

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: A260/2023

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	
.....	31 October 2025
SIGNATURE	DATE

In the matter between:

SIBUSISO NKOSI

APPELLANT

and

THE STATE

RESPONDENT

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 31 October 2025.

JUDGMENT

MKHABELA J (MOSHOANA J CONCURRING)

Introduction

[1] The appellant was convicted in the Regional Court, Benoni, of attempted murder, after he had pleaded not guilty. On 28 March 2023, he was convicted and subsequently sentenced to 14 years' imprisonment. In addition, the appellant was declared unfit to possess a firearm.

[2] The application for leave to appeal against both conviction and sentence was dismissed by the trial court. However, with leave of this Court and pursuant to his successful petition, the appellant was granted leave to appeal his sentence only. Consequently, he now appeals against his sentence.

Background facts

[3] The appellant and the complainant were neighbours who grew up together in the same neighbourhood. On 1 January 2021, the appellant and the complainant had an argument about the sale of dagga. As a result, a fight was looming between them.

[4] People who were present at the time, warned and dissuaded them from fighting. They appeared to oblige and went to their respective homes.

[5] However, the appellant returned from his home armed with a knife. A fist fight ensued and in the course of that fight, the appellant took out a knife and stabbed the complainant multiple times.

[6] The complainant's brother, Mr Thabo Nkosi (Nkosi) who was sleeping at the time, heard the commotion, got out of his bed, and went outside to investigate. Upon seeing the appellant stabbing his brother, Nkosi kicked the appellant away from his brother.

[7] Nkosi then dragged the complainant into his house. The police arrived and the appellant was arrested. The Police did not take the knife when they arrested the appellant.

[7] During the trial, the appellant admitted to stabbing the complainant, but asserted that he did so in self-defence. He also stated that he used a knife that was in the nail cutter, which is normally smaller than the knife that was actually used in stabbing the complainant.

[8] The undisputed medical evidence indicates that the complainant was stabbed four times on his chest, twice on his arms and once on his head. Accordingly, the total number of stab wounds inflicted were seven in total and the injuries sustained were life threatening.

[9] The length of some of the stab wounds was approximately 1 – 3 centimetres and one of the stab wounds was sufficiently deep to reach the complainant's lungs.

[10] In considering an appropriate sentence, the trial court had regard to the relevant mitigating and aggravating circumstances. The appellant's personal circumstances were considered, including that he was 32 years old, unmarried, had a four-year-old child, and lived with his sister and his child.

[11] In addition, the trial court took into account the fact that the appellant was gainfully employed, earning R1000.00 per week, was a breadwinner for his family and had no previous convictions. The court was also informed that the child receives a grant of R450 per month.

[12] Although alcohol was found to have played a role in the commission of the offence, the appellant's decision to go back to his home to get a knife, notwithstanding the previous reprimands by people who were around him, were factors that the trial court regarded as aggravating.

[13] Similarly, the brutality of the manner in which the complainant was stabbed, concomitant with the absence of any provocation or justification to stab the complainant, were held as aggravating factors. The trial court described the multiple stab wounds as an indication of "utmost brutality" and indicated that attempted murders where knives were used are offences that are rife in the court's jurisdiction.

[14] After taking into account the nature of the crime, the interest of society, and the personal circumstances of the appellant, the court found that a sentence of direct imprisonment was appropriate and sentenced the appellant to 14 years' imprisonment.

[15] Before this Court, the appellant effectively attacked the sentence on various grounds. First, that there were indications before the trial court that the appellant could be a primary caregiver and therefore, the trial court was enjoined to investigate and ultimately consider the best interests of the appellant's minor child before the appellant could be sentenced. It was submitted on behalf of the appellant that the trial court committed a misdirection in failing to investigate the circumstances of the minor child before imposing the custodial sentence.

[16] The second ground of appeal was that the trial court had failed to take into account that the appellant was a first offender. The intimation was that the appellant should not have been given a custodial sentence.

[17] The third ground upon which the sentence is challenged is that 14 years' imprisonment is disturbingly and shockingly inappropriate and that this Court should interfere and impose an appropriate sentence.

