



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

**Case no. A195/2023**

In the matter between:

**WARREN JAFTHA**

**Appellant**

and

**THE STATE**

**Respondent**

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**JUDGMENT DELIVERED ON THIS 8TH DAY OF NOVEMBER 2023**

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**ANDREWS AJ:**

**Introduction**

[1] The Appellant, Mr Warren Jaftha, was convicted in Oudtshoorn Regional Court on one count of attempted murder, in that the accused unlawfully and intentionally attempted to kill the complainant by hitting him with a panga. Following his conviction, the Appellant was sentenced to 10 years' imprisonment. The court *a quo* refused the Appellant leave to appeal against sentence. On 15 June 2023, the Appellant was granted Leave to Appeal against sentence on petition.

[2] The Appellant pleaded not guilty to the charge of attempted murder and guilty to assault with intent to do grievous bodily harm; however, after the statement in terms of Section 112(2) of the Criminal Procedure Act<sup>1</sup> (“CPA”), was read into the record, the Appellant indicated that it was not his intention to assault the complainant. The court thereafter applied the Section 113 of the CPA and changed the Appellant’s plea to one of not guilty. The court, after hearing the *viva voce* evidence of the complainant, the medical doctor and the Appellant, found the Appellant guilty of attempted murder.

### **The incident**

[3] The factual matrix of the incident, upon which the Appellant was convicted can be summarised as follows. The complainant went over to Michelle’s house looking for her as he wanted to give her money for food. He enquired from the Appellant where she was. The Appellant informed him that Michelle was not home, swore at the complainant and called him a “moffie”. The complainant whilst walking away, was struck over the head once with a panga by the Appellant. The Appellant was thereafter taken to Groote Schuur where he underwent an emergency operation.

### **Summary of the address on Sentence**

[4] The Appellant’s legal representative placed the Appellants personal circumstances on record, namely that he was a 26 years old, unmarried and had

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<sup>1</sup> Act 51 of 1977.

passed grade 8 at school. The Appellant was unemployed at the time with no dependents. He was residing with his mother.

[5] It was further placed on record that the incident was not premeditated. Submissions pertaining to the rights of the accused and the victim were made with a view to reminding the court to ensure that a balance is maintained and that justice is done when imposing an appropriate sentence. It was conceded that the offence was serious. The court was implored to consider a sentence that would allow the Appellant to rehabilitate in the community, notwithstanding his one relevant previous conviction.

[6] The prosecution emphasised the unprovoked nature and seriousness of the offence which culminated in the complainant ending up in hospital and had it not been for the swift medical intervention, the possibility existed that the complainant could have succumbed to his injuries. It was also highlighted that the concession by the Appellant that he felt humiliated should be viewed as an aggravating. It was mooted that if someone could so easily have been humiliated, such person does not belong in the community and that society in general should be protected from people such as the Appellant. The Prosecution also contended that the Appellant was not deterred by the condition of his one relevant previous conviction and as such he is not suitable to be rehabilitated in the community and requested the court to impose a lengthy custodial sentence not shorter than 7 years.

### **Grounds of Appeal on Sentence**

[7] The Appellant contended *inter alia* that the Court *a quo* erred:

- (a) in imposing a sentence that was not appropriately individualised to fit the crime, the Appellant and the circumstances of the case;
- (b) in overemphasising the interest of society and the retributive consideration and took no consideration of the restorative aims of punishment;
- (c) by failing to inform itself of all the relevant factors needed to reach a balanced sentence, including factors that may reduce the severity of the crime;
- (d) in finding that long term direct imprisonment was the only appropriate sentence for the crime of attempted murder and not considering other forms of punishment and
- (e) in finding that the attack was homophobic in nature.

### **Grounds for opposing appeal**

[8] The Respondent contended that the court *a quo* considered all the factors of the triad together with the aims of sentence. It was argued that the court rejected the version of the Appellant as being false and that the Appellant was found guilty of a very serious offence, highlighting in aggravation, that a serious injury was inflicted. The Respondent submitted that the sentence imposed by the court *a quo* was an appropriate sentence and was not shockingly inappropriate. It was submitted that the Appellant has a propensity to commit violent crime and has shown no remorse.

