REPUBLIC OF SOUTH AFRICA

EASTERN CAPE DIVISION

GRAHAMSTOWN

CASE NO.: CA&R: 176/2020
DATE HEARD: 28 April 2021

DELIVERED: 01 June 2021

XOLANI YAPHI Appellant

and

THE STATE Respondent

JUDGMENT

RUSI AJ:

Introduction:

[1] The Appellant was charged with assault with intent to do grievous bodily harm in the Grahamstown Magistrate's Court. He was convicted of this offence

as charged on the 11th of February 2020. On 27 August 2020, he was sentenced to a period of thirty (30) months' imprisonment. He sought leave from the court *a quo* to appeal against this sentence, and such leave was granted. Hence, it is only against sentence that this appeal is directed. The Appellant was legally represented during trial and sentence proceedings in the court below.

Factual background:

[2] A summary of material facts on which the Appellant was on convicted is that on the 1st of June 2019, there was a traditional ceremony at a homestead situated in Extension 7 Grahamstown. It is common cause that alcohol was served at the ceremony. The Appellant, the complainant, and one Mr Mfabana were among those attending the ceremony, and the three of them consumed the said alcohol.

[3] Due to the fact that the complainant was visually impaired, the Appellant was his guide for the duration of the ceremony up to the time of the assault. Even though the Appellant and the complainant were admittedly intoxicated from the alcohol they consumed during the ceremony, it was the evidence of the complainant that the Appellant was still able to assist him as his guide when he needed to go around. Throughout the day, the complainant and the Appellant enjoyed a cordial relationship. Around 20h00 they went outside the premises of the homestead where the ceremony was held, and had a peaceful conversation about football and the ceremony in general. There were other people outside the

premises where they conversed, one of them being Mr Mfabana. While conversing with the Appellant, complainant saw himself on the ground and the Appellant on top of him. The Appellant cut him with a knife or similar object on his neck. He was unable to say how he came about to be on the ground. As a result of the attack on him by the Appellant, the complainant sustained a laceration to his neck, and further lacerations to his hand. Only the neck injury is set out in a J88 report compiled by Dr Kingsley whose findings were that the said neck injury was potentially life threatening. Photographs depicting both the neck and hand injuries sustained by complainant as result of the attack on him by the Appellant were admitted in evidence by the trial court.

[4] Mr Mfabana testified that he did not witness the assault. However, he was nearby the Appellant and the complainant when he suddenly saw the Appellant tackle the complainant to a fall. When he went to investigate, the Appellant rose up with his hands behind his back. While Mr Mfabana did not witness the actual stabbing of the complainant by the Appellant, he saw the Appellant shoving a knife under a nearby car. Mr Mfabana's evidence was that he was not intoxicated. His evidence was that the Appellant was not intoxicated to a point that he did not know what was happening around. This was the essence of the case for the prosecution.

[5] The basis of the Appellant's defence was that he was so heavily intoxicated at the time of the incident that he does not remember anything about

it. The learned Magistrate correctly warned the Appellant of the provisions of section 1 (1) of Act 1 of 1988[1] pertaining to voluntary intoxication and commission of criminal acts. While it is not deemed necessary to traverse the provisions of this section, for reasons apparent herein below, it is pertinent to emphasize that the onus of proving beyond reasonable doubt that an accused acted in contravention of those provisions rests with the prosecution. If that onus is discharged, it is competent for the trial court to sentence the accused as it would if the accused was convicted of the main offence. The Appellant elected not to give evidence at the close of the case for the prosecution.

[6] The court *a quo* found, on the evidence adduced by the complainant and Mr Mfabana, that the Appellant was the person that stabbed the complainant. This finding cannot be faulted. The learned Magistrate correctly assessed the evidence and drew no adverse inference against the Appellant subsequent to him electing not to testify in his defence. Equally unassailable is the trial court's finding, based on the evidence of the complainant and Mr Mfabana, that even though the Appellant was intoxicated at the time of the assault, he was able to formulate an intention to assault the complainant, and appreciated the wrongfulness of his actions.

[1] Section 1 of the Criminal Law Amendment Act 1 of 1988:

1. (1) Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are impaired commits any act prohibited by law under any penalty, but is not criminally liable because his faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.

