



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable

CASE NO.: A99/2025

In the matter between:

MARCELINO GOLIATH

FIRST APPELLANT

PIET SEDERSTROOM

SECOND APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Goliath and Another v S* (case no A99/2025) [2025] ZAWCHC

Coram: **SLINGERS J AND MOOSA AJ**

Heard: 5 September 2025

Delivered: 14 November 2025 (delivered via email to the respective Counsel)

Summary: Criminal law – appeal on sentence – no cross appeal – possibility of increasing sentence raised by the court – prior notice given of court's intention to consider harsher sentence – notice of abandonment of appeal filed without leave of the court – leave to withdraw refused at the hearing – no material misdirection by trial

court found – s 322(6) of the Criminal Procedure Act not applied –
sentence confirmed.

ORDER

On appeal from the Regional Court in Oudtshoorn, the following is ordered:

1. The appeal against the sentence is dismissed.
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JUDGMENT

Moosa AJ (Slings J concurring)

Introduction

[1] On 19 April 2022, in the Regional Court at Oudtshoorn, the appellants (sometimes collectively called “the accused”) pleaded not guilty to one count of attempted murder. The charge sheet alleged that, on 22 August 2021 at Bridgton, the accused, acting with common purpose, unlawfully and intentionally attempted to murder Henry Coetzee (“Coetzee”) with an axe and a panga respectively. On 28 March 2023, they were convicted, despite their testimony in denial of any involvement in the crime. On 11 August 2023, both were sentenced to seven years imprisonment. It is common cause that, owing to the offence occurring on 22 August 2021, the minimum sentence regime for attempted murder introduced into the Criminal Law Amendment Act 105 of 1997 (“the CLAA, 1997”) with effect from 5 August 2022, is inapplicable. In accordance with s 103 of the Firearms Control Act 60 of 2000, the trial court declared the accused unfit to possess a firearm.

[2] After leave to appeal was refused by the trial court, leave was granted by this Court in relation to sentence alone. There is no cross-appeal. Before us, Mr R.J. Sivnarain and Mr N.G. Breyl appeared for the accused and the State respectively.

[3] A vital procedural issue arose during the appeal before us. It requires elucidation. While reading the record, this Court formed a prima facie view that it may, mero motu, consider increasing the sentence imposed by the trial court. This power is reserved in s 322(1)(b) read with (6) of the Criminal Procedure Act 51 of 1977 (“the CPA”). While the former sub-section empowers a court of appeal to ‘impose such punishment as ought to have been imposed at the trial’, the latter expressly imbues an appeal court with the power to impose a more severe punishment. Section 322(6) of the CPA reads:

‘The powers conferred by this section upon the court of appeal in relation to the imposition of punishments, shall include the power to impose a punishment more severe than that imposed by the court below or to impose another punishment in lieu of or in addition to such punishment.’

[4] The power in s 322(6) must be exercised without infringing an appellant’s right to a substantively fair appeal process as entrenched in s 35(3)(o) of the Constitution, 1996.¹ Prior notice of an appeal court’s intention to consider imposing a harsher sentence must be given. In *Bogaards v S*,² the rationale for the notice requirement was explained thus:

‘The notice requirement is merely a prerequisite to the appellate court’s exercise of its discretion. After notice has been given and the accused person has had an opportunity to give pointed submissions on the potential increase or the imposition of a higher sentence upon conviction of another offence, the appellate court is entitled to increase the sentence or impose a higher sentence if it determines that this is what justice requires.’

¹ The fair trial right of an accused includes fair sentencing procedures. See *S v Mabaso* 2014 (1) SACR 299 (KZP) paras 74 - 76.

² 2013 (1) SACR 1 (CC) para 72. Also, see *Nabolisa v S* 2013 (2) SACR 221 (CC) paras 32 - 34.

[5] Prior notice serves to ensure procedural fairness by giving effect to the *audi alteram partem* principle.³ The notice requirement was satisfied in this case. First, a meeting was convened on 25 August 2025 where the court's intention to consider invoking its powers under s 322(6) of the CPA was communicated to counsel for both sides. This verbal notification was followed-up with written notice despatched via email on 27 August 2025.

