IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3) REVISED

26/10/2016

DATE SIGNATURE

CASE NO: A268/2015

26/10/2016

In the matter between:

VISHENDREN CHETTY	First Appellant
MOHAMED NAIDOO	Second Appellant
CALVIN CHETTY	Third Appellant
RAVIDREN GOVENDER	Fourth Appellant

and

THE STATE	Respondent

JUDGMENT

M L SENYATSI AJ

[1] The appellants pleaded guilty on a charge of assault with intent to do grievous bodily harm and were convicted on 3 February 2015 by the magistrate's court in Atteridgeville. It was submitted at the hearing of the appeal that the first appellant has passed away. The appeal is by the three appellants.

[2] They were sentenced to three years' imprisonment with a section 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the "**CPA**") non-parole order imposed.

[3] The appeal is only against the sentence of direct imprisonment imposed.

[4] It was submitted on behalf of the appellants that the sentence was shockingly harsh and severe as it failed to take into account the appellants' personal circumstances and the merits of the case.

[5] It was furthermore argued that the trial court should have ignored the J88 form which was submitted during the trial to prove injuries sustained by the complainant. The contention is that that form ought not to have been admitted as evidence is based on its alleged failure to comply with the provisions of section 212(4) of the CPA.

[6] The approach of the Appeal Court on the sentencing by the trial courts has been reiterated in various judgments. In this respect the Appeal

Court in ***S v De Jager* 1965 (2) SA 616 (A)** (at page 629) Holmes JA held that: —

> *"It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited."* [Emphasis added]

[7] The law is therefore quite clear that the power of the Appeal Court to interfere with the sentencing discretion of the trial courts is limited.[1]

[1] See ***S v Pieters* 1987 (3) SA 717 (A)**.

[8] It is in exceptional circumstances such as misdirection or irregularity on sentencing by trial courts that the Appeal Court will interfere with the sentence imposed.[2]

[9] It was submitted on behalf of the appellant that the J88 form admitted in evidence in respect of the alleged injuries was not regular as the medical doctor who completed it was a private practitioner and therefore the provisions of section 212(4) of the CPA were not complied with.

[10] Section 212(4)(iv)–(vi) provides as follows: —

> **"212 *Proof of certain facts by affidavit or certificate***
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> *(4)(a) Whenever any fact established by any examination or process requiring any skill —-*
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> *(i)* ...
>
> *(ii)* ...
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> *(iii)* ...
>
> *(iv) in anatomy or in human behavioural sciences;*
>
> *(v)*
>
> *(vi) in the examination of disputed documents, is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit*

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[2] See ***S v Matyityi*** **2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) (30 September 2010).**

alleges that he or she is in the ***service of the State or of a provincial administration or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the Gazette****, and that he or she has established such fact by means of such an examination or process,* ***shall, upon its mere production at such proceedings be prima facie proof of such fact:*** *Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall mutatis mutandis apply with reference to such certificate."* [Emphasis added]

[11] The facts sought to be proved must be established by an examination or process requiring any skill in any or more of the fields stated in section 212(4) of the CPA.

[12] A document purporting to be an affidavit or a certificate must have been prepared and the original thereof must be submitted to court. The

person who made the affidavit (or certificate) must , at the stage when the examination was conducted or process followed, have been in the service of the state; in the service of a provincial administration; in the service of the of or attached to the South African Institute for Medical Research, in the service attached to any university in the Republic, or in the service of or attached to anybody designated by Minister of Justice for the purposes of subsection 212(4) of the criminal procedure Act, 1977 by notice in the *Government Gazette* and this fact must be alleged explicitly in the affidavit (or certificate).

[13] If the skill required to ascertain the particular facts falls within the ambit of anatomy; or pathology, the person who may make the required affidavit, may in lieu of an affidavit, issue a certificate in which event the provisions of section 212(4) shall *mutandis mutandis* apply to such certificate.

