REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

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DATE
SIGNATURE

CASE NO: 43/1077/2018

DPP REF: 2022/020

APPEAL NO: A35/2022

In the matter between:

NKOSI, SKHUMBUZO CLEMENT **APPELLANT**

and

THE STATE **RESPONDENT**

MDALANA-MAYISELA et MOOSA JJ

JUDGMENT

MOOSA J:

INTRODUCTION

[1] This is an appeal against the sentence of 3 (three) years imprisonment imposed upon the appellant by the Regional Magistrate – Soweto.

[2] The appellant enjoyed legal representation during the proceedings; was convicted on 15 October 2021 of assault with intent to do grievous bodily harm having pleaded guilty; and sentenced on 26 October 2021 to 3 (three) years imprisonment.

[3] He noted an appeal having been aggrieved with the sentence and the fact that the court, *a quo*, did not make an order in terms of section 280 of the Criminal procedure Act 51 of 1977, to the effect that the sentence imposed must be served concurrently with the sentence the appellant was serving at the time. He was subsequently granted leave to appeal against his sentence on 10 March 2022.

AD EVIDENCE AND CAUSE OF COMPLAINT

[4] The basis of the appellant's plea was that he had been annoyed by the fact that his girlfriend had been missing for the whole weekend of 04 November 2018. He subsequently discovered that she had gone to see her other boyfriend, Phindani Sikhosana ('Sikhosana'). The appellant duly confronted Sikhosana and assaulted him with fists and a pipe on his face and body, causing him to suffer grievous bodily harm.

[5] The court held the view that the appellant had acted with an element of premeditation, when he demanded that his girlfriend must show him Sikhosana, and proceeded to confront and assault the complainant. The nature of the injuries suffered, are borne out by the medical report which was completed on 09 November 2018.

[6] During the pre-sentencing proceedings, it emerged that the appellant was serving sentences on convictions of attempted murder and robbery with aggravating circumstances. In essence, the appellant was serving a sentence of 21 (twenty one) years imprisonment.

[7] The appellant argues that the trial court erred and misdirected itself when it failed to order that the sentence of 3 (three) years imposed for the

assault GBH conviction run concurrently with the sentences that he was currently serving. Further arguing that the court misdirected itself in not taking into account the cumulative effect of a sentence of a total of 24 (twenty four) years imprisonment, and that such failure to do so induces a sense of shock.

[8] The appellant complains that the sentence imposed is shockingly inappropriate and therefore severe under the circumstances. Further, requesting this court to set aside the sentence so imposed, and to substitute it with a lesser sentence which this Court deems appropriate under the circumstances.

THE LAW

[9] It is trite that the circumstances in which a court of appeal may interfere in sentencing discretion of a lower court are limited. There must be either a material misdirection by the trial court or the disparity between the sentence of the trial court and the sentence of the appellate court would have imposed, had it been the trial court is so marked, that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”.[1]

[10] In **S v Anderson 1964 (3) SA 494 (A) 495 D-E** Rumpff JA (as he then was) stated: *"Over the years our Courts of appeal have attempted to set out various principles by which they seek to be guided when they are asked to alter a sentence imposed by the trial court. These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interests of justice require it."*

[1] S v Malgas 2001 (1) SACR 469 (SCA) at 478 d - g

[11] In **S v Rabie 1975 (4) SA 855 (A**) at 857 D – E the following was stated: "In any 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'.

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

[12] In **S v Kgosimore 1999 (2) SACR 238 SCA** it was held that the approach of a Court of appeal on sentence should be the following: *"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing: viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true enquiry. (Cf* ***S v Pieters 1987 (3) SA 717 (A) at 727 G – I****). Either the discretion was properly and reasonable exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so".*

[13] In **S v Malgas 2001 (1) SACR 469 (SCA) at 478 D – G** the Court applied a broadened scope for the interference and held that: *"However, even in the absence of material misdirection, an appellate court may yet be justified*

in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned".

[14] Section 280 of the Criminal Procedure Act 51 of 1977 provides as follows:

> **Cumulative or concurrent sentences:**
>
> (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishment for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
>
> (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrent.

ANALYSIS

[15] Having due regard to the aforementioned principles set out by the case authority it is clear that the Court of Appeal has a very limited scope to interfere with the discretion of the trial court. The Court of Appeal is in any event able to interfere with the trial Court on sentence in respect of a finding

as to substantial and compelling circumstances even in the absence of material misdirection or a failure of the exercise of discretion.[2]

[16] It is clear from a proper reading of the judgment on sentence that the court *a quo* was full well aware of the fact that it was required to weigh and balance a variety of factors to determine a measure of morale as opposed to legal blameworthiness of an accused. To this end it is clear that the sentencing court properly applied the principles as set out in S v Zinn, and duly considered the personal circumstances of the appellant.

