in this matter. Section 71(1)(c)(i) of the Child Justice Act stipulates that a child justice court may not dispense with a pre-sentence report where it may impose a sentence, *inter alia*, of imprisonment. The court a quo in this matter was dealing with a minor, and ought to have taken all steps to ensure that the pre-sentence report was procured. I am not satisfied that the court a quo did so in this matter. The sentence of ten years' imprisonment is, in my view, harsh, inappropriate and induces a sense of shock.

[12] The respondent (the state) candidly conceded this and agreed that the sentencing the appellant without obtaining a pre-sentence report is a misdirection. Ms Abrahams, for the appellant, argued that even though her heads of argument indicated that a sentence of three years should have been imposed, that upon reflection, she submitted that two years' imprisonment, ante dated to the date of sentencing would be more appropriate. The state agreed with this submission.

[13] In the circumstances, I make the following order:

1 The appeal against the sentence in this matter is upheld and the order of the court a quo is set aside and substituted with the following:

'The accused is sentenced to two years' imprisonment'.

2 In terms of s 282 of the Criminal Procedure Act 51 of 1977, the sentence of two years' imprisonment is antedated to 3 August 2023

NAIDOO J

I concur.

DANISO J

Appearances

For the Appellant:

Adv V Abrahams

Instructed by:

Legal Aid South
Africa Bloemfontein

For the Respondent:

Adv EB Ontong

Instructed by:

Director of Public Prosecutions
Bloemfontein