



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

REPORTABLE

Case No.: **AR333/2024**

In the matter between:

PHILANI MCEBO ZONDI

Appellant

and

THE STATE

Respondent

ORDER

On appeal from: Regional Court for the Regional Division of KwaZulu-Natal, held at Camperdown (Magistrate Ncanyana presiding):

1. The appeal against sentence is dismissed.
 2. The sentences on counts 1, 2, 3, and 4 of the court *a quo* are confirmed.
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JUDGMENT

Harrison J (E Bezuidenhout J concurring)

Introduction

[1] This is an appeal against the sentences handed down by Magistrate Ncanyana of the Regional Court, Camperdown, on 26 July 2024. Leave to appeal was granted against sentence.

[2] The appellant pleaded guilty to the following charges:

- (a) Count 1 – Assault with intent to do grievous bodily harm (in which a prescribed minimum sentence of 10 years is applicable due to the domestic relationship between the accused and the first complainant, Ms F[...] M[...]);
- (b) Count 2 – Assault with intent to do grievous bodily harm;
- (c) Count 3 – Malicious damage to property;
- (d) Count 4 – Contravention of a protection order (contravening s 17(a) read with ss 1, 5, 6, 7, and 17 of the Domestic Violence Act 116 of 1998 ('the DVA').

[3] The guilty plea was tendered in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 ('the CPA').

[4] The appellant was sentenced as follows:

- (a) Count 1: 10 years imprisonment;
- (b) Count 2: three years imprisonment;
- (c) Count 3: two years imprisonment; and
- (d) Count 4: three years imprisonment.

[5] The sentences on counts 2, 3, and 4 were ordered to run concurrently with the sentence on count 1.

Issues on appeal

[6] The issues on appeal are:

- (a) whether the sentence is harsh and induces a sense of shock; and

(b) whether the court *a quo* over emphasised the nature of the offence, and interest of society paying insufficient attention to the appellant's personal circumstances.

[7] At the heart of the appeal is the appellant's contention that the appellant should have received a lighter sentence by virtue of his family having paid compensation of two goats for a cleansing ceremony.

Facts

[8] The facts are set out on the record and derived from the appellant's statement in terms of s 112 of the CPA.

(a) The appellant and F[...] M[...] ('complainant 1') were in a domestic relationship. Complainant 1 was his fiancée, for whom he had paid lobola.

(b) On 29 May 2023 the appellant and complainant 1 went out for a drive and were drinking. The appellant parked at or near Mazithanqaze, where he fell asleep as he was drunk.

(c) When he came to, the appellant found that complainant 1 was no longer in the car. He drove to her residence.

(d) Upon his arrival at complainant 1's residence, he saw her alighting from a Toyota Hiace Quantum ('the Hiace'). The Hiace was driven by M[...] M[...] ('complainant 2'), complainant 1's ex-fiancé. The appellant, upon seeing complainant 1 in the company of complainant 2, assaulted complainant 2 with a wheel spanner. Complainant 2 ran away leaving his Hiace behind.

(e) The appellant got into the Hiace and set it in motion. The Hiace was deliberately crashed into the bush, in order that it sustain damage. Whilst in motion, the appellant jumped out of the vehicle. Still armed with the wheel spanner, the appellant then assaulted complainant 1 and dragged her along the ground.

(f) These events of 29 May 2023, relate to counts 1, 2 and 3.

(g) Count 4 relates to a protection order obtained against the appellant by complainant 1, from the Magistrates Court, Camperdown, on 7 September 2022. That order was to interdict the appellant from assaulting, abusing, threatening, or insulting complainant 1. The order was served on the appellant on the same day, ie 7 September 2022.

(h) On 30 September 2022, and at Nemvula Tavern, the appellant assaulted complainant 1, by hitting her with an open hand on her face. At the time he knew the protection order was in place.

[9] The magistrate duly accepted the s 112 statement, and found the appellant guilty on all charges. The matter was postponed for sentencing. On 26 July 2024 the appellant was sentenced as set out above.

[10] This appeal is against the sentences set out above.

[11] During the course of the argument before us, it was conceded by the appellant's representative that the real issue as regards sentence, is the sentence of 10 years in respect of count 1, which is at the heart of this appeal.

Analysis

[12] The 10-year prison sentence in count 1, is a minimum sentence in terms of s 51(2)(b) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA').

[13] Assault with intent to do grievous bodily harm falls under Part 3 of Schedule 2 of the CLAA, where the victim is or was in a domestic relationship as defined in s 1 of the DVA, with the perpetrator. By virtue of the provisions of the CLAA, read with Schedule 2, the minimum sentence applicable was 10 years.

