delivered 06/4/18

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: A 816/2016

In the matter between:

Montgomery Defend Moni — Appellant

And

The State

JUDGMENT

Maumela J.

1. This is as an appeal against sentence only. Before the Regional Court for the District of Benoni in the regional division of Gauteng, (the court *a quo)*, appellant, Defend Moni, a male who was legally represented throughout the trial was charged with the following offences:
   Count 1: Attempted Murder.
   Count 2: Assault with intent to do Grievous Bodily Harm.

2. In count 1 the allegations were that upon or about the 7th of March 2015 and at or near Daveyton in the regional division of Gauteng, the accused did unlawfully and intentionally attempt to kill Teboho Mahooa, a male person by hitting him with a beer bottle or similar object. In count 2 the allegations were that upon or about the 7th of March 2015 and at or near Daveyton in the regional division of Gauteng, the accused did unlawfully and intentionally assault Teboho Mahooa, a male person by hitting him with a beer bottle with the intent of causing him grievous bodily harm.

3. Before the court *a quo*, appellant pleaded not guilty to both counts. He opted to exercise his right and remained silent. He did not disclose the basis of his defence. The state led evidence, so did the defence. Appellant was found not guilty and discharged on count 1: Attempted Murder. On count 2; assault with intent to do Grievous Bodily Harm, the court *a quo* found the appellant guilty as charged.

4. Appellant was sentenced to undergo 5 years imprisonment without an option of a fine. In these proceedings appellant appeals against sentence. He has leave of the court *a quo*. The appeal is opposed.

GROUNDS OF APPEAL.

5. Appellant raised the following as grounds for his appeal.
   5.1. That the court *a quo* did not consider the mitigating factors attendant to his person.
   5.2. That the court *a quo* failed to consider that at the time of the commission of the crime he was not in his sound and sober senses.
   5.3. That the presiding officer in the court *a quo* overemphasized the interest of the community in determining a fitting sentence to be imposed.
   5.4. That the presiding officer in the court *a quo* was influenced by anger while imposing sentence.

5.5. That the sentence imposed was vitiated by irregularity or misdirection or that it is disturbingly inappropriate.

EVIDENCE.

6. Before the court *a quo* Tebogo Lucas Magoa was the first to testify on behalf of the state. Under oath he told court that on Sunday the 7th of March 2015, at around 22h00 he was at the corner of Cason and Jafta streets. He was walking on foot accompanying a friend known as Johanna who wanted to buy chicken dust from an outlet near Searchers Tavern in Benoni. While he and Johanna were there, a man he knows as Diko emerged from within the tavern. He was hitting his girlfriend. The witness said that Diko is short for Dikomere.

7. He stated that he made a comment to Johanna saying; *"is there still a man in this era who assaults his girl?"* While he and Johanna waited for the chicken dust, the same man accosted him wielding a knife and a bottle. The man questioned the comment about the assault of women the witness made to Johanna earlier on. The man ordered him to repeat the comment. Suddenly the man threw the bottle at him. It hit him on the right side of his face and his right eye, causing injuries. In no time he was full of blood on his face. He said the appellant was vicious in attacking him. The people standing by reprimanded appellant questioning what he was doing. The assailant stopped the attack on his own.

8. Three men volunteered. They drove him in his own vehicle to Glynwood Hospital in Benoni. He was admitted over three days. He was sutured considerably on the face. A picture of his injured face was submitted and admitted by consent as exhibit "A". A copy of the J 88 pertaining to the witness's injuries was admitted by consent as exhibit "B". Under cross examination this witness stuck to his version. He stated that he got to know appellant's name because bystanders shouted his name; "Diko" in efforts to dissuade him from perpetuating the assault further. He disputed appellant's contention that he saw the witness for the first time in court.

9. The witness stated that one Veronica, the owner of the chicken dust place also participated together with many other people who were around in dissuading appellant from continuing with the assault. He said that he was sober at the time he made a statement to the police regarding the incident. He was adamant that the people standing around addressed the person who was assaulting him as Dikomere. He said that at the time he made a statement he was full of blood on his face much as he was in pain. He made a statement to the police 10 days after the day of the incident. He pointed out several instances in his statement where the police recorded details contrary to how he put it to them. He conceded that he can no longer recognize appellant's girlfriend.