### **The Legal Framework**

[9] The guiding principles for an appeal court has been succinctly set out by Davis AJA in *R v Dhumayo and Another*<sup>2</sup> as follows:

“ ...

3. *The trial Judge has advantages- which the appellate court cannot have- in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.*

4. *Consequently the appellate court is very reluctant to upset the findings of the trial Judge.*

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8. *Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.*

9. *In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.*

10. *There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.*

11. *The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.*

12. *An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.*

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<sup>2</sup> 1948 (2) SA 677 (A).

13. *Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important, whether in a civil or criminal case ...*<sup>3</sup>

[10] It is trite that sentencing is within the discretion of the trial court and that a court of appeal will not lightly interfere with the sentence imposed. The powers of the court of appeal are relatively limited to those instances where the sentence is vitiated by irregularity or misdirection or where there is a striking disparity between the sentence passed and that which this court have imposed.<sup>4</sup> In **S v Pillay**<sup>5</sup>, the court set out the correct approach to an appeal against 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 it exercised its discretion properly or judicially, a mere misdirection 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 a misdirection is usually and conveniently termed one that vitiates the Court’s decision on sentence.”*

[11] In sentencing the accused, the court is to have regard to the nature and seriousness of the offences, the personal circumstances of the accused as well as the interest of society<sup>6</sup>. In **S v Banda and Others**<sup>7</sup>, Friedman J stated the following:

*“The elements of the triad contain an equilibrium and a tension. A court should when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one*

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<sup>3</sup> At 705-6.

<sup>4</sup> *State v Steyn* 2014 JDR 0596 (SCA) para 11 where Mhlantla JA stated:

*‘The imposition of sentence is pre-eminently within the discretion of the trial court. The court of appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or so totally out of proportion to the magnitude of the offence, sufficiently disparate, vitiated by misdirection showing that the trial court exercised its discretion unreasonably or is otherwise such that no reasonable court would have imposed it.’*

<sup>5</sup> [1977] 4 All SA 713 (A) 717; 1977 (4) SA 531 (A) 535E-G.

<sup>6</sup> See *S v Zinn* 1969 (2) SA 537 (A) and *Fredericks v S* [208/11] [2011] ZASCA 177 (29 September 2011).

<sup>7</sup> *S v Banda and Others* 1991 (2) SA 352 (BGD) at 355 A – B.

*element is not unduly accentuated at the expense of and to the exclusion of others. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community; its welfare and concern.”*

[12] In determining a fair, just and proportionate sentence, a court should have regard and be mindful of the foundational sentencing principles that the punishment should fit the crime, as well as the criminal, be fair to society and be blended with a measure of mercy.<sup>8</sup> The concept of mercy was articulately and concisely enunciated by Holmes JA in *Rabie (supra)*<sup>9</sup> as follows:

- “(i) it is balanced and humane state of thought.*
- (ii) it tempers one’s approach to the factors to be considered in arriving at an appropriate sentence.*
- (iii) it has nothing in common with maudlin sympathy for the accused;*
- (iv) it recognises that fair punishment may sometimes have to be robust.*
- (v) it eschews insensitive censoriousness in sentencing a fellow mortal, and so avoid severity in anger.*
- (vi) the measure of the scope of mercy depends upon the circumstances of each case.”*

### **Issue to be decided**

[13] The crisp issues to be decided is whether:

- (a) there is any evidence that the victim was assaulted because of his sexuality and
- (b) the sentence imposed by the court *a quo* is disturbingly inappropriate or is vitiated by a misdirection.

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<sup>8</sup> See *S v Rabie* 19975 94) SA 855 (A) at 862 G-H.

<sup>9</sup> At page 862D.

## Considerations of the court *a quo*

[14] The court *a quo*, in its sentence judgment remarked as follows:

*“The court in sentencing will look at the triad which is your personal circumstances, the seriousness of the crime, the society’s interest ...”*

[15] The court further took into account that the Appellant was not a first offender as he was previously convicted for a similar offence. It is furthermore apparent that the court *a quo* considered the prospect of rehabilitation.<sup>10</sup> The court dealt with the rehabilitation consideration within the context of whether accepting responsibility and showing remorse.