[14] In the appeal, both the appellant and the State referred and relied on *S v Malgas*.¹

[15] The appellant argued that the sentence imposed by the magistrate is 'disproportional to the crime'.²

[16] In *Malgas*, the court, when considering the legislatures views on prescribed periods among prisoners, set out the purpose as being 'to elicit a severe, standardised and consistent response from the Courts'.³

¹ *S v Malgas* 2001 (1) SACR 469 (SCA) (*Malgas*).

² *Malgas* paras 22 and 25I.

[17] The State specifically argued further that minimum sentences are not to be 'departed from lightly and for flimsy reasons.'⁴

[18] It is clear that when considering sentence, the court *a quo* considered the appellant's personal circumstances. These personal circumstances are summarised as part of the judgment of sentencing and, accordingly, it cannot be said that they were not taken into account.

[19] The court *a quo* was clearly aware of the seriousness of the crimes, and specifically mentioned that counts 1 and 4 were of a domestic nature and highlighted that 'our country is under attack with acts of abuse against our women and children almost on a daily basis '⁵

[20] It is apposite to quote the preamble to the DVA, which is a good indicator of the legislatures view on domestic violence:

'RECOGNISING that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective;

AND HAVING REGARD to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child;

IT IS THE PURPOSE of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence'.

³ *Malgas* para25C.

⁴ *Malgas* para 25D.

⁵ Record at 36, lines 16 and 17.

[21] The South African Law Reform Commission (SALRC), in an issue paper which reviewed ‘the criminal law response to violence perpetrated within domestic relationships’,⁶ and this included amendments to the DVA, the CLAA, and other legislative instruments, stated as follows:⁷

‘The Constitution embraces the ethos of the African Charter on Human and People’s Rights, which entered into force on 21 October 1986, particularly the protection of the rights of women and children in international declarations and conventions. South Africa’s accession to the African Charter on 9 July 1996 was accompanied by a declaration. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) recalls that:

“Women’s rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights.” (Footnotes omitted.)

[22] To this the SALRC continued within the issue paper to point out that the Maputo Protocol further endeavours as follows:⁸

‘It further strives to, among others, eliminate gender-based violence against women. Article 4 of the Protocol calls upon all States Parties to enact and enforce laws to prohibit all forms of violence against women; to adopt legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women; and to punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims.’ (Footnotes omitted.)

[23] This court highlights the SALRC Issue Paper 42 as it not only details the systemic and endemic nature of domestic violence, but it also recognises that victims are often faced with personal structural barriers, which result in the withdrawing from

⁶ South African Law Reform Commission Issue Paper 42 (Project 100) *Domestic Violence: The Criminal Law Response* (2021) (SALRC Issue Paper 42) at 4.

⁷ SALRC Issue Paper 42 para 14. The SALRC quoted from the preamble of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol).

⁸ SALRC Issue Paper 42 para 15.

processes which give rise to consequences which bear no relation to the future needs of the victims.⁹

[24] As was said by Wallis JA in *Director of Public Prosecutions, Western Cape v Prins and Others*:¹⁰

‘No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights require legal protection by way of international conventions and domestic laws, as South Africa has done in various provisions of our Constitution and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act).’ (Footnotes omitted.)

[25] The argument raised in the appeal that there were substantial and compelling circumstances to deviate from the prescribed minimum sentence, is primarily based on the so-called compensation and payment of the two goats for the purposes of the cleansing ceremony. This type of argument was considered *S v Amerika*,¹¹ where Henney J stated as follows:

‘[21] Given the unique and somewhat unusual circumstances of this case an argument may therefore be made out that, due to the situation in which the victim found herself, in firstly deciding not to lay a criminal complaint against the perpetrator, secondly by having forgiven the perpetrator, and by subsequently having resumed the relationship with the perpetrator, that such conduct may serve as a mitigating factor or a consideration to conclude whether there are substantial and compelling circumstances to deviate from the prescribed sentence. Would it be in the interests of justice for a court do so, where the victim acted in such a manner due to the abuse that she had been subjected to?’

[22] In my view, I do not think it can be regarded as a mitigating factor or as a consideration to conclude whether there are substantive and compelling circumstances to deviate from the

⁹ SALRC Issue Paper 42 para 30.

¹⁰ *Director of Public Prosecutions, Western Cape v Prins and Others* [2012] ZASCA 106; 2012 (2) SACR 183 (SCA) para 1.