Sentencing in the court a quo:

[7] In mitigation of sentence, the Appellant testified that he was 43 years old, employed at Rhodes University since 2011 as a driver and painter where he earned R11 000. 00 per month, with a benefit of 25% rebate on tuition fees for his 20-year-old daughter who was doing her studies at that university at the time. He had two other children aged 7 years; and 4 months respectively. All his children lived with him. With his salary he maintained his children. He also took responsibility for her 94 years old grandmother's medical expenses, including her traveling to doctors in Port Elizabeth. The Appellant was previously convicted of assault on 3 February 2000. He was sentenced to 3 years' imprisonment of which 1 year was conditionally suspended for 5 years.

[8] A probation officer's report, which was requested by the Appellant's legal representative after the conviction of the Appellant was submitted to court, compiled by T. Gwala. The contents of the said probation officer's report were not challenged by either the prosecution or defence. It does not appear that the court below *suo motu* raised any issue with it.

[9] After the Appellant gave his evidence in mitigation of sentence, the complainant was called by the court, ostensibly to give evidence on sentence. It is not without significance for the purposes of this appeal as it shall be demonstrated below, that the complainant testified that he had not forgiven the Appellant; would not have accepted his apology had he tendered it; and that he

was not related to him although relations between them were good before the assault incident. The complainant acknowledged the help that the Appellant had rendered to him as his guide throughout the day of the incident. On this score the learned Magistrate, making reference to the case of *S v Matyityi*[2], stated that *"her intention in calling for the complainant's evidence on sentence was to achieve a victim centered punishment; and to clarify the issue of the relationship between accused and the complainant so that she would approach sentence in a more balanced approach"*.

[10] In sentencing the Appellant, the court *a quo* succinctly set out circumstances under which the offence was committed; the Appellant's personal circumstances; and an overview of legal principles on sentencing. It is worth noting on this score that a patent error seems to have occurred when the learned Magistrate, in her judgment on sentence, stated that the Appellant testified in his defence at the close of the state case. It is the view of this Court that this error is not a material one.

Grounds of appeal:

[11] The grounds on which the Appellant appeals against sentence are that: (a) the learned Magistrate misdirected herself in failing to give proper consideration to the Appellant's personal circumstances at the time of sentence; (b) the learned Magistrate erred in over-emphasizing the sentiments of the complainant

[2] S v Matyityi 2011 (1) SACR 40 (SCA)

at the expense of the circumstances under which the offence was committed, and the personal circumstances of the Appellant; and (c) the learned Magistrate misdirected herself in not considering correctional supervision as an appropriate sentence, notwithstanding the fact that a probation officer's report was placed before her. In that report it was recommended that the Appellant was a suitable candidate to be placed under correctional supervision.

[12] It was initially contended by Ms Obermeyer, counsel for the state, that, in the circumstances of the case, the sentence imposed by the court *a quo* was befitting the crime and the offender. Regarding the fact that correctional supervision was not considered to be an appropriate sentence, it was Ms Obermeyer's initial submission that the report itself could not have been of assistance to the court *a quo* because the Appellant appeared to be the sole source of the information gathered by the probation officer. It was, so counsel submitted, a one-sided and insufficient report. Ms Obermeyer was hard put to give reasons why the prosecution never challenged the report on the score of insufficiency. She conceded that no fault could be put at the doorstep of the probation officer when neither the prosecution nor the defence challenged the report when they had the opportunity to do so at the trial. It must be added that the learned Magistrate was at large, in any case, to call for further information or evidence on sentence had it been so that the report was considered insufficient.

[13] I now turn to the question whether the sentence of 30 months' imprisonment imposed has been vitiated by any irregularity; misdirection; or is shockingly inappropriate.

The law and its application to the present appeal:

[14] It is trite that punishment is a matter for the discretion of the trial court, which discretion will only be interfered with if it has not been exercised properly and judicially, the test being whether the sentence meted out is vitiated by an irregularity, or a misdirection, or is disturbingly inappropriate.[3]

[15] The above stated grounds of appeal and the submission by Ms McCallum, counsel for the Appellant, that the learned Magistrate over-emphasized the sentiments of the complainant at the expense of the well-known triad of sentence, namely, the crime, the offender and the interests of society[4], brings this Court to an examination of the approach adopted by the learned Magistrate in this regard.

