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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR472/2024

In the matter between:

**DIRECTOR OF PUBLIC PROSECUTIONS,
KWAZULU-NATAL**

Appellant

And

NTOKOZO ZUNGU

Respondent

ORDER

In respect of an application for leave to appeal from the Pinetown Regional Court the following order is made:

1. The applicant is granted condonation for the late filing of its application for leave to appeal against the sentence imposed by the regional magistrate on 27 November 2023

2. Leave to appeal against the sentence imposed on the respondent by the regional magistrate on 27 November 2023 is granted to the KwaZulu-Natal Division of the High Court of South Africa, Pietermaritzburg.

JUDGMENT

Chithi J

Introduction

[1] This is an application which has been brought by the Director of Public Prosecutions, Pietermaritzburg, ('DPP') in which it seeks an order in terms of the provisions of s 310A of the Criminal Procedure Act 51 of 1977 ('the CPA') in the following terms:

(a) That the applicant be and is hereby granted condonation for the late filing of an application for leave to appeal against sentence which was imposed upon the respondent by the regional magistrate, Pinetown, on 27 November 2023.

(b) That the respondent be granted leave to appeal against the sentence imposed on the respondent by the regional magistrate, Pinetown on 27 November 2023 to the full court of the KwaZulu-Natal Division of the High Court, Pietermaritzburg.

Background

[2] The facts giving rise to this application are as set out below. The respondent in this matter was charged before the Regional Court in Pinetown for robbery with aggravating circumstances read with the provisions of s 51 (2)(a) and Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('CLAA').

[3] Although the charge sheet does not set out what constituted aggravating circumstances, it is alleged that upon or about 7 June 2021 and at or near 28th

Avenue, Claremont in the Regional Division of KwaZulu-Natal, the respondent did unlawfully and intentionally assault Zandile Dazela and did then and with force or violence take from her an orange Renault Captur motor vehicle, bearing registration letters and numbers N[...], her property, or a property which was in her lawful possession. On 31 October 2023, following upon the trial of the matter, the respondent was convicted as charged. On 27 November 2023 the respondent was subsequently sentenced to seven (7) years imprisonment wholly suspended for a period of five (5) years on condition that the respondent was not again convicted of robbery with aggravating circumstances during the period of suspension. It is this sentence which the DPP seeks to appeal in terms of s 310A of the CPA.

The relevant provisions which found the application

[4] Section 310A of the CPA reads as follows:

'(1) The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.

(2) (a) A written notice of such an application shall be lodged with the registrar of the provincial or local division concerned by the attorney-general, within a period of 30 days of the passing of sentence or within such extended period as may on application on good cause be allowed.

(b) The notice shall state briefly the grounds for the application.

(3) The attorney-general shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by the deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused in terms of subsection (4): Provided that if the deputy sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed.

(4) An accused may, within a period of 10 days of the serving of such a notice upon him, lodge a written submission with the registrar concerned, and the registrar shall submit it to the judge who is to hear the application, and shall send a copy thereof to the attorney-general.

(5) Subject to the provisions of this section, section 309 shall apply mutatis mutandis with reference to an appeal in terms of this section.

(6) Upon an application for leave to appeal referred to in subsection (1) or an appeal in terms of this section, the judge or the court, as the case may be, may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the application or appeal, taxed according to the scale in civil cases of the provincial or local division concerned.'

Grounds of appeal

[5] The grounds upon which the DPP seeks to assail the sentence which was imposed by the regional court are the following:

(a) The magistrate misdirected himself in finding there were substantial and compelling circumstances that warranted the court to deviate from imposing the minimum prescribed sentence of 15 years imprisonment.

(b) The sentence of 7 years imprisonment which was wholly suspended that was imposed by the magistrate is woefully lenient.

(c) The magistrate misdirected himself in not imposing a sentence of direct imprisonment given the gravity and prevalence of the offence

(d) The magistrate misdirected himself in finding that because the respondent was heavily intoxicated this fact played a role in the respondent committing the offence.

(e) The magistrate misdirected himself by overemphasising the personal circumstances of the respondent at the expense of the nature of the crime, the victim and the interests of society.

(f) The magistrate misdirected himself in finding that the fact that there was no evidence that the respondent cannot be rehabilitated constituted a substantial and compelling circumstance justifying the departure from imposing the prescribed minimum sentence.

The pre-hearing court directives

[6] This matter initially served before Mlaba J in chambers on 4 February 2025. Mlaba J then directed a query to the DPP in which she remarked that there was no proof of service in the court file. She then directed that the notice of motion together with a statement of the accused/respondent's rights must be served upon the respondent.