¹¹ *S v Amerika* 2017 (1) SACR 532 (WCC). Footnotes omitted.

prescribed sentence. This would clearly send out the wrong message and would be contrary to the values of the Constitution. It would furthermore undermine the dignity and humanity of abused women in this country. It would send out the message that men who make themselves guilty of spousal abuse or partner abuse by raping their partners will escape the full might of the law. In my view, rape committed in the context of an abusive relationship, should be regarded as an aggravating factor in the consideration of an appropriate sentence.'

[26] Whilst this court accepts that in *S v Amerika* the court was considering an appropriate sentence after having convicted the accused of rape, the commentary regarding the interaction of a personal relationship with domestic violence, as quoted above, highlight that in this appeal the compensation, or a cleansing ceremony, can in no way affect the applicability of the prescribed minimum sentences in the present circumstances.

[27] In a review of a matter, purely dealing with domestic violence, the Western Cape High Court in *Van As v Additional Magistrate Cape Town and Others* stated:¹²

'[49] Lately, the legislature recognised the exigency to augment the existing protection provided by the Domestic Violence Act to the victims of domestic and gender-based violence who are amongst the most vulnerable members of our society. The reason is that South Africa is currently immersed in the worst kind of social evil, i.e. gender-based violence, which has reared its ugly head. The deliberate intervention by the legislature for reform of the existing laws to afford effective and rapid response to gender-based violence is most certainly desirable. Hopefully, it would eventually lead us to the ultimate obliteration of patriarchal comportment and total enhancement of the minimized dignity of women and girls in our society.

[50] Having regard to the constitutional provisions, particularly the right to equality and to freedom and security of the person and the international commitments and obligations of the states towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and Rights of the child (Preamble of the Domestic Violence Act 116 of 1998 as amended, Context and purpose of the Act). In response to a call made as recently as May 2021, by the United Nations Committee on the Elimination of All forms of Discrimination against Women (CEDAW/C/ ZAF/ IR/1 12 May 2021), which South Africa had ratified

¹² *Van As v Additional Magistrate Cape Town and Others* [2023] 4 All SA 231 (WCC).

without reservation in December 1995. See *South Africa Law Reform Commission, Issue Paper 42, Project 100, Domestic Violence; The Criminal Response*, 8 December 2021, page 15 paragraph 17. In essence, the legislature has as a result effected an overhaul of the Domestic Violence Act to be more responsive to the need to afford maximum protection to women and girls who are exposed to domestic and gender-based violence. This is clearly propelled by the global quest for the creation of a specific crime or offence of domestic violence. South Africa is appropriately taking heed of that call.’

[28] Van Rooyen in an article discussing the legislatures response to gender based violence,¹³ also discussed the inclusion of domestic violence in the minimum sentencing legislation concludes with the following:

‘There are many reported instances where the criminal justice system has failed to protect victims of gender-based violence. In some tragic incidents, victims continued to suffer horrific ordeals or even paid with their lives after they had requested assistance from the police and courts. Both Acts promote the commitment of the government to prevent the re-occurrence of these incidents. It conveys the message that gender-based violence will not be tolerated and perpetrators will be dealt with decisively to ensure that victims are afforded the protection that they deserve.’

[29] It is with the foregoing in mind that this court examines the arguments raised on appeal, and evaluates the arguments against the legal mores of society taking into account the *Zinn* triad.¹⁴

[30] The court *a quo* was quite clearly aware of the *Zinn* triad and the court’s obligation to the community. The magistrate specifically recorded: ‘the Courts here are constitutionally bound to protect citizens rights, especially women and children’. As regards the appellant in question, the magistrate came to the conclusion that: ‘Society needs protection from the likes of the accused that (*sic*) has total disregard to human dignity’.

[31] The court *a quo* thereafter found that there were no substantial and compelling reasons that warrants departure from the prescribed minimum sentences. Upon a conspectus of the authorities above, this court also comes to the conclusion there are no substantial and compelling reasons to deviate from the minimum

¹³ M van Rooyen ‘Legislative developments’ (2022) 7(1) *Just Africa* 8 at 10.

¹⁴ *S v Zinn* 1969 (2) SA 537 (A) (*Zinn*) at 540G.

sentence which was imposed nor was there any misdirection by the magistrate in this regard.

[32] A further issue which has been raised in the appeal, is the length of time which the appellant has spent in custody, and it was contended that the length of time constitutes a substantial and compelling reason to deviate from the prescribed minimum sentence.

[33] In the circumstances of this case, it must be noted that the appellant, when he appeared on 29 April 2024, indicated his intention to plead not guilty to all charges. The subsequent delays in the matter were occasioned by the appellant's attempts to have the charges withdrawn (particularly in light of the payment of the two goats in compensation and for the cleansing ceremony).