[16] In *S v Matyityi*[5] the court said the following:

> "[16] An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim

[3] S v Rabie 1974 (4) SA 855 (A) at 857 E
[4] S v Zinn 1969 (2) SA 537 (A); at 540 G
[5] *fn* 4

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. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. 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. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim. (See generally Karen Muller & Annette van der Merwe 'Recognising the Victim in the Sentencing Phase: The Use of Victim Impact Statements in Court'.)

[17] By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness. Furthermore, courts generally do not have the necessary experience to generalise or draw conclusions about the effects and consequences of a rape for a rape victim. As Muller & Van der Merwe put it:

> 'It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced. Each individual brings with himself or herself a different background, a different support system and, therefore, a different manner of coping with the trauma flowing from the abuse.'" (emphasis added).

[17] It is disconcerting that *in casu,* after the complainant was called to give evidence on sentence the information elicited from him bore no reference to what the court set out in *Matyityi* as the essence of the information that the court should then strive to elicit from the victim. It appears to have sufficed for the court *a quo*, regrettably so, that all that the complainant testified about was how he felt about the Appellant and the fact that there was no close relationship between him and the Appellant.

[18] In *S v Mhlakaza*[6] Harms JA said:

> "The object of sentencing is not to satisfy public opinion, but to serve public interest. A sentencing policy that caters predominantly for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public".

And in *S v Karg* the same court had said that

> "This does not mean it is wrong that the natural indignation of the interested persons and of the community at large should receive some recognition in the sentences the courts impose, and it is not irrelevant to bear in mind that if the 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."[7]

[19] It is indeed an ineluctable observation that the incidence of violent crimes continues to rise in this country. It is thus not without justification, that retribution and deterrence be given prominence in sentencing those convicted of such crimes. None of this however, detracts from the duty of the sentencing court to individualize sentence by striving for the right balance between the offender and the unique circumstances of the crime. In this Court's view, the peculiarity of the circumstances of the present case, which comes from the fact that not even complainant was able to tell the court exactly what may have

[6] S v Mhlakaza 1997 (1) SACR 515 (SCA); at 518 e-g
[7] S v Karg 1961 (1) SA 231 (A) at 236 B-C

triggered the assault, ought to have received proper consideration by the court *a quo*.

[20] The reasons for the assault, whether real or perceived are peculiarly within the personal knowledge of the perpetrator, and the Appellant in this case. This fact notwithstanding, it seems to me to be incongruous with human nature and logic, that two persons who have been cordial towards each other for the entire day in question, would fall into an inexplicable and almost fatal scuffle. Both counsel for the respondent and the Appellant were at pains to describe the assault as *"one of the bizarre occurrences"*. While this is no doubt a possibility, it remains inconceivable, in the circumstances of the present case that this happened for no reason at all. This Court is not at large to engage in conjecture nevertheless. Suffice to state that the very peculiar or "bizarre" circumstances of the case should have attracted more consideration from the court *a quo* in passing sentence. Since that did not happen, it behoves this Court to interfere with the sentencing court's exercise of its discretion.

[21] It is regrettable to note that besides a bald statement by the learned Magistrate that, after she considered the probation officer's report wherein correctional supervision was recommended as being an appropriate sentence, she was not in agreement with the recommendations made. The learned Magistrate gave no reasons why she did not so agree. A cardinal rule of adjudication is that reasons are to be furnished for decisions taken by a decision

maker. That is no different with court proceedings. In so far as how probation officer's reports are to be treated, I respectfully align myself with the sentiments of the court in S *v Trichart*[8], even though the facts therein are distinguishable from those in the present case. The court in *Trichart* had this to say on probation officer's reports:

> "It is important for the courts to take these reports seriously and to give rational, even if only brief, reasons for rejecting the recommendations contained in them. The probation officers … perform a valuable task, one that is of huge assistance to judicial officers. The roles performed by the two enjoy a symbiotic relationship. The judicial officer considers factors such as the interests of the convicted individual, the nature and the gravity of the crime(s) of which he or she is convicted and the interests of society. In considering the interests of the individual, the judicial officer receives invaluable information gathered by the probation officer and has the benefit of the probation officer's expertise regarding the psycho-social and other conditions and circumstances concerning the offender".