[18] During oral submissions, Counsel for the appellant did not persist with the contention that the appellant was supposed to be given a non-custodial sentence on the premise that he was a first offender. What was pursued with vigour was that the Court should direct the Department of Social Services to ensure that the welfare of the child is taken care of whilst the appellant is in prison.

[19] When the Court pressed the appellant's Counsel to suggest what an appropriate sentence should be, he suggested 5 years' imprisonment.

The law

[20] In the case of *S v M*,¹ the Constitutional Court stated as follows:

¹ [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 35.

“Thus, it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children’s interests that threatens to do so. The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm.”

[21] The Constitutional Court further held that:²

“There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.

- (a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
- (b) A probation officer’s report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered.
- (c) If on the *Zinn* triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.
- (d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.
- (e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.”

² Above at para 36.

[22] With regard to the leeway that an appellate court has to interfere with the sentencing court's sentencing discretion, the principle is clear. It was encapsulated in the statement of Holmes JA in *S v Rabie* and I can do no better than reproducing it as follows:³

“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.”

[23] In *S v Bogaards*, the Constitutional Court summarised an appellate court's power to interfere with the sentence imposed by a lower court as follows:⁴

“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.” (Footnotes omitted.)

[24] It is trite that there have been different formulations of when a sentence is considered to be so disproportionate or shocking that no reasonable court could have imposed it.⁵

Analysis

[25] The appellant's counsel conceded during oral submissions that the trial court was not informed that the appellant was a primary caregiver to his minor child, but

³ 1975 (4) SA 855 (A) at 857 D-F.

⁴ [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC) at para 41.

⁵ *S v Sadler* [2000] ZASCA 13; 2000 (1) SACR 331 (SCA); [2000] 2 All SA 121 (A) at para 10.

what the trial court was told was that the appellant was a breadwinner who was gainfully employed.

[26] Furthermore, the evidence was that the appellant lives with the minor child and his sister and that the biological mother also visits the child. The appellant contended that the State accepted the personal circumstances of the appellant during closing argument pertaining to sentence.

[27] Consequently, the appellant submitted that the trial court was obligated to comply with guideline (a), which was laid down by the Constitutional Court, namely that “a sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.”⁶

[28] The appellant relies on the following extracts from the record, which is attributed to the Prosecutor’s oral address to the trial court, which is as follows:

“the personal circumstances of the accused are on record your Worship, as being outlined by the legal representative that the accused is gainfully employed and he is a father of a two-year-old.”

[29] It is trite that the quoted guidelines in the preceding paragraph from *S v M* obliges a sentencing court to find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

[30] Notwithstanding the concession that the trial court was not informed that the appellant was a primary caregiver, the appellant’s counsel submitted vociferously that the trial court was enjoined to investigate the plight of the minor child in the light of the imposed custodial sentence. I disagree.

[30] The evidence before the trial court was that the appellant was a breadwinner and not a primary caregiver. There is a very sharp distinction between a breadwinner and a primary caregiver. The former presupposes a person who supports the child

⁶ Above n 1 at para 36.

financially and the latter, as was defined in *S v M*, is a person who takes care of the day-to-day caring of the child.⁷

[31] The trial court took into account that the appellant's sister was also living with the child and that the child's biological mother was involved in the child's life and would occasionally visit the child.

[32] However, even if the appellant is indeed the primary caregiver, there was sufficient evidence before the trial court that the child would not be left stranded or that he would have to be placed in alternative care in the light of the custodial sentence. On the contrary, in *S v M*, it was not disputed that the children would have to be placed in alternative care had their mother been given a custodial sentence.

[33] Moreover, the best interests' principle is not absolute. Even if the appellant is indeed the primary caregiver, this does not mean that he cannot receive a custodial sentence. All that a sentencing court is enjoined to do is to be aware of the existence of the minor child and then grant an appropriate relief that would ensure the child is taken care whilst the primary caregiver is in prison.

[34] I therefore conclude that there is no justification to make an order that the Department of Social Development must ensure that the needs and interests of the child are fulfilled, since the child is being taken care of by the appellant's sister and his biological mother.

[35] It follows, therefore, that in the absence of a misdirection by the trial court, this court, as an appellate court, cannot substitute the trial court's sentence simply because it prefers it⁸. This is by now means the end of the matter though given the other ground on which the sentence is challenged as it is apparent below.

