REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A555/2013

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

06 August 2014
Date

Signature

In the matter between:

LUNGELO LENNOX SAWULE **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

RATSHIBVUMO AJ:

1. Mr. Sawule, the appellant, was charged with three counts of common assault in the Magistrate Court for Klerksdorp. He pleaded 'Not Guilty' to all the charges and was legally represented throughout the

trial. He was however convicted of all the charges and was sentenced to 24 months imprisonment in terms of sec 276 (1) (i) of Act 51 of 1977 on 08 February 2013. His application for leave to appeal the sentence was refused by the trial court. He was however released on bail pending the application in which he petitioned the Judge President of this division for the leave to appeal on 25 February 2013, after spending 16 days in custody. Leave to appeal was ultimately granted by this court through the petition on 07 May 2013.

2. The appellant was employed as a Captain within the South African Police Services (SAPS), stationed at the Crime Intelligence, Lentek Building, Desmond Tutu Street in Klerksdorp – North West. His version had to be rejected for the conviction to follow. The facts which the trial court found to have been successfully proved by the State were to the effect that the appellant assaulted three of his female colleagues at the workplace over a work related argument. The *court a quo* found two of these to have been slapped with a 'backhand' once each, whereas the third one who was standing by the doorway was elbowed to make way for the appellant.

3. Since the matter before us is the appeal against the sentence and not the conviction, no address was made regarding the correctness of the conviction or whether the same is in accordance with justice; and as such, that question does not arise before us. The trial court however accepted the State witnesses' version to the effect that the argument was over the intelligence report compiled by the appellant in his capacity as the acting Operation Commander. The said report was forwarded to its destination by the appellant's senior and acting Cluster Head who happened to be one of the colleagues he slapped.

She had altered the report before forwarding it without informing its author, the appellant about the alterations. She refused to account or to explain to the appellant as to what alterations she made and what necessitated them. It was during this argument as indicated above, that the *court a quo* found he slapped each one of the two once and elbowed the last one.

4. The imposition of sentence is pre-eminently a matter within the judicious discretion of a trial court. The appeal court's power to interfere with a sentence is circumscribed to instances where the sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court. – See *S v Petkar* 1988 (3) SA 571 (A), *S v Snyder* 1982 (2) SA 694 (A) and *S v Sadler* 2000 (1) SACR 331 (SCA).

5. The art of applying the proper guidelines in imposing a sentence is achieved by a consideration, and an appropriate balancing, of what the well-known case of *S v Zinn* 1969 (2) SA 537 (A), at 540G-H described as a 'triad consisting of the crime, the offender and the interests of society.' Although these interests may be conflicting in nature, it is expected of sentencing court to keep a fine balance between them, and it must endeavour not to over or to under emphasise anyone of them – see *S v Moodley* (SS42/05) [2005] ZAGPHC 78 (4 August 2005). Overemphasising some interests over others is a misdirection.

6. A pre-sentence report and a psycho-social report were sought by the trial court and were made available before the sentence. From these,

the following personal circumstances of the appellant's were highlighted. At the time he was 51 years old and employed as a police officer holding the rank of a Captain with more than 24 years of service within the SAPS. He is a married father of four; one minor and three majors who are unemployed and dependant on him. His wife worked as a waitress and between the two of them, they earned a net income of about R10 000.00 of which R7 500.00 came from the appellant. His monthly expenses were *inter alia* R3 000.00 for the rent of the five roomed house he occupies with his family, R 2 000.00 for groceries and R800.00 for school fees.

7. He was at the time a student studying for a police diploma through distance learning. Both the appellant and his wife were diagnosed with a chronic medical condition of which they are taking regular treatment. The appellant has a similar previous conviction – common assault – for which he was sentenced to a fine of R1 200.00 or 120 days imprisonment, half of which was conditionally suspended for three years. At the time of the commission of the current offences, the period of suspension had already lapsed. According to this report, a sentence that could see the appellant lose his job would affect his children since he was the one able to look after their basic needs, something the wife could not afford on her own.

8. Other aspects these reports covered were the interests of the society and the crime the appellant was convicted of. These entailed, "that no weapon was used in the commission of the crime, the appellant did not take full responsibility for the crimes, the offences were not planned and took place simultaneously and that he was not a danger

to the society." The reports also took note of the fact that the previous conviction did not deter the appellant from committing a similar offence. The common denominator in the reports is that they all recommended against custodial sentence. The presentence report recommended a suspended sentence with conditions that the appellant completes therapeutic sessions with a social worker. The psycho-social report on the other hand recommended a correctional supervision sentence.

9. **Provocation**. Although the appellant's version of events was rejected, he claimed to have been provoked by his senior who insulted him making prejudicial utterances on him. The prosecutor was alive to this possibility when addressing the court on sentence when he said there were other avenues available to him such as to report and address those prejudicial remarks if they were indeed made.