[7] On 12 February 2025, Mlaba J allocated the date for the hearing of the matter before her as 25 March 2025 in chambers. She further directed the DPP to serve the notice of set down and the statement of rights on the respondent and to have it filed at least 10 days before the hearing.

[8] According to the return of service, the DPP's notice of motion initiating the application, the accompanying affidavit, the trial court's judgment, the trial court's judgment on sentence, the statement of the accused's rights in terms of s 310A(4) of the CPA in respect of the condonation application and the notice of set down were served personally upon the respondent at Pinetown, at the Pinecrest Centre, on 1 March 2025 at 14h00. The notice of set down and the statement of rights on the respondent were duly filed before this court on 7 March 2025, as per the order of Mlaba J.

[9] At the hearing on 25 March 2025, Mlaba J issued an order:

- (a) Directing the DPP to furnish the respondent with all the relevant papers including the judgments on conviction and sentence.
- (b) Directing the respondent to file his opposing papers on or before 8 April 2025.
- (c) Directing the applicant to file its replying affidavit, if any, by 25 April 2025.
- (d) Directing the parties leave to approach the registrar to set the matter down for a hearing.

[10] On 8 April 2025, the respondent delivered a notice of his intention to oppose the application for leave to appeal against sentence and his heads of argument, but he did not deliver any opposing affidavit, as contemplated in the order of Mlaba J. Section 310A(4) permits the accused to lodge a 'written submission' with the registrar within 10 days after the service of the notice of an application for leave to

appeal upon him. The words 'written submission' is not defined in the CPA. However, it has been accepted that such 'submission [which] is more in the nature of [an] argument, and attestation is not necessary.'¹

[11] This interpretation therefore entitled the respondent to deliver only the notice of intention to oppose and the heads of argument without there being any need for him to deliver any opposing affidavit.

[12] After the parties exchanged their papers and had duly delivered their heads of argument this matter was allocated to me to arrange a date for the hearing with the parties, which was 17 June 2025. At the commencement of the hearing on 17 June 2025, the parties advised the court that the respondent had since delivered the opposing affidavit and the DPP was not opposed to the late delivery of the respondent's opposing affidavit. By agreement between the parties this matter was adjourned for a hearing to the next day, 18 June 2025, to enable the court to consider the respondent's opposing the affidavit.

The respondent's grounds of opposition

[13] The respondent does not oppose the DPP's application for condonation for the late filing of the application for leave to appeal. However, the respondent opposes the DPP's application for leave to appeal. The respondent essentially contends that:

(a) The DPP must convince this court on proper grounds that it has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding.

(b) Section 51(3)(a) of the CLAA empowers a court to impose a lesser sentence than the one prescribed if substantial and compelling circumstances exist justifying the court to deviate from imposing the prescribed sentence. All that the court is required to do is to record such circumstances.

¹ A Kruger *Hiemstra's Criminal Procedure* (March 2025 – Service Issue 18) at 30-70

(c) A term of imprisonment which is wholly suspended is not lenient or should not be seen in that light as it primarily has two beneficial effects. First, the primary aim of a suspended sentence with a negative condition is to keep the convicted person out of prison and avoid the deleterious effects of direct imprisonment. Second, it is to deter the offender from committing similar offences in that the suspended sentence hangs over the offender's head.

(d) The regional magistrate considered the triad of factors comprising the offence, the offender and the interests of society. None of these factors were over or underemphasised but were duly balanced when the sentence was decided upon by the learned regional magistrate.

The issues

[14] The following are the issues which this court must determine:

(a) whether the DPP should be granted condonation for the late delivery of its application for leave to appeal against the sentence which was imposed on the respondent by the regional magistrate, Pinetown on 27 November 2023.

(b) whether leave to appeal against the sentence imposed on the respondent by the regional magistrate, Pinetown on 27 November 2023 should be granted.

Whether condonation should be granted

[15] The respondent was sentenced in this matter on 27 November 2023. In terms of s 310A(2)(a) of the CPA, a written notice of the application for leave to appeal against this sentence had to be lodged with the registrar of this court by the DPP within a period of 30 days after that sentence was imposed or within such extended period as may, on application, and on good cause shown, be allowed.

[16] Ordinarily, this application ought to have been instituted on or before 31 December 2023. However, it was only instituted on 28 November 2024 more than a year after the respondent was sentenced. The DPP advanced two reasons why the application was not timeously lodged. First, it asserts that after the prosecutor

applied to have the record of the proceedings transcribed this matter was only brought to its attention during March 2024. Ms *Ntsele*, to whom the matter was allocated, worked on the matter. However, before the papers were issued, she became indisposed. Second, when she returned to work, she was assigned to do the North Eastern Circuit High Court from 26 August until 20 September 2024. It was only after she returned from her circuit court duties that the matter was brought back to her.