10. Johanna Nyumyaga Malula was the second witness to be called by the state. She told court that on the 7th of March 2015, she was with the complainant, Tebogo, who is her boyfriend. The two of them went to one Veronica's chicken dust outlet. There were no other customers at the outlet at the time. Waiting for the chicken dust, she saw appellant approaching. Her boyfriend alighted from the vehicle and he discouraged appellant from assaulting his girlfriend. She stated that she then moved towards Veronica, the owner of the chicken dust outlet. She does not know what happened between the appellant and the complainant. The next moment she realised that complainant is full of blood, and has sustained serious injuries in the face. She suspects that appellant hacked the complainant with an object she does not know.

11. The witness stated that there were other onlookers around but they did not reprimand the appellant. She has known appellant for the past 11 years because the latter stays at the same street with her brother. She would see appellant passing along the street. She knew him by the name Diko

Mera. She said that there was light from where Veronica was selling chicken dust, much as there was light in the street.

12. Under cross examination this witness stated that earlier on she and Magoa, the first state witness, travelled together to Soweto. Upon return Magoa dropped her at her parents's home. Later on she coincidentally met up with Magoa again when she walked on her own to the chicken dust outlet. Their second meeting was not planned. As she approached, Magoa was in his vehicle. She noticed appellant assaulting a young girl. She drew the notice of Magoa to what she was seeing. That is when Magoa drew near them and tried to intervene. He an manner d the appellant exchanged words.

13. The witness stated that suddenly she heard Veronica shouting appellant's name. Then appellant passed near her. She did not see what happened but she noticed that the complainant is injured. About three days after the incident she and others confronted appellant demanding to know why he injured the complainant. The people in her company knew that appellant is known as Diko. She insisted that appellant visited her at her home to discussed the incident. The witness views that Veronica saw it when the appellant attacked the complainant.

14. The witness stated that when she enquired to Veronica about the identity of the assailant, Veronica denied that the accused is implicated. She saw the appellant again three days after the day of the incident. By then the complainant had already preferred a case against the appellant. Complainant had been released from hospital. The state closed its case.

15. The *first* witness to be called by the defence was Veronica Sithole. Under oath she told court that she runs a place in Daveyton where she sells chicken dust. The outlet has no

name but it is situated near Searchers Tavern. She said that on the 7th of March 2015 in the evening she witnessed a fight near the tavern. The fighters moved onto the street. All she could see was people involved in a fight without being able to see as to who is fighting who. The reason why she could not see clearly is that it was dark since it was in the night. The stand for her chicken outlet was enclosed. Only the front side was open.

16. She said that she does not know Teboho Lucas Mahoa. Neither does she know Johanna "Mawe". She knows the appellant because she used to stay at the same street as he. She has no reason to lie before court. Under cross examination she agreed that she would have been able to see who is fighting had she stepped out of the structure of her shop. She said that there are lights in the street.

17. Montgomery Defend Moni was the second testify for the defence. Under oath he told court that he cannot recall any instance around the 7th of March 2015, before his arrest, where he assaulted anyone. He does not take particular note of days in his life. As such he will not be able to recall what he was doing on the alleged day of the incident in this case. He said that prior to his arrest he did not know complainant in this case. He knew the second state witness only to the extent that this witness approached him in the company of two others prior to his arrest. The other person among them was a male who is gay.

18. He said that the three were passing along the street near his home when they asked about the whereabouts Tegomery's home. They claimed know Tegomery. The three told him that Tegomery fought his girlfriend. He called his girlfriend to where he stood with the three. He said that the three told him that they know Tegomery is taller as compared to him. He said that from where he stood he saw Veronica at a distance. He advised the three to approach Veronica for the

information they were after. He said that his actual name is Montgomery. Growing up, he and his younger brother had difficulties pronouncing the name Montgomery. As a result he ended up with the nickname "Dikomere or Tegomere."

19. He was arrested a few days after the ladies and the gay male visited his home. He said that he knew the gay man in the company of the ladies because he would go drinking in the area where he lives. He said that Johanna Mbalula knew appellant 11 years before the day of the incident. She correctly stated that appellant stays at Shongwe Street. Appellant insisted that he only began to know the complainant at the magistrates court in Daveyton when the magistrate pointed him out as the culprit. He said that at that instance the complainant stated that he does not know his assailant.

20. The issue before this court is whether or not the court *a quo* was correct in imposing the sentence it did on the appellant. If so, the appeal stands to be dismissed. If not the appeal is to be upheld and an appropriate order concerning sentence made. It is trite that appellate courts do not have a free hand to interfere with sentences imposed by trial courts. The court has to look at the offence committed, the circumstances of the appellant, the sentence imposed and the interests of the community. In the case of S v Zinn[1], the court stated as follows: *"in imposing the sentence, the court has to take into consideration, the crime committed, the interests of the accused, and the interest of the community."*

THE INTERESTS OF THE APPELLANT.

