IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

APPEAL CASE NO: A315/2021

COURT A QUO CASE NO: 63/206/2021

REPORTABLE:

OF INTEREST TO OTHER JUDGES:

REVISED.

13/09/2022

In the matter between:

M[....] T[....] Appellant

and

THE STATE Respondent

JUDGMENT

MBONGWE J: (KOOVERTIJIE J CONCURRING).

INTRODUCTION

[1] The appellant, a female aged 47 years, stood trial in the District Court, Atteridgeville, Pretoria, on the 7 September 2021, on a charge of assault with intent to do grievous bodily harm. She was legally represented by an attorney from Legal Aid South Africa. The appellant pleaded guilty to the charge and was accordingly convicted as charged and sentenced on the same day to direct imprisonment for a period of six (6) months.

[2] It is in respect of the sentence that the appellant sought and was granted leave by the trial court to appeal to this court. The appellant had been on bail which the trial court extended pending the outcome of the appeal.

THE FACTS

[3] The events leading to the appellant's arrest, prosecution and sentencing were that during a road rage on 16 May 2021, the appellant then a driver of a motor vehicle, had assaulted the complainant, a pedestrian, who failed to give way to the complainant's motor vehicle despite warning by the appellant. The appellant had lost her temper and took a bottle of beer from a passenger in her motor vehicle before alighting to confront the complainant.

[4] Not only did the appellant prod the complainant with the beer bottle, but she went further to hit him therewith in his right eye causing him blindness in that eye. The appellant admitted these facts in her written statement which was handed in in term of section 112(2) of the Criminal Procedure Act 51 of 1977 (the Act).

[5] In mitigation of sentence, the appellant's legal representative told the trial court that the appellant was 47 years of age and a mother and the primary caregiver of her two minor children aged 12 and 7 years. The State did not produce evidence of previous convictions against the appellant. The appellant was considered a first offender for purposes of sentencing as a result.

THE LAW

[6] It is trite law that sentencing is discretionary to the trial court and that a court hearing an appeal from a lower court is not at liberty to interfere with the trial court's exercise of its discretionary powers, unless it is convinced that the trial had not exercised its discretion judiciously or that the sentence was influenced by a misdirection of fact or raised a sense of shock and was, consequently, inappropriate – see: *R v Dhlumayo* and Others 1948(2) SA 677(A), *NDPP v Pistorius* (96/2015) [2015] ZASCA 204 inter alia.

MISDIRECTION

[7] It seems to me that the trial court had been more eager to dispose of the matter than to dispense justice in accordance with the provisions of the Constitution and established legal principles applicable in the consideration of the appropriate sentence to impose on the primary caregiver of minor children. The trial court was enjoined, in my view, to at the least, seek a pre-sentencing report or the report of a probation officer as envisaged in sections 4(1)(k) of the Probation Services Act 116 of 1991 or 276 (1) of Act 51 of 1977, respectively, to be better informed with regard to an appropriate sentence to impose on the appellant – see *S v M (Centre for Child Law as Amicus Curiae) 2008 232* (CC) at para 61 where the court stated that the question to be asked is whether in imposing direct imprisonment on a primary caregiver, the trial court had been alive and paid sufficient attention to the provisions enshrined in the Constitution that in matters affecting children, the children's interests shall be paramount. In *S v Siebert* 1998 (1) SACR 554 (SCA) at 559 b –h, the court expressed the appropriate approach in the following terms:

‘*’An enlightened and just penal policy requires a broad scope of sentencing options from which the most appropriate option, or combination of options, can be selected to fit the unique circumstances of the case before the court. It requires a willingness on the part of the trial court actively to explore all available options and to choose the sentence best suited to the crime, the public interest and also the aim of the punishment.’’*

There is no evidence, for instance, whether the appellant had no previous conviction or whether the consideration that she was a first offender was a result that the State

had not secured the relevant SAP 69. The appellant's heads of argument contain a contention that the appellant be considered to be a single parent without any factual substantiation for such a consideration. Section 28(1)(b) of the Constitution provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

[8] Clearly the trial court had misdirected itself in imposing a direct imprisonment term on the appellant without an investigation and report on the impact the imprisonment may have on the rights of the minor children of the appellant or whether there will be suitable alternative care available to the appellant's minor children. In terms of section 4(1)(k) of the Probation Services Act 116 of 1991, a Probation 0fficer is obliged to investigate the circumstances of a convicted person and make a recommendation of an appropriate sentence and must, if needs be, tender evidence in court.

[9] There is, in the record of the proceedings before the trial court, a glaring absence of the key factors espoused in the *Siebert* matter for consideration in the determination of an appropriate sentence on the appellant. Absent facts that may be the grounding for the formation of a well founded assessment of the fairness of sentence the trial court has imposed on the appellant, this court is ill-equipped to even begin with such assessment.

CONCLUSION

[10] I am inclined in these circumstances to agree with counsel for the respondent in particular, that any form of interference with the sentence the trial court has imposed would be premature and that, therefore, the matter be remitted to the trial court for further consideration of the sentence upon receipt of the relevant reports referred to in this judgment.

ORDER

[11] Consequent to the findings in this judgment, an order is given as follows:

1. In accordance with conclusion of this court in para [10], this matter is remitted to the trial court for further action to be taken by that court.

M.P. N. MBONGWE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

H. KOOVERTIE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Appellant	MR. H.L ALBERTS
Instructed by	LEGAL-AID SOUTH AFRICA PRETORIA
For the Respondent	ADV L.F SIVHIDZHO
Instructed by	NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS PRETORIA

THIS JUDGMENT HAS BEEN TRANSMITTED ELECTRONICALLY TO THE PARTIES ON 13 SEPTEMBER 2022.