[22] I am in respectful agreement with the submission by Ms McCallum for the Appellant that even though correctional supervision is considered to be a lighter sentence than direct imprisonment, when it is for a substantial period of time, it is an effective sentence. This submission is borne out by a plethora of trite judicial precedent (which I do not intend to traverse in this judgment for the sake of brevity), where correctional supervision was considered as an appropriate sentence, and imposed even in the case of serious offences.[9]

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[8] S v Trichart 2014 (2) SACR 254 GJ

[9] See Du Toit – Commentary on the Criminal Procedure Act on section 276 of Act 51/1977 (the Criminal Procedure Act)

[23] This Court is mindful of the fact that the ultimate decision as to what the appropriate sentence is in each case lies with the trial court. However, in this Court's view, the misdirection on the part of the learned Magistrate in not properly dealing with the probation officer's report, vitiated the sentence imposed.

[24] It is also worth mentioning that nothing was said by the court below regarding how its consideration of the Appellant's personal circumstances influenced the decision arrived at on sentence, and how the interests of society would best be served by the sentence imposed. It would be remiss of this Court not to remark that when the Appellant was convicted for the present offence, his previous conviction was 20 years old. It should follow from this that the Appellant strove to avoid committing offences for that long a period. However, that this was then his second conviction for an offence involving violence is a clear indication that the Appellant would benefit from interventions such as those provided by a sentence of correctional supervision. This court's view is that this ought to have been considered for the purposes of determining what sentence would be appropriate.

[25] It should be remembered that the society whose interests a sentence imposed on the offender should serve, do, in fact, include the offender's family. The interests of the Appellant's children, in particular the two minors, should

have been uppermost in the sentencing court's consideration of an appropriate sentence, notwithstanding the fact that *in casu*, the Appellant might not the primary care giver of the two minor children. The fact that he was their sole supporter who was in permanent employment, should have been given due consideration by the court below. It is on this very same basis that the sentencing court is enjoined to consider each case according to its unique circumstances.

[26] Nothing appears on the record of proceedings in the court below to support a conclusion that, for the circumstances under which the Appellant committed the offence of which he was convicted, he had to be removed from society. Regarding the interests of society, it is this Court's view that most reasonable members of society would not have expected a custodial sentence to have been imposed on the Appellant if his employment and the circumstances of the commission of the offence were taken into account. The court *a quo* failed to take those factors into account.

[27] The principles enunciated in *Zinn* quoted above, as applied and confirmed in subsequent authorities, are peremptory. No factor must be over-emphasized at the expense of the other relevant factors[10]. When all the above factors are taken into account, it becomes an inescapable conclusion that lip service was

[10] Zinn, at 540 F

paid to the balancing exercise of the offence, the offender, and the interests of society.

[28] It was submitted by Ms Obermeyer that the sentence should be set aside and the matter remitted to the court *a quo* for further information to be placed before the trial court by the probation officer. In the absence of an indication by the learned Magistrate that the report was lacking in any respect, and in view of the fact, that both the prosecution and defence were content with the report when it was submitted to the court *a quo,* such a course would not meet the exigencies of this case. There is sufficient information before for this Court to enable it to impose a sentence which it deems appropriate.

[29] In the result, I would make the following order:

1. The appeal against sentence is upheld.
2. The sentence of 30 months' imprisonment imposed by the court *a quo* is set aside and replaced with the following sentence:

2.1.1 The Appellant is sentenced to undergo correctional supervision for a period of 24 months, in terms of section 276(1)(h) of Act 51 of 1977 subject to the following conditions:

(i) The Appellant shall be under house detention at his current place of residence from 18h00 until 06h00, from Friday to Sunday.

(ii) The Appellant shall render free community service as directed by the probation officer, for the duration of such correctional supervision.

(iii) The house detention and free community service shall not interfere with his employment.

3. The Appellant shall attend programs, the dates and duration of which shall be determined by the probation officer.

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L. RUSI
JUDGE OF THE HIGH COURT (ACTING)

I agree, and it is so ordered.

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M.S JOLWANA
JUDGE OF THE HIGH COURT

Appearances: *Adv. H. L McCallum for the Appellant.*
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