IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
(Coram: Henney, J et Wathen-Falken, AJ)

CASE NO: A203/2022

WAYNE SEPTEMBER Appellant

and

THE STATE Respondent

JUDGMENT ELECTRONICALLY DELIVERED ON 9 MARCH 2023

Henney, J et Wathen-Falken, AJ

Introduction

[1] The Appellant, appeared before the Magistrate's Court Worcester on 20 September 2022 and was convicted on two counts of assault with the intent to do grievous bodily harm and one count of contravening section 17 (a) of the Domestic Violence Act, 116 of 1998 ("the DVA"), for having failed to adhere to a protection order issued in terms of the DVA. He was legally represented and pleaded guilty to all three charges. His guilty plea is set out in a statement presented to the court in accordance with the provisions of section 112(2) of the Criminal Procedure Act 51 of 1977 ("the CPA").

[2] The three offences were committed during an incident which took place on 6 March 2022 at the home of Paulina September, the appellant's mother, who is the complainant on the third count. Also present was Ben Davids ("the first complainant ") and Gideon Solomons ("the second complainant"). In his section 112(2) statement with regards to the first charge, the appellant states that on this particular day he was involved in an argument with the first complainant who swore at him. He became

angry and pushed the first complainant from the chair that he was sitting on, causing him to fall onto the floor. He admitted that this particular complainant is a much older person and that he had foreseen the possibility that he could sustain serious injuries, when he pushed him from the chair, onto the floor.

[3] In respect of count two, the appellant stated after he had pushed the first complainant on the first count onto the floor, the second complainant came towards him and he took a spade and hit this complainant on his head and arm. In his address to court before sentence, the prosecutor stated that although the two complainants suffered injuries it was not sufficiently serious to warrant medical intervention or care.

[4] In respect of count three, the appellant admitted that he breached a domestic violence protection order, which was granted in favour of his mother on 9 November 2021 in that he swore at her and threatened to kill her.

[5] Following the plea proceedings, he was sentenced on counts 1 and 2 to a period of 24 months imprisonment after the Magistrate had taken the counts together for the purpose of sentence. On count 3, he was separately sentenced to an additional 12 months imprisonment.

The Appellant seeks to appeal the sentence imposed with leave of the Court *a quo*.

[6] <u>The Sentencing Proceedings</u>

Both the Appellant's attorney and the prosecutor in the court a quo placed the relevant

facts before the Court without leading formal evidence which can be summarized as follows:

> 6.1 The Appellant was 30 years old at the time of commission of the offence and has two (2) minor children aged 8 and 9 years' old who resided with their mother. He completed Grade 12 and was employed at the time of his arrest. The Appellant was in custody for 6 months prior to sentence proceedings.

6.2 Previous convictions were admitted and proven as follows:

6.2.1 On 1 November 2011 the Appellant was convicted on three counts of contravention of protections orders granted in terms of the Harassment Act 17 of 2011 (”the HA”). The charges were taken together for purposes of sentence and he was sentenced to 12 months’ imprisonment suspended for 5 years on condition that he is not convicted of breach of Section 18 of the Harassment Act 17 of 2011;

6.2.2 On 26 November 2019, the Appellant was convicted of assault with intent to do grievous bodily harm and sentenced to 3 months’ imprisonment.

[7] Grounds for Appeal

7.1 The appellant submitted that the court *a quo* over emphasised the previous convictions resulting in a disproportionate sentence in relation to the offences, the interest society and the personal circumstances of the appellant. Moreover, that the Magistrate did not consider the cumulative effect of the sentence. Particularly in light of the fact that no serious physical injuries were proven to be present.

7.2 He also submitted that the court a quo failed to consider alternative means of punishment other than direct imprisonment thereby failing to address any kind of rehabilitation for the appellant, in the form of a suspended sentence or one of correctional supervision. And he submitted that the court a quo erroneously took into consideration that the previous conviction for the contravention of a harassment order as an order granted in favour of his mother to stop him from harassing her, in the absence of any evidence to substantiate it.

7.3 Furthermore, that the court a quo failed to take into account the fact that the appellant spent 6 months in prison awaiting trial. Lastly, that court a quo did not consider the fact that the appellant pleaded guilty and showed remorse for his actions.

7.4 The appellant submits for all of these reasons that the court a quo misdirected itself which lead to a failure of justice when it imposed the sentence on the appellant misdirected himself when imposing sentence.

7.5 The respondent on the other hand in opposing this appeal submitted that the Magistrate did not misdirect himself. And that the sentence imposed by the court a quo was not shockingly inappropriate or disproportionate, given the conduct of the appellant. The respondent submits that given the prevalence of these type of offences, particularly within domestic relationships such as in the present case. The protection order in favour complainant was not sufficient to deter the offender against violent conduct toward victims of domestic abuse, as has happened in this particular case.

