Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

6 December 2024 [redacted]

CASE NO: A51/2024

In the matter between:

N[redacted] J[redacted] **APPELLANT**

And

THE STATE **RESPONDENT**

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 6 December 2024.*

JUDGMENT

Bokako AJ (Mdalana - Mayisela J concurring)

Introduction

[1] The Appellant is appealing against the sentence of six months direct imprisonment imposed for assault common by the magistrate, Orlando District Court. The allegations against the appellant were that on 3 November 2021, she unlawfully and intentionally assaulted Moeketsi Aaron Motloung by hitting him with a wooden stick. She pleaded not guilty to the charge. On 10 October 2023, she was convicted as charged. She was sentenced on 24 October 2023. On 31 October 2023, she was granted leave to appeal against her sentence by the District Court. She was legally represented throughout the trial. The appeal is opposed by the respondent.

Grounds of Appeal

[2] The grounds for appeal articulated by the appellant can be summarised as follows:

[2.1] The imposed sentence is unduly severe and shockingly inappropriate.

[2.2] The trial court overemphasized the element of retribution rather than rehabilitation.

[2.3] There existed notable and persuasive circumstances that justified deviation from the six-month imprisonment in favour of the appellant.

[2.4] The trial court erred in overemphasizing the severity of the offence and societal interests, neglecting the Appellant's personal circumstances.

[2.5] The court misdirected itself by finding that the aggravating factors outweighed the mitigating factors.

[2.6] The court misdirected itself in accepting the state's request for the court to impose a period of six months imprisonment.

Background facts

[3] The essential details concerning the appellant's sentencing can be concisely summarised as follows. The lower court elucidated the case's background, a recounting of which will not be reiterated in this judgment. The appellant faced charges of common assault. On 3 November 2021, the appellant assaulted Mr Aaron Motaung (the complainant) by striking him with a wooden stick.

[4] The J88 was admitted as evidence and marked exhibit A. It illustrates diminutive but nonetheless apparent contusions on the left arm and an injury on the left leg. It further indicates that the complainant underwent examination on 8 November 2021.

[5] The incident occurred on 3 November 2021. The essence of the dispute between the appellant and the complainant is that they are located within the same premises, despite the appellant inhabiting the main residence while the complainant resides in a rear room within the yard. The main residence was formerly owned by the complainant's deceased parents, establishing it as the central aspect of their tumultuous relationship.

[6] The appellant testified that on November 3, 2021, the complainant found her outside in the yard. He then asked for the house keys, but she replied that she could not give them to him. This led to an argument between them. The complainant alleged that the appellant assaulted him, which resulted in his visit to the nearest clinic for consultation.

[7] During the dispute, H[redacted] intervened by instructing the appellant to enter the residence. H[redacted] the appellant's son-in-law, observed her entering the

house. Concurrently, the complainant remained outside, directing insults at the appellant while the latter-maintained silence within the residence. H[redacted] refuted the allegation of assault.

[8] The lower court found the appellant guilty and subsequently imposed a six-months prison sentence.

Discussion

[9] The Appellant has noted an appeal against the aforementioned sentence. Essentially, the Appellant maintains that she presented significant and persuasive reasons for why the court of first instance should not have imposed a six-month sentence.

[10] The mitigating factors presented by the Appellant can be summarized as follows. She as 72 years old when the offence was committed. She is a pensioner. She has a condition with her legs, experiencing an infection on the right leg. She has three children. One is 51 years old, the other one is 44 years old and the third one is 35 years old. She is divorced. She passed Grade 11. She also takes responsibility for her actions. She has a previous conviction, which was 20 years ago.

[11] The aggravating factors are as follows. The complainant was unarmed during the incident, and he did not issue any threats to the appellant. The appellant assailed the complainant in pursuing access to his parental residence, from which she derived benefits as though she were the rightful owner. One week before providing his testimony, the complainant was assaulted by the appellant, who subsequently presented the court with the injuries incurred as a result of this assault. The court acknowledged that the appellant exhibited no remorse in relation to the complainant. The complainant sustained injuries that have been documented in the J88 report, specifically noting the inflammation observed in his left leg as a result of the attack.