[36] I turn now to the custodial sentence of 14 years' direct imprisonment and, in particular, whether it is disturbingly inappropriate when one considers the triad

⁷ Above n 1 at para 28.

⁸ *Mpuqe v S* [2022] ZASCA 37 at paras 25 and 27; *Hewitt v S* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) at para 8.

principles of *Zinn*. These are the nature of the crime, the personal circumstances of the accused, as well as the interests of the community, as relevant factors determinative of an appropriate sentence.

[37] As already indicated, the appellant's counsel conceded, and rightly so in my view, that the appellant has committed a serious offence and that a custodial sentence is warranted, but that a sentence of 5 years imprisonment would be appropriate. I cannot disagree more. The incontrovertible evidence is that the four chest wounds were life threatening and one was sufficiently deep to penetrate the complainant's lungs.

[38] In *Mpuqe v S*,⁹ the Supreme Court of Appeal reduced the sentence imposed by a trial court from 15 years to 10 years imprisonment. The Supreme Court of Appeal took into account that the complainant, who was lucky to be alive, did not sustain any injuries.

[39] The facts that gave rise to the attempted murder charge in that case were that the appellant shot the complainant and the bullet hit the metal lining of his bulletproof vest, and as such, he did not sustain any injuries at all.

[40] The Supreme Court of Appeal reduced the period of 15 years to 10 years imprisonment as the complainant did not sustain any injuries. In doing so it cautioned courts against comparing cases since each case must be decided on its own merits¹⁰.

[40] In this case, the appellant stabbed the complainant seven times in total. Had it not been for the bravery of the complainant's brother, the complainant could have sustained additional stab wounds that could have caused his death.

[41] The brutality of the attack by the appellant was unprovoked in that it was the appellant who went home to fetch a knife and returned to start a fight, emboldened by the fact that he was armed.

⁹ *Mpuqe* (above n 8).

¹⁰ *Mpuqe* (above n 8) at para 28.

[42] Significantly, the complainant was not armed when he was stabbed, nor did he use any dangerous weapon when the fight was ensuing. Moreover, the appellant's conduct was not only brutal, as the trial court correctly found, but was also premeditated in that he went home to fetch the knife. The situation would have been different had the knife had been in his pocket all along and prior to the commencement of the fight.

[43] Despite the above salient facts, I am nevertheless of the view that there exists a striking disparity between the sentence imposed by the trial court in respect of the 14 years imprisonment for the charge of attempted murder and the sentence that this court would have imposed had it been the trial court¹¹.

[44] In arriving at the above conclusion, I am aptly aware of the words of Marais JA in *S v Sadler* to the effect that "sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate court which must prevail"¹².

[45] It is therefore warranted to interfere with the sentence of the trial court on the above ground, and it is trite that an appellate court is not at large to interfere with the sentence of the trial court, as it would have been the case had there been a material misdirection¹³. The sentence to be imposed must demonstrate the seriousness of the crime and the personal circumstances of the accused must recede into the background¹⁴.

[46] In my view, had I been in the shoes of the trial court, I would have imposed 12 years of direct imprisonment for the charge of attempted murder, given its brutality and the absence of remorse on the part of the appellant.

¹¹ *S v Malgas* [2001] ZASCA 30; 2001 (2) SA 1222 (SCA); [2001] 3 All SA 220 (A) at para 12.

¹² *S v Sadler* 2000 (1) SACR 331 (SCA) at para 10

¹³ As above.

¹⁴ *S v Vilakazi* [2008] ZASCA 87; 2012 (6) SA 353 (SCA); [2008] 4 All SA 396 (SCA) at para 58.

ORDER:

1. It is ordered that the appeal against the sentence of 14 years' direct imprisonment is upheld.
2. The sentence is set aside and substituted for a sentence of 12 years' direct imprisonment.
3. It is further ordered that the sentence is antedated to 28 March 2023.



R. MKHABELA
JUDGE OF THE HIGH COURT

I AGREE,



G.N MOSHOANA
JUDGE OF THE HIGH COURT

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Date of hearing: 9 October 2025

Date of delivery of the judgment: 31 October 2025