[6] In response, on 4 September 2025, the appellants' attorneys delivered a notice of abandonment of the appeal. This was met with immediate opposition. Mr Breyll promptly sent an email in which he submitted that the right of abandonment lapsed once the court gave notice of its intention to consider increasing the sentence. Mr Breyll relied on the following passage by Du Toit et al *Commentary on the Criminal Procedure Act* at 30-50:

'As soon as it were to become known that the court of appeal intended increasing the sentence, the appellant would indeed be able to prevent the court from exercising the power to increase sentence by withdrawing his appeal. For this reason *the right to withdraw an appeal lapses as soon as the court of appeal has notified the appellant via the registrar that an increase is under consideration.*' (my emphasis added)

[7] In law, the right to abandon an appeal does not lapse once notice is given of a court's intention to consider increasing a sentence. The correct legal position is that the right continues, but its exercise is fettered by a procedural requirement, namely, an appellant requires leave of the court to effect an intended abandonment (i.e., withdrawal).⁴

³ *Bogaards v S* supra para 66. At para 65, the apex court held:
'Notifying an appellant that the court is considering an increase in sentence or the imposition of a higher sentence on conviction of a different offence is primarily for the benefit of that appellant. It ensures that the appellant is not taken by surprise at the hearing and, importantly, gives her a meaningful and adequate opportunity to make full representations on sentencing and, specifically, on why the sentence should not be increased or a higher sentence should not be imposed after conviction on another offence. This, in turn, ensures that all the relevant information is before the court in order for a fully informed decision to be made.' (footnotes omitted)

⁴ *Bogaards v S* supra para 57.

[8] My view that a mere limitation of the right to withdraw an appeal operates ex lege, as distinct from an extinction of that right through its lapsing, is supported by judicial precedent.⁵ It also finds support in *Bogaards v S* supra para 70. In that case, the apex court held as follows:

‘It must be noted that, in formalising this notice requirement, this Court is also formalising the corollary practice of *limiting* an accused person’s right to withdraw an appeal once notice of an increased sentence has been given.’ (my emphasis added)

[9] Accordingly, Mr Sivnarain was afforded the opportunity to apply for leave to withdraw the appeal. He did so from the bar. Mr Sivnarain informed the Court that the appellants instructed that their appeal be withdrawn based on advice from Mr Sivnarain. He furnished the Court with a copy of an email that he despatched on 25 August 2025 to his instructing attorney where he provided feedback on the gist of the meeting held on that day where this Court gave notice of its intention to consider increasing the sentence. The following extract from Mr Sivnarain’s email is relevant in the application to withdraw:

‘There is a great likelihood that the clients’ sentence will be increased on appeal.

Please take instructions as to whether they still want to proceed with the appeal in the light of the above.’

[10] The application for leave to withdraw the appeal was refused. The reasons for the refusal were encapsulated in an ex tempore judgment by Slingers J. I have nothing to add, save to say the Court found that good cause was lacking for the granting of leave to withdraw the appeal after notification was given of this Court’s intention to consider a harsher sentence. The circumstances of this case are distinguishable in material respects from that in *Nabolisa v S* supra paras 66 - 68. Hence, the outcome differs too.

⁵ See *R v Grundlingh* 1955 (2) SA 269 (A) at 272A; *S v Du Toit* 1979 (3) SA 846 (A) at 855A-E; *S v Kirsten* 1988 (1) SA 415 (A) at 420C-J; *Bogaards v S* supra para 57.

Salient background facts

[11] To assess the merits of this appeal and/or whether this Court ought to invoke its powers under s 322(6) of the CPA, it is necessary to discuss key aspects of the record.

[12] On 22 August 2021, Coetzee was at the home of aunt Emmie, the elder who reared him as a child. While there, Coetzee ate lunch. The appellants came to the yard area of aunt Emmie's property in search of Coetzee. As Coetzee believed the first appellant was there to sell him the airtime which Coetzee sought to purchase from him earlier that day, Coetzee went outside to meet the appellants. Others were also present, including persons named Wayne and Mario. When Coetzee saw the appellants, he noticed that the first appellant had a panga in his hand, while the second appellant held a small axe.

[13] The appellants, who are a father and son duo, enquired from Coetzee as to his knowledge of a robbery perpetrated on them. When Coetzee indicated that he bore no knowledge thereof, the second appellant struck at Coetzee with his axe, but missed. Coetzee, Wayne and Mario then fled. They ran into a room at aunt Emmie's house. They locked the door. The appellants followed them to the room and banged on the door.

