

SOUTH AFRICA / JUDGMENT

S v Zaanazo (HC 05/2023) [2023] ZANWHC 221 (24 November 2023)

[2023] ZANWHC 221

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen, A Reddy

CASE / FILE NUMBER

HC 05/2023

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG
CASE NO: HC 05/23
MAGISTRATE'S
SERIAL NO: 6/2023

Reportable:

YES/NO
Circulate
to Judges: YES/NO
Circulate
to Magistrates: YES/NO
Circulate
to Regional Magistrates: YES/NO
THE STATE
and
PAPI ISAAC ZAANAZO
ACCUSED
CORAM: PETERSEN ADJP
AJP, REDDY AJ
DATE OF JUDGMENT: 24
NOVEMBER 2023

Summary:

Special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 - competent verdicts on a charge of robbery as envisaged in section 260 of the Criminal Procedure Act 51 of 1977 - attempted murder - incompetent verdict on a charge of robbery - incorrect application of section 93ter(1) of the Magistrates Court Act 32 of 1944 - conviction of attempted murder set aside and replaced with a conviction of assault with intent to do grievous bodily harm - sentence aside - court at large to impose sentence afresh - accused sentenced to four (4) years imprisonment antedated in terms of section 282 of the Criminal Procedure Act 51 of 1977.

ORDER

(i)

The conviction and resultant sentence of the accused on the charge of attempted murder is reviewed and set aside.

(ii)

The conviction is replaced with a conviction of assault with intent to do grievous bodily harm as a competent verdict to robbery

in terms of section 260(a) of the Criminal Procedure Act 51 of 1977.

(iii)

The accused is sentenced to four (4) years imprisonment.

(iv)

In terms of section 103(1)(g) of Firearms Control Act 60 of 2000, the accused shall remain unfit to possess a firearm.

(v)

The sentence and order in terms of the Firearms Control Act is antedated to 28 August 2023, in terms of section 282 of the Criminal Procedure Act 51 of 1977.

REVIEW**JUDGMENT****REDDY AJ**

INTRODUCTION

- [1] These review proceedings serve before me at the behest of Regional Magistrate Maleka. The accused was charged and tried by Regional Magistrate Maleka on a charge of robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 (“the CPA”) read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. On 28 August 2023, Regional Magistrate Maleka convicted the accused of attempted murder. On even date, the accused was sentenced to eight
- (8) years imprisonment. The ex lege automatic declaration of unfitness to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000 was not interfered with by Regional Magistrate Maleka, and the accused remained unfit to possess a firearm.
- [2] Attempted is not a competent verdict to robbery as envisaged in section 260 of the CPA, as will be shown in more detail later. Regional Magistrate Maleka accordingly transmitted the matter on review on 10 October 2023, with a request that the verdict of attempted murder be set aside, but that the sentence of eight years’ imprisonment should remain undisturbed.
- [3] In the exercise of its review powers, this Court is enjoined to review and set aside proceedings in which a sentence which is not reviewable has been imposed, but where the proceedings in which such sentence was imposed are found not to be in accordance with justice. Section 304(4) of the CPA and section 22(1)(c) of the Superior Courts Act 10 of 2013 (“the Superior Courts Act”) specifically provide as follows:

“304(4) If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction

or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.” (emphasis added)

“22 Grounds for review of proceedings of Magistrates’ Court

- (1) The grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are —
- (a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- (c) gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

- (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts." (emphasis added)
- [4] So as to encapsulate the proceedings in the court a quo, a chronological backdrop is indispensable. The charge of robbery with aggravating circumstances emanates from an incident which occurred on 4 March 2019 where the accused is alleged to have unlawfully and intentionally assaulted one Rantsi Motlathledi and used force to remove from him, cash to the amount of R730.00, his property or property in his lawful possession. The aggravating circumstances are alleged to have been present in the wielding of a dangerous weapon (a knife) and/or the infliction of grievous bodily harm, on the occasion

when the offence was committed, whether before or during or after the commission of the offence.

