IN THE HIGH COURT OF SOUTH AFRICA

(BHISHO)

CASE NO.: CA&R14/2004

DATE: 21 OCTOBER 2005

In the matter between:

NTOMBOMZI NDOTYI & ANOTHER

versus

THE STATE

EX TEMPORE JUDGMENT

EBRAHIM J

The appellants, who were accused no. 1 and accused no. 5 respectively in the lower court, were convicted of the offence of assault with the intent to do grievous bodily harm and sentenced to a period of imprisonment for 2 years. Their three co-accused were acquitted of this charge. Both the appellants originally appealed against their conviction and sentence.

In the notice of appeal the grounds of appeal against conviction are set out as follows:

> "1. The Learned Magistrate erred in finding that the State had proved its case beyond reasonable doubt.
>
> 2. The sentence is so unreasonable that no reasonable court would have imposed it."

After noting the appeal the appellants delivered a notice of application for amendment of notice of appeal which specified that:

> "1. The appeal against conviction is waived and withdrawn.

2. The appeal lies against sentence only.

3. Appeal against sentence is based on the following grounds:

3.1 The sentence was very harsh and it induces a sense of shock.

3.2 The Learned Magistrate was harsh in the sentence of the appellants and did so without considering the personal circumstances of the accused which would mitigate against imposition of their harsh sentence.

3.3 The Learned Magistrate overemphasised the needs of the community to the detriment of the accused.

3.4 The Learned Magistrate failed to consider alternative sentences which fit the offence and the offender."

The notice stipulated further that:

"Unless objection in writing to the proposed amendment is made within 10 days appellant will amend the notice of appeal accordingly."

At no stage, however, did the appellants approach the Court for an order granting the amendment. The appeal was enrolled for hearing on 6 August 2004, but did not proceed and was postponed to 17 September 2004. The reasons for the postponement are unknown.

On 17 September 2004 the appeal was struck from the roll, as the Court found the notice of appeal to be inadequate. The grounds of appeal the Court held were conclusions and did not detail the grounds upon which the appeal was based.

On 16 November 2004 an application for the appeal to be re-enrolled was granted and the appeal was postponed to 4 March 2005 for

hearing. However, it did not proceed on that date, but the reasons for this are not known. The appeal was then re-enrolled for hearing on 5 August 2005.

On 5 August 2005 Mr Jakavula appeared on behalf of the appellants, but did not have instructions to represent them. Moreover he was not in possession of a copy of the appeal record and consequently not equipped to argue the appeal. In view of this, Mr Jakavula was not permitted to represent the appellants. The Court then postponed the appeal to 16 September 2005 for counsel to be appointed to represent the appellants and argue the appeal.

On 16 September 2005, at the request of the Court, Mr Simoyi appeared for the appellants. He informed the Court that the appellants were abandoning their appeal against conviction and were proceeding only with the appeal against sentence. Mr Simoyi applied for condonation of the improper notice of amendment and the amendment of the grounds of appeal as set out therein. The State did not oppose the application. The Court thereupon condoned the notice of appeal and granted the amendment in respect of the grounds of appeal.

The amended grounds of appeal against sentence read as follows:

> "1. The sentence was very harsh and it induces a sense of shock.
>
> 2. The Learned Magistrate was harsh in the sentence of the appellants and did so without considering the personal circumstances of the accused, which would mitigate against imposition of the harsh sentence.
>
> 3. The Learned Magistrate overemphasised the needs of the community to the detriment of the accused.

4. The Learned Magistrate failed to consider alternative sentences which fit the offence and the offender."

Mr Simoyi has submitted that the Magistrate misdirected herself in overemphasising the interests of the community and the seriousness of the offence to the detriment of the personal circumstances of the appellants. In his submissions he contended that in view of the personal circumstances of the appellants an appropriate sentence was one of a period of imprisonment but wholly suspended on certain conditions together with a fine. Mr Simoyi has not made any submissions in regard to what was raised in the amended notice of appeal, namely that the sentence induces a sense of shock. Notwithstanding this I have accepted that it was raised in the heads of argument and consequently that it needs to be addressed.

Mr Jonas, who appears for the State, in his submissions contended that the sentence did not induce a sense of shock. In his view the serious nature of the offence and the circumstances surrounding it warranted a period of direct imprisonment without any portion thereof being suspended. He submitted further that the Magistrate did have regard to the personal circumstances of the appellants, but that the nature of the assault and its seriousness militated against a wholly suspended sentence. Mr Jonas has accordingly asked that the appeal be dismissed and that the sentence be confirmed.

In the Court *a quo* the complainant testified that she went to the home of the first appellant, accompanied by a friend, to speak to the first appellant about rumours that the first appellant was going to waylay her. She confronted the first appellant about the rumours, but the first appellant denied any knowledge thereof. The second appellant then

jumped on her and the first appellant bit her on her cheek and said that she did not want any other man to be interested in the complainant. The complainant stated that she was dragged outside and beaten on her body with a stick and pipe and became unconscious at some stage. She claimed further that the three co-accused joined in assaulting her.