[16] The court *a quo* took into account the objectives of sentence in reference to decided case authorities on this point. The court considered the seriousness of the offence and was alive to the fundamental legal principle referred to in a plethora of case law that the punishment must fit the crime.

[17] The court *a quo* also referring to ***S v Matyityi***<sup>11</sup> considered what was referred to as the fourth principle, namely that sentences have to be victim centred.<sup>12</sup> In this regard the court considered that the victim still suffers with constant headaches. Additionally, the injury has caused disfigurement that could not be corrected through

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<sup>10</sup> Sentence Record page 32, page 198 of Appeal bundle at line 20 ‘You have come before this court and you have a right as I have mentioned to silence however in *S versus Jantjie of 2011 (sic)* says it is easy to learn from the behaviour of the accused person during the trial that a certain type of a sentence will achieve the objective of rehabilitating the said offender.’

<sup>11</sup> 2011 (1) SACR 40 (SCA).

<sup>12</sup> Appeal record, ‘For a long time the victims of crime were kind of not considered or rather ignored when sentence is considered’.



plastic surgery and the traumatic effect this has on the moral and confidence of the complainant.

[18] The court *a quo* found that the only sentence which will “balance or address or deter” the Appellant would be direct imprisonment.<sup>13</sup>

### **Seriousness of the offence**

[19] The complainant sustained a serious injury. In this regard, Dr De Klerk testified that the complainant had an open wound on his forehead, measuring 5cm in length with some bony fragments in the wound. According to Dr De Klerk, there was a depression in the skull which suggested a skull fracture. The doctor further orated that the injury was an open skull fracture, which was life-threatening with what she termed a “*lot of life threatening complications.*”<sup>14</sup> Dr De Klerk further opined that if there had been a delay in administering the necessary medical care, the likelihood existed that the complainant may have died.<sup>15</sup> Further evident from Dr De Klerk’s testimony is that a lot of force was used to cause the injury which has left the complainant disfigured. From this the doctor deduced that the object that caused the injury would have been heavy.

[20] The nature of the injury was such that the complainant had to undergo an emergency skull operation. The depression in the skull was suggestive of a skull

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<sup>13</sup> Sentence Record at page 36, Appeal Record paginated page 202.

<sup>14</sup> Appeal Record, page 98, lines 3 – 5.

<sup>15</sup> Appeal Record, page 101, lines 10 – 15.

fracture. The life threatening nature of the injury was explained by the doctor who stated that:

*“There are clinical signs that you look for and obviously I felt that clinical signs were there and that is why he qualified for a CT brain. And the risk we have there is bleeding on the brain. Brain contusions which need then urgent surgery. So once again this patient needs to get to George and if the patient has got a brain bleed it might be (sic) number 1 it might be large and number 2 it might be an expanded bleed. So you don’t know how much time you have for surgical intervention to drain the bleeding and to reduce the swelling on the brain. And then also afterwards, after an injury like that like any open fracture, so my initial management in casualty was also that of an open fracture, is your risk for infection with an exposed fracture and also the exposure of the brain, the risk for infection, brain abscesses, meningitis, which are also life threatening illnesses, also exist.”<sup>16</sup>*

[21] The complainant attended at Oudtshoorn and then George for a CT brain scan and was later transferred to Groote Schuur Hospital where he received inpatient treatment for a period of 5 days.

### **Homophobic attack**

[22] The Appellant submitted that the court *a quo* misdirected in finding that the attack was homophobic in nature. In amplification it was contended that no mention thereof was made in the complainant’s statement. It was furthermore mooted that in order for an attack to qualify as homophobia, adequate evidence should be presented to court. In this regard, it was argued that calling someone a name is not sufficient proof of hatred of another’s sexuality.

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<sup>16</sup> Appeal record, pages 101 – 102.

[23] The evidence on record is that the Appellant swore at the complainant and made certain derogatory remarks about his sexuality. The Appellant thereafter attacked the complainant with a panga. The Respondent contended that the only conclusion that can be drawn from the accepted facts is that this was a homophobic attack and that the court *a quo* was correct in describing the attack as homophobic. The Respondent submitted that this attack is analogous to racism and that an attack motivated by homophobia is aggravating for the same reasons.<sup>17</sup> It was submitted on behalf of the Appellant that the court *a quo* elevated the nature of the offence to homophobia.<sup>18</sup>

[24] I pause here to deal with the exchange between the Magistrate and the legal representative of the Appellant.