21. Appellant was 34 years of age at the time he was sentenced. His residential address since birth is number 3612 Shongwe Street Daveyton. At the time of his arrest he was living with his mother, girlfriend and his 3 month old baby. He is unemployed except for the fact that at the time

[1]. 1969 (2) SA 537 (A).

of his arrest he was relying on doing menial jobs washing cars. He is licensed to drive. To earn a living he would fill petrol into vehicles, most of which were taxis. He would check tires and other minor mechanical aspects. For this he earned R 150-00 per day. His father passed on when he was 2 years old. He relies partly on his mother who is a domestic worker. He left school only after completing Grade 8 due to insufficiency of funding given his mother's meager salary. One of the accused's brothers is a member of the South African Police Services. The other brother is an Apex employee.

22. The following previous convictions reflect against appellant's name and he admits them.
    22.1. On the 4th of March 2002 appellant was convicted two offences, namely; Robbery and Attempted Murder. On the count of robbery he was sentenced to undergo 15 years of imprisonment. On Attempted Murder he was sentenced to undergo 5 years imprisonment.
    22.2. For purposes of the offence of attempted murder, on the 27th of April 2012 he was released on special remission until the 3rd of March 2016. It was submitted for consideration by the court that between 2009 and 2015 when he was convicted in this case appellant did not offend the law. He denied complicity throughout and did not express contrition. He has one child.

23. It is trite that courts have consistently held the view that sentences imposed are to be tinged with a measure of mercy. In the case of Sv Rabie[2] the court stated the following: *"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

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2. 1974 (4) SA 855 (A).

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".

24. It was submitted that the court a quo erred in determining sentence against appellant because it did not consider the fact that he was not in his sound and sober senses when he committed the offence. This is not borne by the evidence led. Even if it was, the question goes unanswered as to why appellant did not express contrition throughout the trial. He cannot be heard to attribute is offending to his compromised state of sobriety while he at the same time contends that he is innocent.

25. It was also submitted that the court *a quo* was motivated by anger when it determined a fitting sentence to be imposed upon the appellant. A reading of the record of this case before the court a quo does not reflect any instances where the presiding officer demonstrated anger or lack of composure.

THE INTERESTS OF THE COMMUNITY.

26. Reports on criminal activities abound on a daily basis in the South African social, print and other media. Communities are impatient in the face of the spate of criminality that victimizes them without respite. There is a need therefore, in the process of sentencing to leave members of the community with a sense that the law and indeed courts, shall come to their rescue whenever criminality abounds. At all times when their rights, especially the rights enshrined in the Bill of Rights in the constitution are invaded, courts have to respond with an approach in the imposition of sentences that assures them that the law shall protect all and apply to all with equality. They have to remain

certain that crime shall not be met with impunity or laxity of the criminal justice system.

27. Our courts have adopted the view that increased firmness is warranted for purposes of punishing offences of assault involving the use of sharp instruments against defenseless victims. In the case of S v Nyikana[3] the court remarked as follows on how courts must approach injuries inflicted with sharp objects: *"I refer to the matter of S v Fezeka Ngwala-Ngwala[4]; a review judgment by White J with which Peko J concurred."* The court then quoted the following: *"The judges of this court are often amazed at the lenient sentence which magistrates impose for serious assault with .... or other sharp instruments. Such lenient sentences do not bring home to the public the seriousness of such assaults. Frequently the judges have to preside over such cases resulting from a single fatal wound with the one or other sharp instrument in which they must impose a sentence of 15 or 20 years imprisonment. We feel that if magistrates could attend such trials they would realise the seriousness of these assaults and impose more meaningful sentences."*

28. In the case before court the attack against the complainant did not bring fatal consequences. However appellant used a bottle and a knife against an unarmed victim. A bottle can be very sharp if it breaks upon impact against an object or a victim. A knife is a sharp instrument. Appellant threw the bottle at the complainant, injuring him so seriously that he was admitted in hospital for some time, much as he required notable suturing. The court has to weigh the sentence imposed given the nature and severity of the offence committed.

29. It is important for courts to be seen to be taking meaningful measures to stem the tide of the violent crime that gets perpetrated on end against innocent members of the

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[3]. 2008 JDR 0886 (BHC)

[4]. Unreported: 6th March 2001, page 2.

community. Should courts fail in this regard, one of the consequences shall be that the public shall lose confidence in the criminal justice system. As a consequence, members of the public shall grow to be more prone to take the law into their hands. They may grow to be more inclined to exact mob justice or self-justice under the guise of self defence.