[17] It is trite law that once it becomes clear that the crime is deserving of a substantial period of imprisonment, the question whether the accused is married or single, whether he has children or whether he is employed, becomes largely immaterial.[3]

[18] It is axiomatic that the determination of an appropriate sentence is a matter that has to be determined on case by case basis, and that the merits and circumstances of each and every case differ. I have duly noted that the two convictions for which the appellant has been sentenced clearly involve the element of violence, on the part of the appellant. To that it must be added that the conviction of assault with intent to do grievous bodily harm also involves an element of violence. Hence, in the circumstances the inescapable conclusion is that the appellant is a violent individual, and accordingly the public needs to be protected from him, and his violent tendencies.

[19] For the purpose of the appeal, it is necessary to determine as to whether, having due regard to the totality of the evidence, the court *a quo* imposed a sentence which was appropriate and in accordance with justice and equity, and one that is in accordance with what the Supreme Court of Appeal would approve. Put differently, was it a just sentence that was imposed upon the appellant.

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[2] S v Tafeni 2016 (2) SACR 720 at 723

[3] S v Machaba and Another 2016(1) SACR 1 (SCA) at 40

[20] In **S v Kibido 1998 (2) SACR 213 (SCA)** at 216 g - I Olivier JA enunciated the trite principle as follows when an appellate Court considers sentence on appeal:

"Now, it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account (see S v Fazzie and Others 1964 (4) SA 673 (A) at 684A - B; S v Pillay 1977 (4) SA 531 (A) at 535A-B). A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard (*S v Fazzie and Others* (supra) at 684B - C; *S v Pillay* (supra) at 535E). *Furthermore, a mere misdirection is not by itself sufficient to entitle a Court of appeal 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 (see Trollip JA in S v Pillay (supra) at 535E - G)."*

See also S v Moswathupa 2012 (1) SACR 259 (SCA) at para 4, S v Sadler 2000 (1) SACR 331 (A) at 334-335 para 8-9;S v Rabie 1975 (4) SA 855 (A) at 857D – F; S v Malgas 2001 (1) SACR 469 (SCA) at 478, para 12, S v Sadler 2000 (1) SACR 331 (A) at 334-335 para 8-9.[4]

[21] In S v Moswathupa (supra) it was held that a court must not lose sight of the fact that the aggregate penalty must not be unduly severe when dealing with multiple offences. Against this backdrop, in my view there is no merit in the argument that the trial court misdirected itself in concluding that the only sentence to be imposed was direct imprisonment. All things considered there is nothing evoking a sense of shock in the sentence imposed by the trial court requiring any interference on appeal.

[22] I have carefully considered the record of proceedings and the veracity

[4] Setholo v S 2017 (1)SACR 544 (NCK)

of the evidence, and am satisfied that the court *a quo* properly took into account all the relevant factors that needed to have been taken into account when arriving at, and imposing the sentence of 3 (three) years imprisonment.

[23] I do not think that the aggregate penalty is unduly severe, and am satisfied that the trial court a quo properly considered the provisions and purport of section 280(2), and having done so correctly concluded that the sentence of 3 (three) years not to run concurrently with the other sentences previously imposed.

[24] I pause to mention, that I am satisfied that there is no other sentence to have been imposed upon the appellant, save for the one so imposed by the court *a quo*, In any event the sentence imposed is not out of kilter with the sentence that we would have imposed, in the circumstances. It is clear that this conviction is a separate conviction, after the appellant was sentenced previously. I am unable to find any support for the contention that the trial court *a quo* was duty bound to have ordered that the sentence of 3 (three) years run concurrently in terms of section 280 of the Criminal Procedure Act.

[25] Accordingly in my view, the sentence of 3 (three) years is a just and equitable sentence that was imposed upon the appellant, and requires no further scrutiny. It follows that the appeal against the sentence must fail.

ORDER

[26] In the result, I make the following order:

[a]. Condonation for the late filing of the appellant's heads of argument is hereby granted.

[b] The appeal against the sentence imposed is dismissed and the sentence of 3 (three) years imprisonment imposed by the trial court is confirmed.

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C I MOOSA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG
MONDAY, 11 SEPTEMBER 2023

I agree:

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MMP MDALANA-MAYISELA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG
MONDAY, 11 SEPTEMBER 2023

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Date of Hearing:	**05 June 2023**
Date of Judgment:	**11 SEPTEMBER 2023**