IN THE NORTH WEST HIGH COURT

MAFIKENG

CA 11/2011

In the matter between:

TAU KGOTSO OSIA **APPELLANT**

and

THE STATE **RESPONDENT**

CRIMINAL APPEAL

GURA J, KGOELE J

DATE OF HEARING	**:**	**20 APRIL 2012**
DATE OF JUDGMENT	**:**	**07 June 2012**
FOR THE APPELLANT	**:**	**Advocate Zwiegelaar**
FOR THE RESPONDENT	**:**	**Advocate Nontenjwa**

JUDGMENT

KGOELE J:

[1] Appellant pleaded guilty and was on the strength of a statement made in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 **(the CPA)** convicted by the trial court held at Ga-Rankuwa on contravening an order imposed on him in terms of Section 7 of the Domestic Violence Act 116 of 1998 **(Domestic Violence Act).**

[2] He was sentenced pursuant to the provisions of section 276 (1) (i) of the CPA to 24 months imprisonment from which he may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services or a parole board.

[3] Leave to appeal against the sentence was granted by the trial court hence this appeal.

[4] **Section 17(a) of the Domestic Violence Act** provides as follows:-

> "17. Notwithstanding the provisions of any other law, any person who –
>
> a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7;

b) contravenes the provision of section 11(2)(a);

c) fails to comply with any direction in terms of the provisions of section 11(2)(b); or

d) in an affidavit referred to section 8(4)(a), wilfully makes a false statement in a material respect,

is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and in the case of an offence contemplated in paragraph (b), (c), or (d), to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

[5] **Section 73(7)(a) of the Correctional Services Act, Number 111 of 1998**, provides that a person sentenced to incarceration under section 276(1)(i) of the Criminal Procedure Act, must serve at least one sixth of his or her sentence before being considered for placement under correctional supervision, unless the court has directed otherwise.

[6] From the Pre-Sentencing report the correctional supervision officer considers the appellant as a suitable candidate for a sentence of correctional supervision contemplated in section 276 (1) (h) CPA for the following reasons:-

"- The accused is manageable for the purpose of Correctional Supervision. He has a positive and monitorable address. He has a reasonably fair support system. His movements show stability and therefore there are no risks identified in absconding.

- The accused is not a risk for the purpose of Correctional Supervision, therefore he can be placed back in the community.

- The accused is aware of his mistakes and weaknesses especially his lack of self control and aggressive behaviour and has a positive attitude to be involved in the treatment programmes conducted by the social worker at Community Corrections."

[7] Although there were no medical reports handed in to prove the injuries sustained by the complainant, she said in her testimony that appellant stabbed her several times on her neck, face and back with a broken bottle.

[8] The appellant submitted that the trial court erred by over-emphasising the seriousness of the crime and the nature and extent of injuries sustained by the complainant. Further that although appellant is deserving some form of punishment, he is not the kind of a person that should be removed from the

society by means of direct imprisonment.

[9] Lastly that the sentence is shockingly inappropriate.

[10] The respondent supports the sentence handed down by the trial court.

[11] A court of appeal always bears in mind the following principles laid down in the case of **S v Anderson 1964 (3) SA 494 (A) at 495 C-E** and in many other cases when faced with the consideration of whether to increase or decrease a sentence, or leave it to remain unaltered.

> "The decisions clearly indicate that a court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. There must be more than that. The court of appeal, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with".

[12] Further at page **495 F-H**:-

> "As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a motive, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the court's decision on sentence".

[13] In **S v Scheepers 1977 (2) SA 155 (A) at p159 A-D Viljoen J.A.** expressed a personal opinion that imprisonment is justified only if the offender needs to be removed from society in order to protect society and if the purposes of punishment cannot be achieved through any other punishment. In addition, the court also declared that if the same objects of punishment can be achieved through an alternative sentence, that alternative sentence should be preferred. **See also S v Hoffman 1978 (4) 61 (A) 65 B-D.**

[14] The appellant was twenty four (24) years old at the time of commission of this offence. He was employed at NECSA as a mechanical trainee, earning R2500-00 per month. He has completed his mechanical engineering degree at Tshwane University of Technology. He was paying R500-00 per month to the complainant for maintenance of their minor child, although complainant said he was not regular with the said

payments. He pleaded guilty to the offence he was facing. He is a first offender. He conceded that he could have handled the situation differently and expressed remorse. He did seek help and assistance elsewhere prior to the commission of the offence.

[15] The offence the accused was convicted of remains very serious. It is one of the offences which are prevalent in our country. What is even aggravating in this matter is the fact that it is clear that the complainant sustained permanent scars on the face as a result of the incident, although there is no evidence of the magnitude of the scars. Without overlooking all of the above-mentioned facts, I am of the view that the seriousness of the offence and the prevalence thereof do not per se justify the presiding officer to overlook the personal circumstances of the appellant.

[16] It seems as if the presiding officer placed much emphasis on the seriousness of the offence. This can be glanced from the fact that he did ignore the recommendation by the Correctional Officer and further from the following remarks made during the sentencing process:-

> *"Correctional supervision as well as imprisonment: The test for imprisonment is should a person prove to be somebody who is such a danger to society that that individual needs to be removed from society for a period, not forever, no imprisonment is forever,*

for a period.

That is the box that needs to be ticked before you go to jail. That also needs to be weighed against the possibility of paying a fine. The purpose of a fine is always if a court makes a finding that that box should not be ticked, in other words he is not such a danger, he should not go to jail, then you give the person the opportunity to pay their way out of jail with a certain fine which must be reasonable for that individual to pay his way out of jail. In other words the punishment lies in the pain of the pocket. Not the imprisonment when you couple imprisonment with a fine.

In this instance you have got money for a fine but I would not consider a fine considering the ***seriousness of this offence****. Before I get to whether I am going to tick that box or not, let me make two further comments – one about correctional supervision and one about restorative justice. [My own emphasis]*

[17] I am of the view that the personal circumstances of the appellant, especially that he was a young graduate professional with a stable work and promising career prospects, that he was contributing to the maintenance of the child strongly counts in his favour. The sentence imposed on him means that he will have to serve some time in jail. He does not have the option to pay a fine. This will cause him to loose his employment. He will then be transformed into being an unstable person and most importantly, not being able to provide for the child.

[18] One has to bear in mind that too harsh a punishment serves neither the interest of justice nor those of a society. Neither does the one that is too lenient. Courts should therefore strive for a proper balance that has regard to all the objects of sentencing. The proper balance of these objects informs me that an imprisonment term coupled with an option of a fine in the circumstances of this matter can still achieve the same intended purpose of punishment.

[19] I therefore come to the conclusion that the presiding officer improperly exercised his discretion by overemphasizing the seriousness of the offence above the personal circumstances of the appellant.

[20] Consequently the following order is made:-

20.1 The appeal succeeds;

20.2 The sentence imposed by the trial court is set aside and substituted with the following:-

Two (2) years imprisonment or Six (R6 000-00) thousand rands, half of which is suspended for 3 years on the following conditions:-

- **the accused is not found guilty of c/o Section 7 of the Domestic Violence Act committed during the period of suspension**

- **the accused should attend the programmes as recommended in Annexure "A" of the report of the Correctional Service Officer.**

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A M KGOELE
JUDGE OF THE HIGH COURT

I agree

_____
SAMKELO GURA
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPELLANT	:	Botha Coetzer Smith
FOR THE RESPONDENT	:	Director of Public Prosecution