- [5] The accused, duly represented by a legal practitioner (attorney) from Legal Aid South Africa
- Ms Odendaal, pleaded not guilty to the charge on 17 January 2023. The basis of his defence was that he found the complainant and his then girlfriend Miss Lesego Masibi ("Masibi") grabbing each other. Masibi was in possession of a small Swiss knife in her right hand. As he positioned himself between them with the aim of separating them, Masibi "cut" the complainant.

PRELIMINARY ISSUE

- [6] Save for the reasons advanced by Regional Magistrate Maleka for transmitting the matter on review, a meticulous perusal of the review record demonstrates a concerning aspect related to the application of section 93ter of the Magistrates Court Act 32 of 1944 ("the MCA"). The record reflects that Regional Magistrate Maleka and Ms Odendaal harbour under a serious misapprehension that section 93ter
- (1) of the MCA makes it peremptory to sit with lay assessors in respect of a charge of robbery with aggravating circumstances as intended in section 1(1) of the CPA. As will be demonstrated below, section 93ter(1) of the MCA, does not make it peremptory for a Regional Magistrate or Magistrate to sit with assessors where an accused is tried with the crime of robbery with aggravating circumstances as intended in section 1(1) of the CPA. The section, at most vests a Regional Magistrate or Magistrate with a discretion whether or not to sit with assessors in the case of an accused tried as aforesaid.
- [7] This Court, in giving effect to its powers of review, is constrained to address this issue, to place the intention of the legislature in perspective and in so doing to prevent a perpetuation of the incorrect interpretation of section 93ter(1) of the MCA by Regional Magistrate Maleka.
- [8] Section 93ter(1) of the MCA provides as follows:

"93ter Magistrate may be assisted by assessors"

- (1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-
- (a) before any evidence has been led; or
 - (b) in considering a community-based punishment in respect of any person who has been convicted of any offence,

summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.”

- [9] Notwithstanding the provisions of section 93ter(1) of the MCA being explained to the accused, it is not peremptory for a Regional Magistrate to sit with lay assessors where an accused is tried with the crime of robbery with aggravating circumstances read with section 1 of the CPA. Section 93ter(1) at most vests a Regional Magistrate or Magistrate, with a discretion whether or not to sit with assessors in a matter where an accused is charged with the crime of robbery with aggravating circumstances read with section 1 of the CPA. This discretion may be exercised before any evidence is led or for purposes of determining a suitable sentence. The discretion must be exercised subject to the provisions of section 93ter(2)(a) of the MCA, which provides in the case of the trial of a matter on the merits, that:

“(2) (a) In considering whether summoning assessors under subsection (1) would be expedient for the administration of justice, the judicial officer shall take into account -

- (i) the cultural and social environment from which the accused originates;
- (ii) the educational background of the accused;
- (iii) the nature and the seriousness of the offence of which the accused stands accused or has been convicted;
- (iv) the extent or probable extent of the punishment to which the accused will be exposed upon conviction, or is exposed, as the case may be;
- (v) any other matter or circumstance which he may deem to be indicative of the desirability of summoning an assessor or assessors,

and he may question the accused in relation to the matters referred to in this paragraph.”