[14] Evidence indicating that a factual finding was made by the deponent is allowed by section 212(4) but a fact must have been established by the deponent and such factual finding must be mentioned in the statement. Many section 212(4) statements received from state laboratories (for example, ballistic reports, DNA reports, etc.) currently express the conclusions of the deponents. Such conclusions indicate that the deponent formed an opinion with regards his/her analysis. Such opinion evidence is not sanctioned by section 212(4) and prosecutors and

magistrates should resist the temptation to receive such statements. In cases where it is clear that the factual findings were not made by the deponent, *viva voce* evidence should be presented to prove the point in dispute. Many J88 forms, which can legally be submitted to a court in terms of section 212(4), not only mention the factual findings made by the medical practitioner (for example, that lacerations or penetrating wounds were found on the body of the victim) but, in cases of murder or culpable homicide, also contains the conclusion (or opinion) what the cause of death was. Such conclusion or opinion is, as was indicated above, not admissible in terms of the section 212(4) statement. If the cause of the death is in dispute in a particular matter, *viva voce* evidence should be preferably be presented to prove such.

[15] If the affidavit/certificate complies with the above-mentioned requirements, and if the document (affidavit/certificate) is submitted to court, it shall constitute *prima facie* proof of the facts thus established. The word *shall* as contained in the sections, indicate that the court is compelled to accept the document and that the facts contained in that document became *prima facie* proof. The court has no choice or discretion regarding this type of evidence and no further requirements/ qualifications is legally necessary. *Prima facie* proof means that credible proof to the contrary by means of rebutting evidence is still possible. In the absence of such proof to the contrary, the *prima facie* proof will

become conclusive proof. In ***S v Abel* 1990 (2) SACR 367 (C)** on 370 Scott J states: —

> *"In terms of these sections the certificate is prima facie proof of its contents, provided, of course, it complies with the requirements of the sections. It follows that in the absence of other credible evidence, the prima facie proof will become conclusive proof."*

[16] Counsel for the appellants contended correctly, so in my view, that the provisions of section 212(4) of the CPA were not applicable in that the private practitioner was not a person employed by the State or designated by the Minister as required in terms of the Act.

[17] The question therefore becomes whether or not the J88 form should have been accepted as *prima facie* evidence of the fact required to be established in proving the aggravation of the sentence.

[18] It was furthermore, contended on behalf of the appellants that it was incorrect to argue on behalf of the State that there was no remorse shown by the appellants and the court was referred to, *inter alia*, ***S v Tladi* 1994 (1) SACR 174 (NC)**.

[19] The issue in ***S v Tladi*** *supra* was different from the issues before this court. In that case the court had to deal with whether or not the accused could be convicted of both dealing in dagga and possession thereof

arising from the same facts. The accused had pleaded guilty to possession of dagga and not guilty to dealing in dagga. The State did not accept the plea on the alternative charge and requested the court to question the accused in terms of section 112(1)(b) of the CPA. That case dealt with whether or not the State could require the court to question the accused in terms of the section where the accused, charged with the main count of dealing in dagga (to which he had pleaded not guilty) and another court of possession of dagga, (where he pleaded guilty) could be questioned by the court to make admissions to establish the elements of the main charge which he had pleaded not guilty to. The court found that if the request by the prosecutor for the court to question the accused is not for *bona fide* purposes of establishing the elements of the charge to which the accused had pleaded guilty, such request amounted to irregularity.

[20] In this case, there is no doubt that the elements of assault with the intent to do gross bodily harm were established by the admissions made by the appellants in their statements made in terms of the plea of guilty.

[21] It cannot be denied that the plea of guilty on the charge should have been taken into account as a factor when sentencing was considered together with all other personal circumstances of each appellant.

[22] I now consider whether the trial court was correct in accepting that the J88 form purportedly complied with section 212(4)(iv) of the CPA.

[23] As already stated, the provisions of section 212(4)(iv) of the CPA are peremptory.

[24] The intention of the legislature is clearly to ensure that production of evidence of a fact required to be proven by an expert is simplified by the certificate or the J88 form.