*“Your Worship I can just say to the court this is the impression I got from my own client I have actually asked him upfront if this is the position with regards to and he has not told this to me before but my impression of client self Your Worship is that he is also homosexual, so they are both homosexual even the accused is homosexual Your Worship.”<sup>19</sup>*

[25] The sexual orientation of the Appellant, prior to this moment, was never raised. In fact, the complainant testified that it was the Appellant who uttered words to the effect:

*“Hy het vir my sê hey jou moffie fok hier, sorry vir die woord, fok hier weg van die huis af jy kan mos sien Michelle is nie hier nie.”<sup>20</sup>*

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<sup>17</sup> Respondent's Heads of Argument, paras 40 – 4.

<sup>18</sup> Appellant's Heads of Argument, para 16, page 5.

<sup>19</sup> Appeal Record, page 191, line 20.

<sup>20</sup> Appeal record, pages 55 – 56, line 20.

[26] The question to be answered in this regard is whether there is any evidence on record that the victim was assaulted because of his sexuality. The Respondent conceded that there is no evidence that the victim was assaulted because of his sexual orientation. The record is silent on this aspect.

[27] In light hereof it behoves this court to deal with the court *a quo*'s remarks in this regard.

*“The offence itself is serious and it is coupled with hatred which this country is facing. Violence against gay lesbian and other...We have lost many of our members of the community due to this hatred. We are living in a democratic society. South Africa is a democratic society one can practice whatever they want to practice especially with my body. You cannot hate me because I am lesbian. I cannot hate you because you are gay that is your personal choice and those are the thing we need to address in our community.”<sup>21</sup>*

### **Judicial Notice**

[28] The Appellant contended, as a ground of appeal, that the court could not have taken notice of the fact that *‘[w]e have lost many members of our community due to this hatred.’<sup>22</sup>* It is trite that facts may be judicially noticed even if they are not general knowledge. There is an overabundance of case law and judicial writings dealing with the doctrine of judicial notice, which does not require restating save to reiterate that judicial notice can be taken even in circumstances where facts which are not generally known but which is readily and easily ascertainable from sources of indisputable authority. It was also correctly pointed out by the Respondent that the court may take judicial notice of social conditions and crime.<sup>23</sup>

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<sup>21</sup> Appeal Record, pages 199, line 20 – 200 line 10.

<sup>22</sup> Appeal record, page 200.

<sup>23</sup> Respondent's Heads of Argument, paras 46 and 48; Schwikkard PJ and Van der Merwe SE *'Principles of Evidence'* (Fourth Ed) page 526 – 527.

[29] Even if the court may take judicial notice of social conditions and crime, I am of the view that emphasis on homophobic attacks were not pertinent to the facts and or factual findings of this particular case *in casu*.

## Discussion

[30] The Appellant is not a first offender. He was convicted on 30 October 2016 on a count of assault to do serious bodily harm and sentenced to pay a fine of R1500 (One Thousand Five Hundred Rand) or eight (8) months imprisonment. In addition, he was sentenced to a further six (6) months imprisonment, which was wholly suspended for a period of five (5) years on condition that he is not again found guilty of a crime involving violent crime during the period of suspension. It is evident that the Appellant committed this offence during the period of suspension. No application was made to put the suspended sentence into operation.

[31] It was contended on behalf of the Appellant that the court *a quo* disregarded the Appellants personal circumstance. The personal circumstances of the Appellant were placed on record by his legal representative however, the court *a quo* simply remarked, "*Looking at your personal circumstances, the seriousness of the crime, society's interest...*"<sup>24</sup> The fact that the court *a quo* did not restate it, does not mean that it was not considered as was aptly enunciated in ***Rex versus Dhlumayo and Others***<sup>25</sup> that:

*"An Appellate Court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-*

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<sup>24</sup> Appeal record, page 198, line 15.

<sup>25</sup> 1948 (2) SA 677 (AD) at 760.