[14] Wayne and Mario escaped through an opening. Coetzee stayed. He felt that he had no reason to fear because he had done nothing wrong. The first appellant, aged 28, entered the room. He started a fight with Coetzee. At some point, Coetzee unlocked the door and opened it to escape. However, the second appellant, aged 57, stood outside. Using his axe, he hit Coetzee on his right elbow and other areas of Coetzee's body. The first appellant did likewise with his panga. The assaults were brutal. Coetzee was unarmed and defended himself against the violent onslaughts using only his forearms.

[15] Eventually, Coetzee could no longer lift his arms to defend himself. He fell to the ground. While he lay there, the appellants continued hitting Coetzee all over his body using the panga and axe they brought with them. When Coetzee's body looked lifeless,

the appellants stopped. They left believing that Coetzee was dead. However, he survived.

[16] The medical evidence supported Coetzee's version. The J88 form by Dr Van der Linde revealed the severity of the violence. The J88 showed that Coetzee sustained serious trauma on his head, face, arms, hands, fingers, and legs. Dr Van der Linde recorded that the 'injuries is life-threatening'. This is consistent with the appellants using dangerous weapons. All this supported the magistrate's finding of an intent to commit murder.

[17] Coetzee survived the vicious attack, but he was left with serious injuries. The quality of his life changed drastically. The brutal attack left Coetzee physically disabled. He will likely be disabled for the rest of his life. He is eligible for a disability grant at taxpayers' expense. After considering the *Zinn* triad of relevant factors for sentencing purposes, and the period of incarceration imposed in *Grigor v S*⁶ for attempted murder, the trial court sentenced the appellants to seven years direct imprisonment.

Issues for adjudication

[18] The issues before us for adjudication are two-fold. First, the issue arises whether the appellants proved that the magistrate failed to exercise her discretion on sentence judicially and properly.⁷ If this is answered affirmatively, then the sentences imposed a quo fall to be set aside and this Court would then, based on the facts in the record, be at large to sentence the appellants afresh.⁸

[19] Secondly, if the first question formulated above is answered in the negative, then the question arises whether the circumstances of this case justify the sentences

⁶ [2012] ZASCA 95 (1 June 2012)

⁷ *S v Rabie* 1975 (4) SA 855 (A) at 857D-F.

⁸ See *S v Malgas* 2001 (2) SA 1222 (SCA) para 12.

imposed by the trial court be increased pursuant to this Court's powers in s 322(6) of the CPA.

Submissions by counsel

[20] Mr Sivnarain contended that the magistrate misdirected herself on sentence. Relying on *S v Maliswane and Another*,⁹ he argued that the magistrate under-emphasised the appellants' personal circumstances, their prospects of rehabilitation, and the remorse showed for their conduct. Relying on *S v Malgas* supra, Mr Sivnarain submitted that the sentence of direct imprisonment for seven years is shocking. Relying on *S v Beukes*¹⁰ and *S v Petzer*,¹¹ he submitted that the magistrate misdirected herself by finding that direct imprisonment was the only appropriate sentence in the context of this case.

[21] Accordingly, Mr Sivnarain urged us to set aside the sentence of seven years direct imprisonment and to substitute it with a less harsh sentence as determined by this Court.

[22] Mr Breyll, for the State, was in a difficult position. While he wished to argue in favour of this Court exercising its s 322(6) powers, Mr Breyll was mindful that he opposed the appellants' application for leave to appeal on the following basis with regard to sentence:

'20. Respondent agrees with the sentence imposed by the honourable court and that it is a just and suitable sentence. The respondent also humbly submits that another Court will not interfere with the trial court as there is no material misdirection nor is it 'shocking', 'startling' or 'disturbingly inappropriate'.'

[23] In his heads filed in relation to this appeal, Mr Breyll persisted with the view expressed in the extract quoted. However, at the hearing, he made submissions

⁹ 2017 (1) SACR 26 (ECG),

¹⁰ 1990 (2) SACR 323 (C).

¹¹ 1992 (1) SACR 633 (A).

favouring this Court imposing a harsher sentence pursuant to its powers under s 322(6) of the CPA.

[24] Ultimately, Mr Breyl aligned himself with Mr Sivnarain's submission that the sentence of seven years direct imprisonment is inappropriate in this case. He argued that it is too lenient. Mr Breyl invited us to consider the changed norms in relation to sentencing for attempted murder. He drew our attention to the minimum sentence regime introduced into the CLAA, 1997 with effect from 5 August 2022. Mr Breyl argued that a sentence ranging between 10 to 15 years imprisonment would be just and fair for both appellants as it would reflect the seriousness of the crime.