[25] In proving such a fact intended in the section, the expert must be in the employment of the State or any organ referred to in section 212(4) of the CPA.

[26] It is undisputed that Dr. I.R. Van der Merwe was neither in the employ of the State nor was he or she designated by the Minister when he or she completed the J88 form as contemplated in section 212(4)(iv) of the CPA.

[27] As a consequence, the finding made by the trial court in determining the appropriate sentence, was based on a flawed certificate purported to be a J88. This in my view, constitutes irregularity and the appellants were prejudiced when their sentence was considered.

[28] The last issue for determination is whether or not the non-parole order made in terms of section 276B of the CPA by the trial court was (competent) regular.

[29] In ***Jimmale and Another v S* (CCT223/15) [2016] ZACC 27 (30 August 2016)** the Constitutional Court held that non-parole order should be made only in exceptional circumstances: "*which can be established by investigation of salient facts, legal argument and sometimes further evidence upon which a decision for non-parole rests.*"

[30] The Supreme Court of Appeal in ***S v Botha* 2006 (2) SACR 110 (SCA)** held that judicial interference, on non-parole orders, even where it manifests itself in the form of a mere recommendation, is unacceptable in that it is unfair to both an accused person and the correctional services authorities. The same approach was followed in ***S v Stander* 2012 (1) SACR 537(SCA)** where the Court held that the provisions of section 276B of the CPA: "*do not put the court in any better position to make decisions about parole than it was in prior to its enactment.*"

[31] The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the executive action may be interpreted as an infringement of the independence of the Judiciary.[3]

[32] The non-parole order may not exceed two thirds of the prison term.

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[3] ***Jimmale and Another v S*** *supra.*

[33] In ***Mthimkhulu v S* 2013 (2) SACR 89 (SCA)** the Supreme Court of Appeal dealt with an order of a non-parole period imposed in terms of section 276B(2) of the Act. The trial court failed to invite the parties to address the court before it imposed the non-parole order. The court held that the failure might well, depending on the case, constitute an infringement of the accused's fair-trial rights.

[34] It is evident from the precedent that a section 276B non-parole order should not be resorted to lightly.

[35] The trial court should always be mindful that the parole considerations are the domain of the Correctional Services Department and should, in my view, make such orders in exceptional circumstances.

[36] There is no evidence on the record in the present matter that the appellants were afforded a hearing before the non-parole order was made.

[37] The trial court on page 30 of the record of the sentencing proceedings stated as follows: —

> "*The court has decided therefore that a term of imprisonment must be imposed. The court wants to explain that the sentence the court decided on, is one in terms of Section 276(1) of the Criminal Procedure Act 51 of 1977, which means that one/sixth of the term*

imposed, must be served by the accused. Not the whole term, but one/sixth, in other words, the terms of imprisonment that you will serve is one of six months, but the term imposed by the court in terms of section 276(1) is three years, which means that after six months you might be released by the correctional services department."

[38] The trial court has failed to provide reasons as to what factors it took into account when imposing the non- parole order of six months.

[39] In light of the above I find that the trial court misdirected itself by imposing the non-parole order without affording the appellants a hearing.

[40] It is for the above reasons that this court is of the view that it is justified to interfere with the sentence imposed by the trial court.

[41] In the result, the following order is made: —

Order

1. The appeal against the sentence is upheld
2. The non-parole order of the trial court is set aside.
3. The order of the trial court sentencing the appellants to three years is set aside and substituted with the following order:

(i) The appellants are sentenced to one year imprisonment wholly suspended for three years on condition that they are not found guilty of a similar offence.

4. The sentence in (i) above is antedated to 3 February 2015 when the trial court imposed its imprisonment sentence.

M L SEKHATSI AJ
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

E MOLAHLEHI J
JUDGE OF THE HIGH COURT

For the appellant **Advocate Van Wyk**
Instructed by **Muthray & Associate Inc.**

For the Respondent **Advocate K Van Rensburg**
Instructed by **The Director of Public Prosecutions**