[17] The test for condonation is whether it is in the interests of justice that it should be granted or refused. In *Grootboom v National Prosecuting Authority and another*² the following was stated:

'If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.' (Footnotes omitted.)

[18] The respondent does not oppose the DPP's application for condonation. Consequently, this court does not see any reason why condonation should not be granted. Even if the application was opposed, in the interests of justice, I would still have granted the application for condonation. This notwithstanding that the length of the delay between the time when the sentence was imposed and the time the application was lodged was somewhat long and the explanation for the delay was also somewhat poor. The reasons why I have granted condonation will become apparent later in this judgment.

² *Grootboom v National Prosecuting Authority and another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) para 50

The party's submissions

[19] Ms *Ntsele* for the applicant argued that the trial court failed to give adequate weight to the seriousness of the offence particularly where a motor vehicle was taken. The sentence which the learned magistrate imposed was inappropriately lenient and failed to give due weight to the gravity and prevalence of the offence, the interests of society and the need for deterrence and retribution. She went on to argue that the trial court failed to consider the principles governing the minimum sentence legislation and to heed the caution from the Supreme Court of Appeal against imposing lenient sentences for violent crime. To this end she argued that there were no substantial and compelling circumstances which justified the trial court to deviate from imposing the prescribed minimum sentence of 15 years imprisonment in this case. The fact that there was a possibility of the respondent being rehabilitated did not constitute a substantial and compelling circumstance. She concluded by arguing that the trial court over-emphasised the personal circumstances of the respondent without affording due weight to the other triad of factors in terms of *S v Zinn*.³

[20] Ms *Ntsele* emphasized that the trial court completely failed to consider the interests of the complainant. It did not consider what the complainant stated in her victim impact statement which included:

- (a) The fact that she lost her vehicle as it overturned immediately following upon the robbery.
- (b) She can no longer afford to buy herself another vehicle. This has left her unable to commute to and from work and generally unable to attend to the activities of her daily living, including that of her family.
- (c) The incident left the complainant devastated and severely traumatised to the extent that she is unable to drive on her own due to fear.

[21] Mr *Mthembu* for the respondent argued that the applicant did not have any prospects of success on appeal in that the sentence imposed would not be found to

³ *S v Zinn* 1969 (2) SA 537 (A) ('Zinn')

be inappropriate. He argued that the trial court properly considered the triad of factors as set out in *Zinn*. Consequently, this court should dismiss the applicant's application.

[22] When this court enquired from Mr *Mthembu* whether the trial court could be said to have considered those factors if they are not reflected anywhere in the judgement on sentence, Mr *Mthembu* appropriately conceded that he could not take the point any further.

The applicable legal principles

[23] It is trite that punishment is pre-eminently a matter for the discretion of the trial court. The power of an appeal court to intervene is limited to instances where the trial court has misdirected itself on the law or facts, or if it has committed an irregularity which vitiates the sentence, or in instances where the sentence imposed by the trial court differs so greatly from the one the appeal court would itself have imposed.⁴

[24] The word misdirection has been interpreted to mean an error committed by the court in determining or applying the facts when assessing the appropriate sentence. It has been held that 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 '⁵

[25] Where the point which has been put in issue is an under- or over-emphasis of a fact the

'question would not be whether the sentence was merely affected by the under-emphasis or over-emphasis but whether it was affected to such an

⁴ *S v Singh and others* [2016] ZASCA 37; 2016 (2) SACR 443 (SCA) para 23; *S v Malgas* 2001 (1) SACR 469 (SCA) ('*Malgas*') para 12; *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10.

⁵ *S v Pillay* 1977 (4) SA 531 (A) at 535D-G.

extent that the over- or under-emphasis led to the exercise of the penal discretion by the trial court being vitiated'.⁶

[26] The test which the applicant must satisfy at this stage is whether it has reasonable prospects of success on appeal. It has been held that

'the test of reasonable prospects of success has the effect that the Court will refuse an application for leave in those cases where no chance of a successful appeal exists or where the Court is certain beyond reasonable doubt that the appeal will fail'.⁷

The issue of whether the trial court misdirected itself in imposing the sentence which is the subject of this application would be a matter which has to be decided by the appeal court. However, this test must be considered at this stage in the assessment of whether the applicant has any prospects of success on appeal when viewed against the applicant's grounds of appeal.