[12] An appellate court may exercise its discretion to modify a sentence solely under the following circumstances: (a) if an irregularity has transpired that results in a miscarriage of justice; (b) if the lower court has considerably misdirected itself, thus compromising the integrity of its sentencing decision; or (c) if the sentence is exceedingly disproportionate or shocking to the extent that no reasonable court would have imposed such a penalty.

[13] Further, the appeal court seeks to determine whether the lower court misinterpreted the law in its sentencing or whether a substantial discrepancy exists between the sentence imposed by the trial court and the sentence that an appellate court would have rendered. Furthermore, it investigates whether the imposed sentence may be regarded as shockingly, startlingly, or disturbingly inappropriate[1].

[14] It is widely acknowledged that the sentencing process necessitates a comprehensive assessment of the offence's severity, the Appellant's personal circumstances, and societal interests. Courts may only impose more lenient sentences if they possess strong justification indicating that substantial and compelling circumstances exist to justify such a deviation.

[15] In this instance, the lower court imposed a six-month prison sentence against the appellant, concluding that significant factors did not warrant a lesser penalty. The appellant contends that she merits a reduced sentence based on compelling reasons she has articulated, which challenge the decision of the Court a quo to impose a six-month imprisonment penalty.

[16] This Court is now undertaking a comprehensive examination of the mitigating circumstances to ascertain whether the imposition of a lesser sentence was justified. Although each factor is analysed in isolation, it is acknowledged that the court must consider the cumulative effect thereof.

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[1] *S v Van De Venter* **2011 (1) SACR 238** (SCA) at para [14].

17] From a perusal of the trial record, it is clear that the *Court a quo* did not take the Appellant's age into consideration during sentencing. The sentencing of an accused does not occur in isolation; rather, the court must ascertain which penalties apply. Furthermore, it is imperative for the court to collect all pertinent information to determine an appropriate sentence.

[18] When an offender is of an advanced age, this factor may be considered a mitigating circumstance during the sentencing phase. Numerous cases acknowledge old age as a mitigating factor, including S v Munyai 1993 1 SACR 252 (A); S v Du Toit 1979 3 SA 846 (A); and S v Heller 1971 2 SA 29.

[19] In this instance, it is imperative to acknowledge that the appellant`s age does not absolve her of criminal responsibility. Nevertheless, it may be considered a mitigating factor during the sentencing phase. This contrasts the respondent's assertion that elderly individuals, due to their accumulated life experience, ought to possess a heightened awareness of the potential consequences of their actions.

[20] The purpose of a sentence is not to destroy the offender completely (*S v Zinn supra* 541B-C), and the period of imprisonment would not offer a person of advanced age a chance to reform and begin his life anew (*S v Zinn supra* 541B-C).

[21] The court below should have considered other sentencing options beyond solely a custodial sentence. Imprisonment can be especially harsh for elderly individuals with medical conditions, complicating their ability to manage.

[22] While the appellant's age does not absolve her of criminal actions, it constitutes a significant factor for the court to consider in determining the nature and severity of the punishment. She currently resides with her daughter, who assists in managing her health challenges. Given the expected progression of her health issues, she will require additional support that correctional services may not be equipped to provide.

[23] Consequently, it can be concluded that the lower court erred by failing to consider the appellant's age.

[24] The court *aquo* succinctly examined the mitigating and aggravating circumstances pertinent to the offenses and cited them in the sentencing judgment. Regrettably, no report from a probation officer addressing the appellant's purported health issues was submitted to the judicial officer.

[25] In imposing the sentence, the learned magistrate considered the following factors as aggravating circumstances**.** **T**he court articulated that the complainant was vulnerable and unarmed, presenting no imminent threat to the appellant. Consequently, this occurrence cannot be classified as a mutual altercation; rather, it constituted an assault perpetrated by the appellant in an attempt to gain entry into the complainant's residence, which he was denied.

[26] The court emphasized the importance of recognizing that merely one week before the trial, the complainant was assaulted by the appellant. This incident was introduced as evidence demonstrating that the appellant showed no remorse for her previous conduct. Despite the knowledge of the impending court appearance, the appellant continued to perpetrate assault against the complainant, suggesting that the complainant was subjected to some form of abuse by the appellant.