[8] Discussion

"Sentencing is pre-eminently within the discretion of the trial court, and the appeal court may interfere only if there is clear misdirection on the part of the trial court or the sentence is shockingly severe. The correct approach is to apply the triad of factors enunciated in S v Zinn, namely weighing: the personal circumstances of the accused; the interest of society; and the nature and seriousness of the offence.[1]

[9] The essential enquiry for this Court is to assess whether the Court *a quo* in imposing the sentence, exercised its discretion judicially. In fact, a mere misdirection is not in itself sufficient for an Appeal Court to interfere. As stated in the case of *S v Pillay*[2], the misdirection of the Court *a quo* must be of such a nature, degree or seriousness that it shows, directly or inferentially that the Court did not reasonably exercise its discretion properly.

[1] S v Gule 2019JDR 0173 (ECB)
[2] 1977 (4) SA 531 (A)

[10] More recently in *S v Salzwedel and another*[3], the Supreme Court of Appeal stated that an appeal Court can only interfere with a sentence of a trial Court in a case where the sentence imposed was shockingly inappropriate.

[11] We do not agree that the magistrate committed any material misdirection during the sentencing of the appellant. Whilst the fact that the appellant was in custody for a period of six (6) months awaiting the finalisation of the case was not specifically mentioned it cannot in our view, be regarded as a material misdirection. It does not mean that it was not considered. In any event, it seems that the appellant brought the pre-trial detention upon himself for failure to comply with the conditions of his initial release.

[12] The court revoked its order of release after it emerged that he failed to adhere to his conditions of release as well the protection order, after he visited the house of the third complainant. It cannot sit well with any court or for that matter be in the interests of justice that where an accused person after having been released on bail, or warning with certain conditions, and subsequently breaches any of those conditions which results in his or her incarceration, brought about by him or herself could be considered as a mitigating or sentencing reducing factor. Especially in cases of domestic violence, where such a breach threatens the safety of the victim, which necessitates the incarceration of the perpetrator.

[13] In our view, even if it can be said that the magistrate, for failing to take this into consideration had misdirected himself, it is not a misdirection that would vitiate the sentence imposed by the magistrate to the extent that we should interfere with it.

[14] We also do not agree, that there was an over emphasis by the magistrate on the previous convictions of the appellant, because in this of kind of case, it is a material and weighty consideration. Because it illustrates a propensity on the part of the appellant, not to adhere court orders and also, his inclination to commit violent offences. In circumstances where the violence and threats of violence, in the current matter were similar to that which he was previously convicted of.

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[3] 1999 (2) SACR 586 (SCA)

[15] We furthermore do not agree, that the court a quo took into consideration as a fact that the previous conviction for failure to comply with the harassment order, was one which relates to an order granted in favour of his mother. In this regard, the court a quo said:[4]

> "*You have previous convictions. There is also a harassment order that your mother took out against you, protection order."*

From our understanding, the court mentioned that the appellant has previous convictions, but never specifically said it was a previous conviction for contravening the provisions of the HA in respect of the mother of the appellant. The magistrate it seems made a mistake and misspoke when he mentioned HA, and corrected it himself in the same sentence by saying "protection order".

[16] It is not in dispute that a protection order was granted against the Appellant in terms of the DVA, which relates to the breach as per count 3. Whilst the other two victims were not under the protection of the protection order, it clearly seems that the crimes committed against them, were as a consequence of the appellant's breach of the protection order. It is not exactly clear, what the ages of the respective complainants were, but it seems on the appellants own admission the first complainant was a frail person who could have been seriously injured as a result of his conduct.

[17] The first complainant who is the intimate partner of his mother, just as the second complainant could not defend themselves against the appellant. What, however is not in dispute, is that all the complainants were older persons, and what is furthermore apparent from the conduct of the appellant was that he threatened and assaulted them.

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[4] Record page 16.

[18] Our courts have in general condemned crimes of violence committed against older persons. In *S v Rhini*[5] it expressed itself as follows when it said "*The deceased was a frail man of advanced age. The perception and attitude of the community is that the elderly and frail should be protected and any attacks on them are viewed with abhorrence."*

[19] In *S v Jo Au*[6] the court with reference to Du Toit *STRAF IN SUID-AFRIKA (page 90),* regarding the circumstances and factors that should be taken into account in the imposition of sentence supported the following submission:

> *"Die feit dat 'n hulpelose of ou, weerlose persoon die slagoffer van 'n misdryf was, verhoog uiteraard ook die laakbaarheid van die betrokke wandaad. Dit is so omdat dit spreek van gevoelloosheid en lafhartigheid aan die kant van die beskuldigde, en ook die diepste afkeuring en verontwaardiging van die gemeenskap ontlok[7]".*