[27] The respondent was convicted of robbery with aggravating circumstances in terms of s 51(2) read with Part II of Schedule 2 of CLAA. Upon conviction the respondent was liable to be sentenced to 15 years imprisonment unless there were substantial and compelling circumstances justifying the court to deviate from imposing the prescribed sentence.

[28] The legislature included robbery with aggravating circumstances as part of a battery of offences which are listed in s 51 (2) and Part II of the CLAA in recognition of not only its prevalence but also seriousness. The aim was to ensure that the courts imposed severe, standardised and consistent sentences in response to such offences unless there were "truly convincing reasons for a different response".⁸

⁶ *Attorney-General, Venda v Maraga* 1992 (2) SACR 594 (V) ('*Maraga*') at 608.

⁷ *Rex v Ngubane and others* 1945 AD 185 at 186-7, *Maraga* at 599.

⁸ *Malgas* para 25C.

[29] The sentiments expressed in *Malgas* were restated in *S v Matyityi*⁹ by the Supreme Court of Appeal ten years later where it was held that:

'Parliament. . .has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined ... and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness.'

[30] In this case both the respondent and the applicant led evidence in mitigation and aggravation of sentence. In addition, the victim impact statement of the complainant was read into the record. In his judgment on sentence the learned magistrate save for detailing the well-established principles of sentencing and the personal circumstances of the respondent he did not account for the evidence which was led in aggravation of sentence nor the content of the victim impact statement. In relation to substantial and compelling circumstances, he concluded that the fact that there was no evidence that the respondent could not be rehabilitated on its own constituted substantial and compelling circumstances justifying him to depart from imposing the prescribed minimum sentence of 15 years in this case.

[31] Whenever a court imposes a sentence upon an offender whether it imposes a custodial or a non-custodial sentence it is always hoped that one or more or all of the purposes of punishment would be achieved. The main purposes of punishment are not mitigatory in nature. In order for the learned magistrate to have concluded that the respondent was a candidate who was capable of being rehabilitated there ought to have been some evidential material upon which this conclusion could be founded. Ordinarily, such evidential material would include cooperation with the police, a plea of guilty and an apology to the complainant. The respondent did not do any of these things which would have gone a long way to demonstrate that there was some prospect of rehabilitation on his part. On this aspect there is a reasonable prospect that a court of appeal might find that the learned magistrate misdirected himself in

⁹ *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 23.

finding that the absence of any evidence that the respondent cannot be rehabilitated constituted substantial and compelling circumstances.

[32] It has been said that the

'imposition of sentence is not a mechanical process in which predetermined sentences are imposed for specific crimes. It is a nuanced process in which the court is required to weigh and balance a variety of factors to determine a measure of the moral, as opposed to legal, blameworthiness of an accused. That measure is achieved by a consideration, and an appropriate balancing, of what the well-known case of *S v Zinn* 1969 (2) SA 537 (A), at 540G-H described as a "triad consisting of the crime, the offender and the interests of society".¹⁰

[33] Save for reciting the well-known principles in relation to sentencing the learned magistrate, did not appear to have considered the crime, the interests of society and the interests of the complainant when he imposed a sentence of seven years imprisonment which was wholly suspended. The respondent in this case took advantage of a defenceless woman, permanently depriving her of what was a prized possession and left her traumatised. The learned magistrate failed to balance these factors against the personal circumstances of the respondent. This failure on its own may well be seen as an over-emphasis of the personal circumstances of the respondent at the expense of other factors including the complainant's interests. In any event, the sentence which was imposed by the learned magistrate appears to be out of line with the sentences which have been imposed for a similar offences. For this reason, there is a reasonable prospect of success that a court of appeal might find that this amounted to a misdirection which vitiated the proceedings. It is for the aforementioned reasons that I would still have granted the application for condonation in the interests of justice even if the respondent had opposed it.

[34] Consequently, and for all the above reasons, I am of the view that the applicant has reasonable prospects of success on appeal.

¹⁰ *S v Arends and others* [2010] ZAECHC 16 para 7.

Order

[35] In the result, I grant the following order:

1. The applicant is granted condonation for the late filing of its application for leave to appeal against the sentence imposed by the regional magistrate on 27 November 2023.
2. Leave to appeal against the sentence imposed on the respondent by the regional magistrate on 27 November 2023 is granted to the KwaZulu-Natal Division of the High Court of South Africa, Pietermaritzburg.

CHITHI J

Date of hearing : 18 June 2025

Date of judgment : 18 July 2025

APPEARANCES

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