[27] The court further found that there existed no evidence indicating that the appellant's health would deteriorate if she were to be incarcerated. From her viewpoint, the aggravating factors presented to the court outweighed the mitigating factors. She found that an appropriate sentence for the appellant would entail six months of direct imprisonment.

[28] Each statement must reflect the accused's distinctive character and particular circumstances (S v Matoma 1981 930 SA 838 A at 843A). In this case, the appellant was 72 years of age at the time of sentencing. As delineated in the Older Persons' Act, 2006 (Act No. 13 of 2006), females are classified as older persons at the age of 60 years, while males are acknowledged at 65 years.

[29] Upon thorough consideration, I discern numerous mitigating factors pertaining to the appellant that may reduce her sentence. The assessment is not exclusively focused on the aggravating elements. The appellant is an elderly woman experiencing significant health issues. From a stringent legal standpoint, this represents a considerable and compelling circumstance.

[30] I concur with the submission made by the respondent and emphasise that the public interest must be considered during the appellant's sentencing. However, the respondent's counsel judiciously acknowledged that a six-month prison term wasn't the sole fitting sentence for the appellant in this case.

[31] In my view, the trial court did not attach sufficient weight to the appellant's personal circumstances and her prospects for rehabilitation. These considerations should have compelled the presiding sentencing officer to solicit a report from a probation officer to gain a more comprehensive understanding of the appellant's situation.

[32] The trial court's failure to consider and attach sufficient weight to the appellant's personal circumstances culminated in a disturbingly inappropriate sentence.

[33] In *S v Mbingo* **1984 (1) SA 552** (AD) at 555F-G it was held:

"*In considering whether a sentence is so severe as to warrant alteration, one must bear in mind that the trial court is not only better able to assess the probable effect of the sentence on the accused but is also in closer touch with the community, which the trial court serves, and has a more intimate awareness of its requirements.*"

[34] Common assault is characterised as a minor offence. It can potentially recur in social interactions, as exemplified in this case. If the assault involves any aggravating factors, a comprehensive evaluation of the merits and demerits of imposing a custodial sentence should be conducted.

[35] The primary objective of imprisonment is to segregate the offender from society to enhance public safety. Furthermore, it allows the judicial system to administer an appropriate sentence to individuals whose conduct warrants severe punishment.

Conclusion

[36] This court has considered the arguments presented by both counsels. The Magistrate should have considered several critical factors when determining the appellant's most appropriate sentence.

[37] In this instance, the trial court neglected the opportunity to engage with the appellant on a deeper level. Furthermore, it did not acquire valuable insights from specialists concerning the appellant's psycho-social circumstances and their relevance to the community it served, including the correctional services and resources accessible for an elderly individual confronting physical health challenges.

[38] The magistrate failed to consider the appellant's personal circumstances adequately. It is troubling that the magistrate disregarded the appellant's situation. The appellant did demonstrate that the court a quo has misdirected itself in imposing an inappropriate sentence.

[39] Consequently, I conclude that the trial court erroneously imposed a severe sentence. Furthermore, the lower court did not possess adequate information to appropriately consider the appellant's personal factors and circumstances. The appellant demonstrated sincere remorse.

[40] I believe the lower court's order should be set aside. Additionally, I believe that the appellant's individual circumstances and prospects of rehabilitation in a non-incarceration setting constitute sufficient justification for a fine.

[41] Consequently, I propose that the six-month prison sentence is overturned and replaced with a fine of R1500.

Order

[42] Accordingly, the following order is proposed:

1. The appeal against the sentence is upheld.

2. The sentence of six months imprisonment is set aside and replaced with the following sentence:

"The accused is sentenced to a fine of R1500.00; or three (3) months imprisonment suspended for five years on condition that the accused is not found guilty of the same or similar offence."

[redacted]

T BOKAKO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION JOHANNESBURG

I agree, and it is so ordered.

[redacted]

MMP MDALANA-MAYISELA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION JOHANNESBURG

Date of hearing:	4 November 2024
Delivered on:	6 December 2024

APPEARANCES:

For the Appellant:	Adv S. Bovu
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Johannesburg.	
For the State:	Adv. RL Kgaditsi