[25] This Court must resist Mr Breyl's invitation to consider the new sentencing guidelines. Doing so would violate the appellants' fundamental right to a fair appeal procedure as is entrenched in s 35(3)(o) of the Constitution.¹² The minimum sentence did not apply when the appellants attempted to murder Coetzee. Therefore, the trial court, correctly so, did not apply the minimum sentence guidelines. Moreover, the appellants were not informed at trial that the minimum sentence may be used for sentencing purposes, if they are convicted. Accordingly, if this Court were to be guided by the minimum sentence regime in any way for purposes of its powers under s 322(6) of the CPA, then this would be a material irregularity that would lead to a failure of justice.

[26] On this basis, I hold that this Court should apply the law and the sentencing norms which operated when the crime was committed for which the appellants were convicted. For purposes of this appeal, this Court should not be guided by the new sentencing norms that have the force of law when this appeal is adjudicated.

General principles on sentencing at trial and on appeal

¹² Section 35(3) of the Constitution confers on an accused 'a right to a fair trial, which includes the right ... (o) of appeal to, or review by, a higher court'.

[27] Owing to this Court's stated intention to consider imposing a harsher sentence by invoking its powers under s 322(6) of the CPA, it is necessary to discuss certain basic principles that are germane to sentencing, both at the level of a trial court and on appeal.

[28] Sentencing is not a scientific process in which a just sentence may be determined with absolute precision. Sentencing is a mental process involving the exercise of judicial discretion. At times, that discretion is regulated by a legislated minimum sentence regime from which deviation is permissible only if a court finds that substantial and compelling circumstances exist.¹³ For sentencing, age-old principles of punishment have been jettisoned by the Constitution, 1996 and its values in favour of a more human-centric approach that balances the rights of victims with an accused's right to a fair process.¹⁴

[29] Holding the fate of an accused in one's hands is a weighty judicial responsibility.¹⁵ The formulation of a just sentence is informed by a judicial officer's sense (or feel) for what would be just in the circumstances of a case, moderated with a healthy dose of compassion and mercy, and mediated by the ideals of restorative justice.¹⁶ When sentencing an accused, the aims of deterrence, rehabilitation, retribution, and crime prevention is also promoted in the interests of society. Although every sentence sends a message (or warning) to societal members, fairness demands that an accused is not used as a sacrificial lamb on the altar of deterrence for would-be offenders.¹⁷

¹³ *S v Matyityi* 2011 (1) SACR 40 (SCA) para 23.

¹⁴ *Temmyes and Another v S* [2025] 3 All SA 876 (WCC) para 93.

¹⁵ In *S v Banda and Others* 1991 (2) SA 352 (BG) at 353C, sentencing is described as an 'awesome responsibility'.

¹⁶ In *S v Matyityi* supra para 16, the following was held:

'In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the state – it is an injury or wrong done to another person. ... As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values namely human dignity. It enables us as well to vindicate our collective sense of humanity and humanness.'

¹⁷ *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) para 35. Also, see *S v Sindeni* 1995 (2) SACR 704 (A) at 709A - B.

[30] A just sentence is one bearing the hallmarks of proportionality between the crime and the criminal. A sentence must fit the crime and the criminal who perpetrated it.¹⁸ While crimes are similar in nature, no two cases are likely to be on all-fours with each other; and accused persons are unlikely to have identical personal circumstances. Therefore, sentencing is an individualised process that is fact-based and context-specific. Sentencing an accused is also not a mechanical process.

[31] Taking into consideration aggravating and mitigating factors, a sentence should be carefully calibrated by striking a delicate, but fair, balance between those competing interests and considerations relevant to the mental process of sentencing. The factors that are legally relevant in this context are: (i) the personal circumstances of the offender, and his/her prospects for rehabilitation; (ii) the nature, gravity, and prevalence of the offence(s) involved; (iii) the broader interests of society, including the interests of the community where the offence(s) was/were committed; and (iv) the impact of the offence on its victim(s). Each of these factors should be given their due weight to determine a well-balanced sentence, with no single factor pre-dominating over any other. None should be over-emphasised, nor under-emphasised. All the factors should be equipoised.

[32] The addition of (iv) in the list of factors mentioned in the preceding paragraph aligns with this Division recently holding, correctly so in my view, that the time is ripe to expand the well-known *Zinn* trifecta to a quartet that includes consideration of the consequences of a crime on its victim(s).¹⁹ Routinely, our criminal courts consider a pre-sentence victim impact assessment report. This aligns with an enlightened, victim-centred penal philosophy as was advanced in, for e.g., *S v Matyityi* supra para 16.