*embracing and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.”*

[32] It is however apposite to mention that the court *a quo*'s judgment on sentence comprised of approximately 4 pages. The court dedicated at least one page on remarks that were unrelated to the accepted facts and evidence that were placed before it. The Presiding Officer has to be criticised for wondering off into territory that were not chartered during the trial.

## **Conclusion**

[33] This court on appeal cannot simply *juxtapose* its views and opinions on sentence and then conclude that the sentence of the court *a quo* is inappropriate if it differs from what this court would have done. It is only when the trial court has exercised its discretion in an improper manner or misdirected itself that interference will be warranted.<sup>26</sup> It is trite that an appeal court will not interfere with the trial court's exercise of its discretion in relation to sentence.<sup>27</sup>

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<sup>26</sup> *S v Rabie* 1975 (4) SA 855 (A); See also *S v Pieterse* 1987 (3) SA 717 (A).

<sup>27</sup> See *S v Romer* 2011 (2) SACR 153 (SCA) at para 22 Petse AJA stated

*'It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justify interference on appeal has been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence is*

*(a) Disturbingly inappropriate;*

*(b) So totally out of proportion to the magnitude of the offence;*

*(c) Sufficiently disparate;*

*(d) Vitiating by misdirections showing that the trial court exercised its discretion unreasonably;*  
*and*

*(e) Is otherwise such that no reasonable court would have imposed it.'*

See also *S v Hewitt* 2017 (1) SACR 309 (SCA); and *S v Livanje* 2020 (2) SACR 451 (SCA).

[34] The test to be applied is whether the trial court in imposing the sentence exercised its discretion properly or not.<sup>28</sup> I am therefore of the view that the court *a quo* misdirected itself in overemphasising the homophobic undertones as a reason for the assault, which was not raised in evidence. It is manifest that the court *a quo* placed disproportionate emphasis on evidence that were not traversed during the trial. This is a clear misdirection and is deserving of censure. As a result, the sentence imposed by the court *a quo* is disturbingly inappropriate and warrants interference.

[35] It is further pellucid that the Appellant has not shown any remorse and his attempt to plead guilty on a lesser charge of assault with intent to do grievous bodily harm is not indicative that he was remorseful but merely an attempt at getting a lesser sentence. The Appellant throughout the trial, failed to accept responsibility. At no stage did the Appellant express any compassion towards the complainant for what had happened and/or for leaving him with a life-long stark reminder of that fateful, vicious and unsolicited attack. The victim will forever carry a life-long scar as he has been disfigured to such an extent that no amount of plastic surgery will be able to fix. I am in agreement with the Respondent that the moral blameworthiness of the unprovoked attack and the seriousness of the injuries sustained by the complainant cannot be overemphasised.<sup>29</sup>

[36] This court has regard that the Appellant is still relatively young. However, I am of the view that a sentence proportionate to the gravity of the offence and the degree of responsibility of the Appellant in this matter demands a punitive sanction

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<sup>28</sup> *S v Matlala* 2003 (1) SACR 80 (SCA) at 83d-e; *S v Shapiro* 1994 (1) SACR 112(A) at 123c-f and *S v Sandler* 2000 (1) SACR 331 (SCA) paras 6 – 9.

<sup>29</sup> Respondent's Heads of Argument, para 32.

of direct imprisonment, which is to be blended with considerations of the main purpose of punishment which are deterrent; preventative, reformatory and retributive.<sup>30</sup>

[37] In the circumstances I would uphold the appeal. The sentence imposed by the court *a quo* is accordingly set aside and replaced with the following sentence:

**The accused is sentenced to ten (10) years imprisonment of which five (5) years imprisonment is wholly suspended for a period of five (5) years on condition that the accused is not again convicted of murder or attempted murder or assault with intent to do grievous bodily harm or attempt thereto or assault or attempt thereto, committed during the period of suspension. The sentence is to run retrospectively from the date that sentence was imposed, namely 25 November 2022.**

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**ANDREWS, AJ**

I agree and it is so ordered.

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**FORTUIN, J**

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<sup>30</sup> See *R v Swanepoel* 1945 AD 444 at p455.



**APPEARANCES:**

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*Heard on:* 20 October 2023

*Delivered:* 08 November 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email