- [10] The misapprehension on the part of Regional Magistrate Maleka and Ms Odendaal in the absence of any cogent reason there for, appears to be predicated on a proposed statutory amendment of section 93ter(1) of the MCA which has never been put into operation by the Legislature.
- [11] The current position in our law was dealt with comprehensively in *Sibanda v S* (CA 59/2022) [2023] ZANWHC 40 (12 April 2023), where Hendricks JP (Petersen J concurring), eloquently set out position. In *Sibanda* the issue was whether the Regional Magistrate misdirected himself by not giving effect to section 93ter(1), by appointing two assessors to sit with him in a matter where the accused was tried with the offence of rape. The contention being that it was peremptory, in the case of a charge of rape, that the Regional Magistrate be assisted by two assessors unless an accused requests that the trial be proceeded with without assessors. The provisions of section 93ter(1) of the MCA were misconstrued on a similar basis as in the present matter, being the proposed statutory amendment of section 93ter(1) of the MCA read with Schedule 2 of the MCA which has never been put into operation by the Legislature.
- [12] In *Sibanda* the following exposition of the law as it currently stands, was provided:
- “Section 2 of the Magistrates’ Courts Act 67 of 1998*
- [7] ... The focal point is thus whether the Regional Magistrate misdirected himself by failing to appoint two assessors in terms of section 2 of the Magistrates’ Courts Act 67 of 1998. The President assented to Act 67 of 1998 (the English text signed by the President) on 28 September 1998, which was published in Government Gazette (GG) 19323 of 7 October 1998. The date of commencement of Act 67 of 1998 was, however, still to be proclaimed by Proclamation in the Government Gazette. Section 6 of Act 67 of 1988 specifically provided that:
- “6 Short title*
- (1) This Act is called the Magistrates’ Courts Amendment Act, 1998, and shall take effect on a date fixed by the President by proclamation in the Gazette.
- (2) Different dates may be so fixed in respect of –
- (a) different items contained in Schedule 2 to the principal Act; and
- (b) different areas in the Republic.”
- [8] On 20 April 2000, two years after Act 67 of 1998 was assented to, Proclamation R24 was published in Government Gazette GG 21124 of 20 April 2000. Proclamation R24 reads as follows:
- “No. R. 24, 2000 COMMENCEMENT OF THE MAGISTRATES’ COURTS AMENDMENT ACT 67 OF 1998*

Under section 6 of the Magistrates' Courts Amendment Act, 1998 (Act No. 67 of 1998), I hereby fix 20 April 2000 as the date on which section 2 of the said Act, in so far as it inserts section 93ter (10) and (11) in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and substitutes section 93ter (5) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), shall come into operation.

Given under my Hand at Pretoria this Seventeenth day of April, Two thousand.

T. M. MBEKI

President

By Order of the President-in-Cabinet:

P. M. MADUNA

Minister of the Cabinet"

[9] Therefore, only section 2 was put into operation with effect from 20 April 2000 in so far as it substitutes sub-section

(5) and inserts sub-sections (10) and (11). Section 93ter (5),

(10) and (11) of the Magistrates' Courts Act 32 of 1944 deals with the oath or affirmation every assessor shall take upon registration on the roll of assessors (sub-section 5) and applications for recusal of an assessor (sub-section 10) and the death of an assessor (sub-section 11).

[10] In so far as the ground of appeal states that "...it is a requirement of the law in terms of the provisions of section 2 of the Magistrate's Court Act ("MCA") 67 of 1998, that he (the learned Regional Magistrate) must be assisted by two assessors, unless he (the appellant) request that the trial proceed without the assessors, and this rendered the trial unfair.", in respect of a charge of rape, this appears to be predicated rather on the substitution of section 93ter which was envisaged by section 1(a) of the Magistrates' Courts Amendment Act, Act 118 of 1991. Under the heading "Substitution of Section 93ter of Act 32 of 1944, as substituted by section 10 (2) of Act 91 of 1977 and amended by section 1 (a) of Act 118 of 1991", the following is stated:

"2. The following section is hereby substituted for section 93 ter of the principal Act:

"Magistrate to be assisted by assessors at certain criminal proceedings.

93 ter (1) In this section assessor means a person where name is registered on a roll of assessors, in terms of regulation referred to in section 93 quat.

(2) A judicial officer shall be assisted by two assessors at the trial of an accused person in respect of any offence referred to in Schedule 2."

[11] Schedule 2 states:

"Schedule 2

Offences in respect of which judicial officers must be assisted by two assessors in terms of section 93 ter (2):

1. Murder
2. Rape
3. Robbery, where serious bodily harm has been inflicted on the victim.
4. Assault, where serious bodily harm has been inflicted on the victim.
5. Indecent assault.”