The assault on the complainant was of a vicious and sustained nature and directed primarily at her face and head. The medical report reveals that she sustained multiple wounds on the top of her head and forehead. The doctor has illustrated by way of a diagram that there were 9 wounds on the top of the complainant's head and 5 wounds on her forehead and face, including a bite on her right cheek. The wounds have left visible scarring on her face. At the right eye was a periorbital swelling and a sub-conjunctival haematoma. The scalp area was swollen and there were bruises on her forearms, her right upper arm, right thigh, leg, shins, buttock and hands. The complainant testified that she was hospitalised for a month, whereas the medical report reveals that she was hospitalised for a week. Even if she was only hospitalised for a week, the fact remains that the assault was so severe that she had to be hospitalised.

In view of the nature and severity of the assault, and the fact that it was directed primarily at the complainant's face and head the only reasonable inference is that the appellants intended inflicting not only grievous bodily harm, but also wanted to disfigure the complainant. According to the complainant the first appellant stated as much when she bit the complainant on the cheek.

Our Courts of Appeal have stated in a number of decisions that sentencing is at the discretion of the trial court. An Appeal Court would

not lightly interfere with this discretion unless it was shown that the trial court exercised its discretion in an unjust or unreasonable manner. See **S v PETERS** 1987 (3) SA 717 (AD) at 727F-H; **LEPHOLLETSA v S** [1997] 3 All SA 113 (AD) at 115i-j and **S v ANDERSON** 1964 (3) SA 494 (AD) at 495D-E.

In the absence of any misdirection or irregularity committed by the Magistrate this Court can only interfere with the sentence imposed by the trial court if the sentence induces a sense of shock. In other words,"If there is a striking disparity between the sentence passed and that which the Court of Appeal would have imposed". See **S v DE JAGER AND ANOTHER** 1965 (2) SA 616 (AD) at 629A-B, **S v HLAPEZULA** 1965 (4) SA 439 at 444A; **S v PETERS** *supra*; **MAROBUDI v S** 2000 All SA 123 (AD) at 127g-h; and **S v SADLER** 2000 (1) SACR 331 at 335e.

In applying the principles enunciated in the aforementioned decisions, and taking account of the nature and severity of the assault perpetrated on the complainant, I do not consider that there is any merit in the submission that the custodial sentence of a period of imprisonment for 2 years induces a sense of shock. If anything, when account is taken of the consequences of the assault, the sentence may in fact verge on the side of leniency. I find that the Magistrate exercised her discretion in a proper and reasonable manner. She took account of relevant factors and properly applied her mind in determining an appropriate sentence. I do not consider that she has overemphasised the seriousness of the offence and the interests of society to the detriment of the personal circumstances of the appellants.

On the basis of the number of cases that come to this Court, either in the form or reviews or on appeal or prosecuted directly, assaults

in the area of jurisdiction of this Court are really of pandemic proportions. It appears that every argument, no matter how minor, is resolved by an aggrieved person assaulting the other. Invariably, too, resort is had to weapons of one kind and another. Despite increasingly harsh sentences these have not had any effect in diminishing the number of assaults that take place.

I must emphasise that on reading the record in this matter, and on looking at the injuries that the complainant sustained, that the sense of shock that grips one is that such a serious and sustained assault could have been perpetrated on someone simply because it appears that there was some argument about a boyfriend. This Court cannot express its condemnation sufficiently strongly that such disputes should never ever result in an assault, let alone, an assault of this nature.

It is evident from the Magistrate's reasons that she took account of the personal circumstances of the accused as conveyed to her at the time of sentencing. Moreover, the Court *a quo* was informed that neither of the appellants was in a position to pay a fine. In any event, having regard to the severity of the assault, I do not consider that the imposition of a fine is an appropriate sentence in the circumstances.

There is no indication that the Magistrate disregarded the fact the appellants' were first offenders. Courts have often said that whilst a Court will attempt to afford a first offender an opportunity of remaining out of prison that in certain instances the nature of the crime is such that its seriousness demands that a custodial sentence be imposed and that such a sentence is the only appropriate sentence in those circumstances. The fact that the Magistrate considered a custodial sentence to be the only appropriate sentence does not warrant the conclusion that she

misdirected herself. It is evident having regard to the circumstances of the assault that the Magistrate did not misdirect herself in this regard. I find no basis for interfering with the sentence on this ground either.

In the result the appeal fails and is dismissed. The sentence of imprisonment for 2 years that the Court *a quo* imposed on each appellant is confirmed.

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Y EBRAHIM : JUDGE

BHISHO : HIGH COURT

KEMP AJ I agree.

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J KEMP : ACTING JUDGE

BHISHO : HIGH COURT