10. Chances of the appellant being provoked appear to be greater when one takes into account the fact that it was not the first day he confronted his senior over the report. He did that a day before, and he was refused access. The next day he persisted on demanding access to the report which he believed contained bad remarks about him. The complainant steered away from divulging the contents of the report when she gave evidence. According to State witnesses, it was only after one of the complainants stood up very close in front of the appellant that he delivered the first slap with the backhand. But surely, there were better options to challenge the complainant on her management style than a confrontation. Given this background, it would appear that the appellant may have indeed been provoked to his limits.

11. **Minor offence**. Whereas common assault embraces a wide range of unlawful activities, it may be classified as a minor offence – see *S v Aniseb and Another* 1991 (2) SACR 413 (NB) at 414. In certain circumstances, the seriousness of assault does not have to be measured by the consequential injuries, but by the manner of execution of such assault. In *S v Visagie* 2009 (2) SACR 70 (W), which happened to be a case of assault at the workplace too, the appeal court was of the view that 'pushing' the victim was so trivial that it did not even warrant a conviction. While the appeal court was satisfied that the act of pushing covered all the elements of assault, the conviction was set aside based on *de minimis non curat lex* maxim. The court reached this decision even though the victim had fallen down when he was so pushed, and even broke his wrist.

12. It would appear from the judgment on sentence that the magistrate was not persuaded to impose any of the recommended form of sentences, preferring rather a custodial sentence because the appellant had a similar previous conviction; that the offence was committed against the women and that it took place at his workplace. For those reasons, no correctional supervision report was sought which could have enabled the court to identify available and relevant programs as recommended by the social workers.

13. Violence against women and/or children is serious because these happen to be the most vulnerable members of our society – *S v K* 2008 (1) SACR 84 (C). Whether it is committed at workplace, home or any public place, it makes no difference. Violence against women is a crime and has to be uprooted irrespective of where it is

committed. There is therefore nothing unique at the fact that the victims in this matter were attacked at their workplace.

14. The only aspect that stands above others in respect of this appellant is therefore his previous conviction. The SAP 69 reflects that a fine was imposed which was partially suspended whereas the remaining portion of the fine was payable for him to gain his freedom. The period of suspension had already lapsed at the time of the commission of the current offence. It would appear that sight was lost of the fact that the appellant served his sentence for the previous conviction and that this time around, he had to be sentenced for the current conviction. In *S v Beja* 2003 (1) SACR 168 SE (at p. 170) Pillay J held,

> "The magistrate clearly, in my view, misdirected himself in overemphasising the prevalence of the crime, the impact of the list of previous convictions of the accused and seemed to be misguided in reasoning that the accused could not be rehabilitated without a long term of imprisonment and thereby disguising the sentence so as to give the impression that it is in the interest of the accused. It is trite that the sentence must always fit the crime and the fact that the person to be punished has a long list of previous convictions of a similar nature, while it may be an important factor, *could never serve to extend the period of sentence so that it is disproportionate to the seriousness of the crime for which such a person must be punished*. A period of imprisonment must always be reasonable in relation to the seriousness of the offence." [*own emphasis*]

15. It all comes down to the basic principle that the punishment should fit the crime. Otherwise it inevitably overemphasises the interests of society at the expense of the interests of justice and the interest of

the offender. If it does this, it cannot be a just sentence. In *S v Baartman* 1997 (1) SACR 304 E (at 305) Jones J held,

> "In a case such as this it is necessary to be aware of three considerations:
>
> (a) the accused should be sentenced for the offence charged and not for his previous record;
>
> (b) the public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and
>
> (c) while it may be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased.
>
> Thus, a thief who steals a loaf of bread should not have to go to gaol for 10 years because he has stolen countless loaves of bread, one at a time, in the past. His sentence should never escalate with the passage of time from a few weeks for initial offences, to a few months, eventually to years, and then to many years; the offence remains a petty offence no matter how often it is repeated."

The list of previous convictions cannot serve as a reason for imposing a sentence above what can be regarded as a normal sentence for the offence. It may however serve as a reason not to be merciful to a repeat offender. See *R v Petersen* 1944 EDL 165, *S v Shabangu* [2005] JOL 16217 (T) and S v Smith [2000] JOL 7026 (E).

16. It is clear that any reference to the appellant's personal circumstances was used by the court *a quo* as aggravating circumstances, ignoring all that served as mitigating. While the court is not bound by the recommendations of the social workers in imposing sentence, one would expect motivated reasoning for rejecting the same. This is lacking in the magistrate's judgment on sentence. Clearly the magistrate misdirected herself in overemphasising the interest of the

society over the appellant's personal circumstances. As a result, the sentence imposed is disproportionate to the offence he was convicted of. This misdirection on the part of the trial court calls on the appeal court to intervene and substitute the sentence imposed.