[34] Any delays in the finalisation of this matter were never at the instance of the State, they were factors which were brought about by the conduct of the appellant. This sort of conduct was specifically considered in *S v Ludidi and Others*,¹⁵ where the court stated:

'[13] It is now trite law that in respect of finite sentences there is no hard- and-fast rule as to the weight to be afforded to presentencing incarceration. It is but one of the factors to take into consideration when determining the existence of substantial and compelling circumstances. In addition, a sentencing court should take into account the reasons for the prolonged period of detention prior to sentencing.

[14] In *S v Solomon and Others*, commenting on the effect of lengthy presentencing incarcerations on life imprisonment, Rogers J endorsed the view of Goosen J, as he was then, in *S v Kammies*. The conceptual difficulty with a sentence that has no determinate maximum period was acknowledged. A court cannot approach a life sentence as anything other than a sentence which is imposed for the rest of that person's life. It cannot be "reduced" by the period spent in custody awaiting trial and it would be improper for a court to take into account the possibility of parole. Goosen J suggested that the most appropriate course of conduct would be to antedate the sentence. In *Solomon* the court held that life imprisonment means a sentence which extends for as long as that person is alive. Absent the prospect of parole, a person "would not have been released sooner on the hypothesis of no interval between arrest and sentencing".'

¹⁵ *S v Ludidi and Others* [2024] ZASCA 162; 2025 (1) SACR 225 (SCA).

[15] This court, in dealing with a sentence of life imprisonment in *S v Ngcobo*, confirmed that the period spent in custody before conviction and sentencing is not, on its own, a substantial and compelling circumstance. It is merely a factor in determining whether the sentence imposed is disproportionate and unjust. It was held that the two years spent in custody would make a minimal impact on a sentence of life imprisonment and did not render the sentence shockingly disproportionate.’ (Footnotes omitted.)

[35] The very conduct of the appellant in attacking both complainants with a wheel spanner, clearly highlights why the court *a quo* found him to be a person from which society requires protection, and given the circumstances of this case, it is indeed fortunate that no deaths emanated from the appellant’s conduct.

[36] It must be emphasised that sentencing is within the discretion of the court *a quo* and, in this regard, *S v Bogaards*¹⁶ states:

‘[41] Ordinarily, sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.

[42] The state is correct that, absent any other constitutional issue, the question of sentence will generally not be a constitutional matter. It follows that this court will not ordinarily entertain an appeal on sentence merely because there was an irregularity; there must also be a failure of justice. Furthermore, this court does not ordinarily hear appeals against sentence based on a trial court’s alleged incorrect evaluation of facts. For instance, this court will not, in the ordinary course, hear matters in relation to sentence merely because the sentence was disproportionate in the circumstances. Something more is required. It is evident that this matter involves important constitutional questions in relation to whether the Supreme Court of Appeal failed to meet the requirements of the substantive notion of fairness encapsulated in s 35(3) of the Constitution, by effectively increasing the applicant’s sentence without giving him prior notice that it was considering an increase in sentence, and whether the common law ought to be developed in order to give formal recognition to the practice of giving notice when considering an increase in sentence. It is these constitutional issues which seize this court with the requisite jurisdiction.’ (Footnotes omitted.)

¹⁶ *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC).

[37] There is no irregularity in this matter, particularly as the court *a quo* imposed a minimum sentence in accordance with the CLAA. This does not induce any sense of shock. The court *a quo* in a considered manner and without misdirection imposed the minimum sentence and, accordingly, that is not a basis to appeal the sentence.

[38] In addition, it is clear that the court *a quo* clearly considered all of the relevant factors, and did not misdirect itself and, accordingly, there is no basis in law to interfere with the discretion of the court *a quo*.

[39] In all the circumstances, there is no reason to find that there was any misdirection by the court *a quo*, and there is no reason to interfere with the sentence. In the circumstances, the appeal will fail, and I make following order:

1. The appeal against sentence is dismissed.
2. The sentences on counts 1, 2, 3, and 4 of the court *a quo*, are confirmed.

I agree.

HARRISON J

E BEZUIDENHOUT J

Appearances

For the Appellant: Mr. S Khumalo
Instructed by: MKHIZE PR ATTORNEYS
Address: 63 Dale Road, Manor Gardens
Glenwood
Durban
4000
Tel: 079 660 5242
Email: senzonelson07@gmail.com

For the Respondent: Ms Banda
Instructed by: STATE ADVOCATE
DPP – KWAZULU NATAL
PIETERMARTZBURG
Email: ckander@npa.gov.za

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