[12] Section 2 read with Schedule 2 of Act 117 of 1991, was never put into operation and similarly the remainder of section 93ter as substituted by section 2 of Act 67 of 1998, is still not operative and will seemingly never become operative. In this regard an amendment of section 93ter is pending in Parliament in which the peremptory requirement to sit with assessors in murder matters will no longer be a requirement. See: General Notice 1678 of 2023: Publication of Explanatory Summary of the Judicial Matters Amendment Bill, 2023 and the subsequent publication of the Judicial Matters Amendment Bill 7 of 2023.

[13] It axiomatically follows that the amendments in terms of section 2 read with Schedule 2 of Act 67 of 1998 was never promulgated and is therefore not the current

applicable law and will seemingly never be law. It was therefore not necessary for the learned Regional Magistrate to sit with two assessors in this matter. This should take care of the point of law raised as the first ground of appeal. To dispel any confusion that section 93ter applies to offences other than murder, it is apposite to revisit the authorities from the Supreme Court of Appeal (SCA), this Division, as well as other Divisions of the High Court, which is well entrenched in respect of section 93ter as it presently stands.

[14] In terms of these authorities, murder is the only offence for which it is compulsory for a Regional Magistrate to sit with two assessors. This is in terms of Section 93 ter of the MCA 32 of 1944, as amended...

[13] To sum up: A Regional Magistrate or Magistrate may summon assessors to assist at trial or for sentence, as the case may be, for any offence (including robbery with aggravating circumstances),

subject to the factors listed in section 93ter(2) of the MCA. This is discretionary and not peremptory. Presently, the only crime which makes it peremptory to summon assessors is murder. As to the approach to section 93ter (1) of the MCA, see Director of Public Prosecutions, *KwaZulu-Natal v Pillay* (706/2022) [2023] ZASCA 105; 2023 (2) SACR 254 (SCA); [2023] 3 All SA 613 (SCA) (23 June 2023).

DISCUSSION

- [14] Given the request of Regional Magistrate Maleka, a succinct summation of the evidence in the court a quo is necessary. It is within the subset of this factual matrix that this Court is called upon to exercise its reviewing powers and to set aside the conviction of attempted murder, replacing it with any competent verdict provided in section 260 of the CPA, as the evidence may prove. The substratum of the request by Regional Magistrate Maleka is that a gross irregularity was committed when the accused was convicted of attempted murder which is not a competent verdict as provided in section 260 of the CPA.
- [15] The complainant in the present robbery matter, was convicted of an unknown charge and sentenced, the date of which was undisclosed. The accused and the complainant appear to have enjoined a convivial relationship prior to this event. On the release of the complainant the friendship was fractured when he elected to sever ties with a gang known as the Alaska gang which both were members of. On the morning of 4 March 2019, the complainant on encountering the accused, purchased two beers for the accused and the company of the accused at Extension 6, Jouberton. There was known conflict between a group residing in Extension 11 and 19 Jouberton. The accused wanted clarity as to which group the complainant had aligned himself to. This did not appear to be resolved when the complainant parted ways with the accused.
- [16] Later that day, the accused, upon seeing the complainant in the company of his mother and ten (10) year old daughter, whistled and gestured to him to slow down. The accused ran in the direction of the complainant, with friends in his company cautioning him not engage in any aggressive behaviour. The accused's friends proceeded to Mbuli's Tavern.
- [17] An altercation occurred between the complainant and the accused. The accused uttering vulgarities/profanities directed at the next of kin of the complainant. The accused further gave him an ultimatum to choose whether he wished to be affiliated with the Extension 10 or Extension 11 gang.
- [18] The accused drew a white knife which was estimated to be twenty centimetres in length inclusive of the blade and handle. The mother of the complainant intervened in separating the two, placing herself face to face with the accused. The accused, unperturbed by the complainant's mother, extended his right hand, which was bearing the knife, and stabbed the complainant once on left side of his neck.
- [19] The stab to the neck of the complainant rendered him "dizzy." The complainant's mother stepped aside and told the accused that he could kill the complainant since he wanted to kill him. The obviously petrified daughter of the complainant exclaimed that her dad should not be killed. The complainant fell to the ground, with blood oozing from his neck. Whilst on the ground, the accused searched the complainant and removed an amount of R750-00 (although the charge sheet indicates R730.00, nothing turns in this) from his left pocket. The complainant was rendered unconsciousness, only regaining consciousness at Tshepong Hospital.