[33] It would be a usurpation of a trial court's hallowed prerogative if its sentence could be substituted simply because an appeal court prefers a different punishment.

¹⁸ In *S v Rabie* supra at 862G-H, it was held:
'Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.'

¹⁹ *S v Buhlungu* [2025] ZAWCHC 331 (18 June 2025) para 26.

The power to interfere on appeal is circumscribed.²⁰ Interference is permissible: (i) when a trial court committed an irregularity resulting in a failure of justice;²¹ (ii) when a trial court misdirected itself in such nature, degree, and seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all, or exercised it improperly or unreasonably, thereby vitiating its decision on sentence;²² (iii) when the sentence is so disproportionate, shocking, or startling that no reasonable court could have imposed it;²³ (iv) when there is a striking disparity between the sentence imposed by the trial court and that which a court of appeal would have imposed if it were the trial court;²⁴ and (v) when a court of appeal sets aside a conviction on one charge and convicts the accused of another offence.²⁵

[34] The enquiry on appeal is not whether a trial court's sentence is right or wrong; nor is a mere misdirection in and of itself sufficient to entitle a court of appeal to set aside a sentence. More is required. What is envisaged here is the existence of indications which convincingly show that there has not been a proper and reasonable exercise of the trial court's sentencing discretion.²⁶ In the absence of distinguishing features of such nature and effect, interference on appeal with a lower court's sentence would not be justified.

[35] In law, this would be so unless the circumstances justify the invocation of an appellate court's power to impose a harsher sentence under s 322(6) of the CPA. That power cannot be utilised indiscriminately (such as, for purposes of imposing a sentence which an appellate court considers more appropriate merely because it prefers a harsher sentence to the perceived more lenient sentence imposed by a trial court).²⁷

²⁰ *Director of Public Prosecutions, Gauteng v Pistorius* 2018 (1) SACR 115 (SCA) para 17.

²¹ In this context, an irregularity is 'a wrongful or irregular deviation from the formalities and rules of procedure aimed at ensuring a fair trial' (*Nabolisa v S* supra para 24). Irregularities are, therefore, deviations from that which 'one would regularly expect in a properly conducted criminal trial' (*S v Jaipal* 2005 (4) SA 581 (CC) para 44).

²² *S v Hewitt* 2017 (1) SACR 309 (SCA) para 8. A misdirection is 'an error committed by the Court in determining or applying the facts for assessing the appropriate sentence' (*S v Pillay* 1977 (4) SA 531 (A) at 535E).

²³ *S v Malgas* supra para 12.

²⁴ *S v Pillay* supra at 535E - F; *S v Petkar* 1988 (3) SA 571 (A) at 574C.

²⁵ *S v Bogaards* supra para 41.

²⁶ *S v Pillay* supra at 535F; *Kgosimore v S* 1999 (2) SACR 238 (SCA) para 10.

²⁷ *S v Malgas* supra para 12.

[36] For an appellate court to invoke its powers under s 322(6) of the CPA, it should first satisfy itself that the difference between the sentence it would impose as compared with that imposed by the trial court is so substantial that the trial court's sentence would appropriately attract the labels (or epithets) of shocking, or startling, or disturbingly inappropriate.²⁸ If not, then the power to impose a harsher sentence should not be utilised. In such instances, an appeal court should defer to the trial court's discretion.

Evaluation of the trial court's sentence in this case

[37] To apply the test discussed under the preceding heading in the context of this appeal, it is necessary to consider the trial magistrate's judgment on sentence. If her basis for imposing the seven-year direct imprisonment sentence is flawed to the extent that her sentencing discretion can be said to have been exercised injudiciously, then interference on appeal would be warranted.

[38] The magistrate's judgment on sentence was comprehensive. In the course of her judgment, the magistrate considered the principles on sentencing with reference to well-known, relevant judicial precedents. This includes, amongst others, *S v Zinn*,²⁹ *S v Rabie* supra, *S v Matyityi* supra, and *Grigor v S* supra.

[39] On the basis of the *Zinn* triad, the trial magistrate considered: (a) the appellants' personal circumstances (such as, their respective ages, employment, education, marital status, and dependents); (b) their potential for rehabilitation; and (c) the absence of a prior criminal record for the second appellant. As aggravating factors, the trial magistrate considered: (d) the absence of remorse and the presence of mere regret;³⁰

²⁸ *S v Malgas* supra para 12.