And further in that judgment at paragraph [13] the court refers to an earlier decision of *S v Moyo*[8] where that court said: *"Where elderly, defenceless, unarmed and frail people become victims of crime, courts should robustly punish offenders in order to deter others who are likeminded. Courts are the instruments through which the society exerts punishment on offenders and the punishment that courts impose on them must accordingly reflect the deep abomination with which the law-abiding and God-fearing society regards as serious crime."*

[20] In S v Mathe[9] the court expressed similar sentiments where it said *"… Many cases involving murder or violent crimes between members of the same family have become prevalent and have frequented our courts. In* ***Kekana v The State (629/13)***

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[5] 2014 JDR 1092 (ECG) at para 10
[6] 2013 JDR 1127 (GNP) at para 10
[7] Loosely translated
The fact that a helpless or old defenceless person was a victim of a crime, naturally also increases the reprehensibility of the relevant misdeed. That is so because it shows a heartlessness and cowardice on the side of the accused, as well as the severest disapproval and outrage of society.
[8] 1979(4) SA 61 [ZRAD] at 63 E-F
[9] 2019 JDR 1079 (GP) at para 22

[2014] ZACSA 158 (1 October 2014) Mathopo AJA *(as he then was), remarked at para 20 as follows:*

> *"Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country."*
>
> And with particular, with reference to domestic abuse of a parent the court went on to say the following also in paragraph [22] "...*In this case the accused attacked a vulnerable and unarmed elderly woman who was his mother. What is more concerning and serious is that the deceased, for her own reasons, did not consider seeking protection against the accused and the abuse which ultimately led to her death. This specific crime is worth mentioning with regards to the intimidation and vulnerability of woman in domestic abuse cases. They face constant fear and guilt that makes approaching the Courts that much more difficult*."

[21] In coming back to this case, it is one of those unfortunate incidents where a parent and other older persons had been physically abused and threatened by an adult child. There seems to be a prevalence of these offences where elderly persons and more frail persons who are unable to defend themselves are assaulted by their children, or people that lives with them in the same household. It usually happens in a domestic set up which can be characterized as a form of domestic abuse. In South Africa, a lot of prominence has been given by our society and our courts to cases of domestic abuse and violence between spouses and life partners, which are commonly referred to as gender-based violence.

[22] It has also become prevalent that parents seek protection against domestic abuse against adult children within the domestic environment through the DVA. The physical and emotional abuse of the elderly are no less abhorrent and reprehensible than domestic abuse, in the form of gender-based violence, which happens between spouses and life partners. As shown above, it seems our courts, in sentencing

perpetrators, who commit crimes, especially violent crimes against the elderly has imposed sentences to express its utmost abhorrence in the conduct of such persons.

[23] This type of offence is inherently aggravating, because of the frailty of the victim, the victim's inability to defend him or herself and it usually happens behind closed doors, out of sight of other family members, neighbours or witnesses. In many cases, the victims would not want report the crime, out of fear for the perpetrator or parental guilt and shame. It is usually discovered by other members of the family or members of the medical profession, who would fortuitously discover that the elderly victim had been physically abused. In this regard, the Constitutional Court in *S v Baloyi and others*[10] said the following about this domestic violence in general, which in my view, would be equally applicable in this particular case. Sachs J said the following:

> "… *All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished.*
>
> *[12] In my view, domestic violence compels constitutional concern in yet another important respect. To the extent that it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form."*

[24] The mere fact that the complainants have not sustained any serious physical injuries, cannot detract from the seriousness of the offence. This in our view, cannot be regarded as a mitigating circumstance but is regarded as a neutral factor that cannot seriously be taken into consideration in favour of the appellant. This is so because given the age and the frailty of the complainants. Any form of assault on them should be considered as patently serious and aggravating.

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[10] (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86; 2000 (2) SA 425 (CC) (3 December 1999)

[25] It is clear that given the conduct of the appellant the sentence of direct imprisonment under circumstances was not inappropriate. The previous convictions considered in light of the current charges, is a clear indication that the appellant has a propensity toward violence and has no regard for Court orders. In these circumstances the appellant's personal circumstances should take a back seat and the seriousness of the offence as well as the interests of society should weigh more heavily.

[26] The sentencing Court in imposing sentence clearly took cognisance of the fact that the three charges emanated from the same incident and took counts 1 and 2 together for purposes of sentence. This stands in direct contradiction to the averment made by counsel for the appellant that the Court did not have regard for the cumulative effect of the sentence so imposed.

[27] The magistrate in our view did not misdirect himself, and we are satisfied the Magistrate imposed a balanced sentence and properly considered all the circumstances in a proportionate manner.

[28] In the result, we make the following order:
"*That the appeal against sentence is dismissed*."

R.C.A. HENNEY
JUDGE OF THE HIGH COURT
R. WATHEN-FALKEN
ACTING JUDGE OF THE HIGH COURT