17. **Irregularities and fair trial.** We observed from the record disconcerting remarks and/or conduct of the trial by the presiding magistrate throughout the trial which have some impact on whether the proceedings were irregular.

18. Just after the prosecutor read out the charges of assault against the appellant, the following appears from page 2 of the record:

> INTERPRETER: The accused understood Your Worship.
> HOF: Al drie klagtes?
> ACCUSED: Yes Your Worship.
> HOF: Net 'n oomblik voor u pleit Mnr Aanklaer hirdie twee klagtes maak nie voorsiening vir enige beserings of iets nie.
> PROSECUTOR: Let me quickly just amend the charge sheet Your Worship.
> HOF: Sover ek weet moes daar darem by aanranding iets wees 'n kneusing of iets.
> PROSECUTOR: If I may just explain the charge to be clear Your Worship.
> HOF: U gaan nie 'n problem het nie, you do not have a problem?
> MR MOLAMU: As the court pleases Your Worship. No objection Your Worship.
> PROSECUTOR: As it pleases the court Your Worship. The annexures have been amended to read as follows:

The Public Prosecutor thereafter read out the charges having added the words: "… causing her injuries or certain wounds." It is not clear from the record how the magistrate questioned the facet of injuries on charges of common assault.

19. And on page 9 of the record, just as the Public Prosecutor was leading the first witness, the following appears:

> HOF: Net 'n oomblik. Kaptein hierdie is nie 'n grap nie. Dit is nie sirkus nie verstaan u my baie mooi? Meneer u moet u klient aanspreek asseblief.

The record does not reflect why the accused had to be rebuked like this.

20. On page 24 of the record, the attorney asked his 11th question in cross examination of the complainant which by then amounted to just over one page:

> MR MOLAMU: Were there other people who came in with him or was he alone? --- He was on his own.
> HOF: Please do not repeat questions that has already answered. Proceed.
> MR MOLAMU: […] He shouted. He then stormed out of the room, is that correct, when he did not receive the report --- Yes.
> He was followed by Mrs Market, is that correct? --- Yes.
> COURT: Sorry sir you are not busy in cross-examining you are busy repeating her evidence.
> MR MOLAMU: Uhm.
> COURT: So please proceed with cross-examination.
> MR MOLAMU: As it pleases the court Your Worship.

COURT: There is no use in repeating what she already testified.

21. On page 26 the following appears from the record:

MR MOLAMU: […] Therefore from the point where she was standing she could see everything that was happening inside the office that you were in, from the point where you were standing. …Yes I could (intervene)

COURT: How can she answer that? She do not know what Market see or what she not see.

MR MOLAMU: Your Worship (intervene)

COURT: How can she answer you sir? She cannot answer on behalf of Market what she could see or not. Leave that question for Market who an answer you.

22. The attorney eventually abandoned the questions over Mrs Market. Mrs Oosthuizen had already started to respond and her answer to the question was 'yes…' but with the magistrate's intervention, she could not finish her answer. I do not see the basis for preventing the witness from answering the question. If she did not know if Mrs. Market saw the events, she could indicate that she did not know. She may have observed that Mrs. Market saw what happened seeing elsewhere in her evidence she talks of Mrs. Market shouting to the appellant to stop. Another possibility is that Mrs. Market could have told her that she saw everything since these people work together and may have talked about it in later days. Mrs. Market also testified and one understands why the attorney adopted this line of cross examination since her version of events varied to an extent with that of Mrs. Oosthuizen.

23. On page 29 of the record, the following appears:

> MR MOLAMU: […] Did you sign the statement? --- Yes I did. Your Worship as it pleases the Court may I please ask (indistinct)
> COURT: Do what?
> MR MOLAMU: As it pleases the Court may I please ask whether it is her signature on there.
> COURT: No you cannot. She admit it that she signed it why must she confirm it is her signature.
> MR MOLAMU: Is that the statement she made Your Worship.
> COURT: Ja she admit that she did sign it. Dankie.
> MR MOLAMU: As it pleases the Court. Mrs Oosthuizen after the accused had hit or smacked Mrs Dumont you informed the Court that he also smacked you as well. At this point in time (intervene)
> COURT: Net 'n oomblik. Weet jy do not mislead the witness. Wie het hy eerste gestaan, vir u? --- Nee eerste vir Lydia.
> O jammer meneer, jameer.

24. Page 107 of the record reflects how after cross examination of the appellant by the Public Prosecutor, the Defence Attorney attempted to re-examine him unsuccessfully so.