[20] The complainant's mother corroborated his evidence in material aspects on the stabbing. However, they differed materially on whether the accused had searched the complainant after he had been stabbed. This material factual inconsistency resulted in Regional Magistrate Maleka correctly finding that the evidence of the state fell gravely shy of proving the guilt of the accused beyond a reasonable doubt on an allegation of robbery with aggravating circumstances as intended

in section 1(1) of the CPA.

[21] Masibi, the former girlfriend of the accused testified that she was not present on the day the complainant was stabbed nor was she in possession of any Swiss knife. The accused version juxtaposed against the collective evidence of the state resulted in a finding that the state had proved beyond a reasonable doubt that the accused stabbed the complainant. See: S v V 2000

(1) SACR 453 (SCA) at 455B, S v Van Meyden 1999

(1) 447 (W) at 448F-H.

[22] Regional Magistrate Maleka convicted the accused of attempted murder in circumstances where the only charge proffered against the accused by the State was robbery with aggravating circumstances. Section 260 of the CPA provides as follows:

"260. Robbery

If the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery or, as the case may be, attempted robbery, but –

- (a) the offence of assault with intent to do grievous bodily harm;
- (b) the offence of common assault;
- (c) the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law;
- (d) the offence of theft;
- (e) the offence of receiving stolen property knowing it to have been stolen; or
- (f) an offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955),

...

the accused may be found guilty of the offence so proved, or, where the offence of assault with intent to do grievous bodily harm or the offence of common assault and the offence of theft are proved, of both such offences."

[23] Aside from the seriousness of the offence and the life-threatening nature of the injury inflicted on the complainant, as expounded on by Dr Raveedran who attended to the complainant, Regional Magistrate Maleka was not at liberty to convict the accused of attempted murder, which is not a competent verdict to robbery.

THE EFFECT OF THE MISDIRECTION (GROSS IRREGULARITY)

[24] The conviction of the accused of attempted murder which is not a competent verdict to robbery constitutes a misdirection on the part of Regional Magistrate Maleka which is tantamount to a gross irregularity in the proceedings in which he imposed a sentence which was not reviewable in the ordinary course. The conviction of attempted murder and the resultant sentence is accordingly not in accordance with justice and stands to be reviewed and set aside.

[25] Section 304(2)(c) of the CPA vests this Court with the following powers on review:

“Such court, whether or not it has heard evidence, may, subject to the provisions of section 312 –

- (i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;
- (ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate’s court;
- (iii) set aside or correct the proceedings of the magistrate’s court;
- (iv) generally give such judgment or impose such sentence or make such order as the magistrate’s court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or
- (v) remit the case to the magistrate’s court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and
- (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.”

[26] Regional Magistrate Maleka implores this Court to alter the conviction to one of assault with intent to do grievous bodily harm, but to retain the sentence at eight (8) years imprisonment. It follows axiomatically that the setting aside of the conviction of attempted murder by necessary implication means that the resultant sentence also falls away. Given the request of Regional Magistrate Maleka in relation to the sentence, if this Court were to remit the matter to Regional Magistrate Maleka for sentencing, the probability of the resultant sentence is a foregone conclusion. It is therefore not prudent to remit the matter for sentencing by Regional Magistrate Maleka.

ORDER PURSUANT TO SECTION 304(2)(c)(iv) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

[27] In terms of section 304(2)(c)(iv) of the CPA, this Court is vested with the power to “generally give such judgment or impose such sentence or make such order as the magistrate’s court ought to have given, imposed or made on any matter which was before it at the trial of the case in question.”