²⁹ 1969 (2) SA 537 (A).

³⁰ The concept of remorse and how to evaluate whether an accused is remorseful has been usefully explained as follows: 'Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather

(e) the appellants' dishonesty when they testified that they were wrongly implicated but later, only after conviction, the second appellant admitted their participation in the crime; (f) the offence is serious and involved substantial violence; and (g) the interests of society to be protected from dangerous individuals. The first appellant's prior criminal record was also considered as aggravating, but for him only. On all this, the magistrate cannot be faulted.

[40] The magistrate was mindful that she was tasked with striking a delicate balance between the interests of society on the one hand, and that of the accused on the other. Her awareness of this critical aspect is revealed in the following comment made by her:

'Sentence imposed must boost the confidence of the public in our courts and the criminal justice system, but this does not mean that the accused must be sacrificed on the alter of deterrence.'³¹

[41] The magistrate also considered the contents of the pre-sentencing report filed in relation to the appellants. She explained her rationale for not supporting the recommendations contained therein. She held that 'the court is of the view that under these circumstances and the seriousness of the offence there is no other sentence that the court can impose except that of direct imprisonment'.³² This conclusion is, in my view, unassailable.

[42] The magistrate gave due and proper weight to the appellants' respective personal circumstances. When doing so, she expressly recorded, correctly so, that in cases of serious crimes (such as, attempted murder), an accused's personal circumstances recedes into the background, and the interests of society in crime prevention, deterrence, and retribution should come to the fore and assume greater significance.³³

look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence.' (*S v Matyityi* supra para 13).

³¹ Record page 407: lines 14 – 17.

³² Record page 412: lines 4 - 7.

³³ *DPP, Gauteng v Pistorius* supra paras 22 - 23.

[43] The magistrate considered different sentencing options and held that a suspended sentence or sentence in terms of section 276(1)(h) of the CPA, as recommended in the Correctional Supervision Report, will send a wrong message to society. On this basis, the magistrate rejected those options. This conclusion too is, in my view, unassailable.

[44] When determining the period of incarceration, the magistrate considered *Grigor v S* supra and another appeal case of 2015 whose citation is unclear from the record.³⁴ The magistrate pointed to the fact that the SCA in both matters upheld prison terms of six and five years respectively for the crime of attempted murder.

[45] The magistrate recognised that while she may be guided by judicial precedent, the sentence which she imposes should, as explained in para [30] above, be fact-based and context-specific. This is judicious conduct on the magistrate's part when determining a just and fair period of imprisonment for attempted murder.

[46] The magistrate imposed a period of seven years direct imprisonment. This decision reflects that the magistrate applied her mind to the facts and circumstances of the case before her, and did not simply adopt the prison term imposed in the two cases cited by her. The magistrate was evidently alive to the additional aggravating factors in the case with which she was seized (such as, the attack on Coetzee was pre-meditated and unprovoked; both appellants had ample time and opportunity to leave the scene at aunt Emmie's premises before the attack on Coetzee, but both elected to remain and attack Coetzee with weapons of death and using substantial violence).

[47] I conclude that the sentence imposed by the trial court is not tainted with misdirection; nor is the sentence shocking (or alarming); nor is the sentence capable of sustaining the epithet of startling or disturbingly inappropriate. For all these reasons, I propose to dismiss the appeals by both appellants against their respective sentence.

³⁴ Record: page 412: lines 22 - 25.

[48] As regards my prima facie view favouring a heavier sentence, I have decided that this is not an appropriate case where this Court's powers under s 322(6) of the CPA should be used. On the basis discussed in paras [35] to [36] above, the powers in s 322(6) should be exercised sparingly, and only when appropriate. Although I may have been inclined to impose a longer period of imprisonment if I were the trial court, I am alive to the fact that this is not the test for invoking s 322(6). In this appeal, deference should be shown to the trial court's wide discretion on sentence.

Order

[49] In the result, based on all the foregoing, I would make the following order:

"The appeal against the sentence is dismissed."

F. MOOSA
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

H. SLINGERS
JUDGE OF THE HIGH COURT

Appearances:

For appellants: R J Sivnarain

Instructed by: Legal Aid South Africa, Cape Town

For respondent: N G Breyl

Instructed by: Office of the Director of Public Prosecutions, Cape Town