> MR MALOMU: Thank you Your Worship. Capt Sawule on the 14 July 2011 how was your demeanour when you went to Col Oosthuizen office.
> COURT: Sorry mister uhm what is your name again… Malomu
> MR MALOMU: Malomu Your Worship
> COURT: You cannot lead new evidence now at this stage re-examination is only when you want to clarify something that your client has already testified on. You cannot now, it is not an opportunity to put new evidence before court.

25. After attempting to ask about 4 questions, all of which were disallowed by the court, the following appears on page 109.

> MR MALOMU: As the Court pleases Your Worship. Capt Sawule could you clarify to the court on, you said to the, can you clarify to the court on that day did you actually during the proceeding or the incident touch Mrs. Oosthuizen at any point? --- No.
>
> Out of the two people (intervene)
>
> COURT: Mr Malomu please.
>
> MR. MALOMU: As the Court pleases Your Worship no further questions from the defence.

26. Cross examination is an art that develops with experience. As judicial officers we are expected to exercise the patience that would ensure that justice is not only done but also seen to be done. We do not know if the statement the defence attorney wanted to cross examine the complainant on is the one she had made and signed. The magistrate seemed to be sure that it was, to the extent that she refused further basis being led on it. We can only speculate as to what could be contained in the statement and what the outcome of the trial could have been had he been allowed to cross examine the witness on it.

27. In *S v Musiker 2013* (1) SACR 517 (SCA) the court held that cross examination on a statement was an important piece of evidence that deals with the credibility of a witness which cannot just be barred simply because counsel failed to lay the basis. A judicial officer in criminal matters does not just sit as an umpire waiting to decide the winner in a duel between the State and the defence. It is about justice. Failure by the presiding officer to assist an inexperienced

attorney in laying the basis that would enable cross examination on a statement was found to be unacceptable thereby rendering the trial proceedings irregular – see *S v Musiker* supra (at paragraph 17).

28. Equally, I do not understand the legal basis for the magistrate's conclusion that re-examination is preordained for what the witness already testified on as opposed to what may have been raised through cross examination. For some of the questions the defence attempted to raise emanated from the cross examination by the public prosecutor.

29. In *S v May* 2005 (10) BCLR 944 (SCA) Lewis JA held,

> "The trial must be so conducted that the judicial officer's "open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused". "The Judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression. A Judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. As Lord Greene MR observed in *Yuill v Yuill* (1945) 1 All ER 183 (CA) at 189B, if he does indulge in such questioning– 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation.'"

See also *S v Rall* 1982 (1) SA 828 (A) and *S v Mseleku* 2006 (2) SACR 237 (N).

30. It is trite that disallowing admissible questions in a trial is an irregularity which can render a trial unfair - *S v Matroos* [2005] 2 All SA 404 (NC). While we have no doubt that thwarting the defence' attempts to cross examine or examine the witnesses freely rendered the proceedings irregular, it does not follow automatically that irregular proceedings make the trial unfair – see *S v Nnasolou and Another* 2010 (1) SACR 561 (KZP) where proceedings were found to be fair though irregular. Since the question on conviction does not arise – for it was not raised on the application for leave to appeal before the court a quo, it was not part of the petition and was not even addressed on papers before us; I do not see the need to go beyond a finding on irregularity – see *S v Hlungwani* (A37/2013) [2013] ZAGPPHC 226 (2 August 2013) and *S v Tonkin* (938/12) [2013] ZASCA 179 (29 November 2013)

31. However the manner in which the learned magistrate conducted the proceedings makes it apparent and brings to the fore that the magistrate allowed her natural indignation with either the accused or his attorney to override her better judgment on sentence and hence deprived the appellant the benefit of a wholly or partially suspended sentence.

32. In the result the following order is made:

1. The appeal against sentence is upheld to the extent that the sentence imposed is set aside and substituted with the following sentence:
   'The accused is sentenced to 12 (twelve) months imprisonment, wholly suspended for 3 (three) years on condition the accused is not

convicted of the offence of assault committed during the period of suspension.'

2. The Registrar is requested to make this judgment available to Magistrate Le Roux of Klerksdorp and to her Cluster Head – Chief Magistrate (North West) for evaluating the need for further judicial training on the part of the magistrate in light of this judgment.

TV RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree.

N V KHUMALO
JUDGE OF THE HIGH COURT

FOR THE APPELLANT	**: ADV VERTUE**
INSTRUCTED BY	**: WAKS SILENT INC KLERKSDORP**
FOR THE RESPONDENT	**: ADV KOETZER**
INTRUSCTED BY	**: DIRECTOR OF PUBLIC PROSECUTIONS PRETORIA**
DATE HEARD	**: 29 JULY 2014**
JUDGMENT DELIVERED	**: 06 AUGUST 2014**