30. In the case of R v Karg[5] the court stated: *"I do not agree with the submission that these considerations are irrelevant. While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."*

THE OFFENCE.

31. The offence of which appellant is convicted is serious. It involved the perpetration of aggravated violence. Harmful objects were used against an unarmed victim who was not fighting back. The injuries sustained by the complainant are serious. As a result of the injuries complainant was admitted in hospital for a considerable period of time. The attack against him was unprovoked. The complainant merely made a remark to his girlfriend.

32. Even if the remark was directed at the appellant, the latter did not respond instantaneously. He left the scene only to

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[5]. [1961] 1 All SA 533 (AD).

return later in order to launch the attack upon the complainant. A period of time elapsed between the time the remark was made and the time complainant was attacked. Appellant was therefore not justified to act out of anger because there was sufficient time for his anger to subside and for him to cool off. It shows that premeditation on the part of the appellant cannot be ruled out.

APPELLATE POWERS OF THIS COURT.

33. For purposes of the offence in issue, the Regional Court in Daveyton has determined and imposed 5 years imprisonment. Appellant submits that this sentence is inappropriate much as it is a result of misdirection on the part of the court *a quo*. The state contends that this sentence fits the crime, the accused and the interests of society. The question is whether this court stands entitled to interfere with this sentence.

34. In the case of S v Rabie[6], the court stated as follows: *"The decision as to what an appropriate punishment would be is pre-eminently a matter for the discretion of the trial court. The court hearing the appeal should be careful not to erode that discretion and would be justified to intervene only if the trial court's discretion was not "judicially and properly exercised" which would be the case if the sentence that was imposed is "vitiated by irregularity or misdirection or is disturbingly inappropriate."*

35. In S v Vilakazi 2009(1) SACR 552 SCA, at page 560, the court in determining the appropriateness of the imposition of a prescribed minimum sentence stated the following: "*it is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the*

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[6]. 1974 (4) SA 855 (A).

particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The constitutional court made it clear that what is meant by the "offence" in that context and that is the sense in which I will use the term throughout this judgement unless the context indicated otherwise."

36. In the case of Mpofu v Minister for Justice and Constitutional Development and Others, (CCT 124/11) [2013] ZACC 15; 2013 (9) BCLR 1072 (CC); 2013 (2) SACR 407 (CC) (6 June 2013), the court stated: "*Ordinarily, an appellate court can only interfere with the sentence of a lower court where there has been an irregularity that results in a failure of justice."*

37. Our courts have held the view that sentencing is intrinsically a matter for the discretion of the trial court. The court has to determine whether or not the court *a quo* misdirected itself in imposing sentence against the appellant. It is trite that in passing sentence courts stand enjoined to consider the sentencing triad as indicated in the case of S v Zinn[7]. In this case the court considered among others that complainant was subjected to violence without justification.

38. In S v Pillay[8] Trollip JA stated: *"Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing sentence exercised its discretion properly and judicially, a mere discretion 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. Such misdirection is usually and conveniently termed one that*

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[7]. Supra.

[8]. 1977 (4) SA 531 (A), at page 535 E – F.

vitiates the court's decision on sentence."

39. The court a quo sentenced appellant to 5 years imprisonment. The offence for which the sentences imposed is serious. It was unprovoked and in it serious violence was meted out. A dangerous object was used against an unarmed victim who was not fighting back.

40. The complainant did not conduct himself in a manner untoward when he expressed disapproval as appellant assaulted his girlfriend in the street for all to see. Throughout the trial before the court *a quo* appellant showed no contrition for what he did. He never took the court into his confidence. He has therefore not demonstrated any propensity towards rehabilitation. However in a considerable number of cases amenability to rehabilitation results from a process which in some instances is protracted, much as it varies from person to person. It might therefore not be prudent to rule out prospects of rehabilitation of offenders including the appellant.

41. It is trite that in the exercise at hand it is not for the court considered whether in the place of the court *a quo* it would have imposed a different sentence. The court only has to consider whether in imposing sentence the court *a quo* misdirected itself. There is no indication in this case that the court misdirected itself in imposing sentence.

42. In the result, the appeal against sentence stands to be dismissed. The following order is made:

ORDER.

1. The appeal against sentence is dismissed.

T. A. Maumela.
Judge of the High Court of South Africa.

I agree.

V T Mtati AJ
Acting Judge of the High Court of South Africa.

43.