[28] Having carefully considered the evidence presented in the court a quo, I am satisfied that in terms of section 260(a) of the CPA that the evidence presented by the State on the charge of aggravated robbery does not prove the offence charged, but does within the confines of the competent verdicts, notwithstanding the life-threatening nature of the injury inflicted on the complainant, prove the competent verdict of assault with intent to do grievous bodily harm.

[29] The accused is accordingly found guilty of assault with intent to do grievous bodily harm.

SENTENCE

[30] In *S v Malgas* 2001 (2) SA 1222 (SCA), in the context of an appeal, stated as follows in respect of the question of sentence:

“[12] ...Where material misdirection by the trial court vitiates its exercise of that discretion an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large...”

[31] This Court is therefore at large to consider sentence afresh. The imposition of sentence is founded on the exercise of the principle of proportionality. In the exercise of a sentencing discretion balance is key. It is trite when considering sentence that the Court considers the personal circumstances of the accused, the seriousness of the offence and the interests of society. See *S v Zinn* 1969

(2) SA 537 (A); [1969] 3 All SA 57 (A). The Court also remains mindful of the main purposes of punishment which include deterrence, retribution, and rehabilitation.

[32] At the time of the imposition of sentence, the accused was thirty-nine (39) years old, unmarried with three children, aged sixteen (16), ten (10) and two (2) years old. All three (3) children lived with the accused and his partner. The accused contended that he was the primary caregiver of his sixteen (16) and ten (10) year old sons born of a previous relationship. The accused was not a first offender and had the following four previous convictions in chronologically order:

(i) On 11 March 2004 the accused was convicted of malicious damage to property and sentenced to a fine of R300.00 or ninety (90) days imprisonment which was wholly suspended for five (5) years on condition the accused is not convicted of malicious damage to

property which is committed during the period of suspension.

(ii) On 22 March 2006, the accused was convicted of a contravention of section 4(b) of the Drugs and Drugs Trafficking Act 140 of 1992, possession of an undesirable dependence producing substance for which the accused was cautioned and discharged.

(iii) On 11 November 2011, the accused was convicted of assault with intent to do grievous bodily harm. The accused was sentenced to pay a fine of R2000.00 or six (6) months imprisonment which was wholly suspended for five (5) years on condition the accused is not convicted of assault with intent to do grievous bodily harm, which is committed during the period of suspension.

(iv) On 17 September 2015, the accused was convicted of a contravention of section 2(1) of the Dangerous Weapons Act 71 of 1968. The accused was sentenced to one hundred and eighty (180) days imprisonment which was wholly suspended on condition the accused was not convicted of contravening section 2(1) of the Dangerous Weapons Act 71 of 1968 which is committed during the period of suspension. In terms of section 103 of the Firearms Control Act 60 of 2000, the accused was declared unfit to possess a firearm.

[33] Given the previous criminal record of the accused it is apparent; that the previous convictions of 11 November 2011 and 17 September 2015 are relevant and form part of what is to be considered in the arriving at an appropriate sentence. Whilst due regard must be had to these previous convictions it is not an overarching factor for an offender but play a role in the determination of a fair and just sentence.

[34] Prior to the arrest of the accused, he was employed on a casual basis cleaning yards earning an income that fluctuated between R120.00 and R160.00 per day. The highest level of education attained by the accused was the standard seven 7 (Grade 9). The accused was arrested on 24 March 2022 and remained incarcerated until bail was deposited on 10 November 2022. The almost eight (8) months of pretrial incarceration must be factored into the equation. The leading authority on the issue of the period spent by an accused in detention while awaiting trial, conviction and sentence is *Radebe and Another v S* (726/12) [2013] ZASCA 31; 2013

(2) SACR 165 (SCA) (27 March 2013) by Lewis JA (Leach JA and Erasmus AJA concurring). It is unarguable that time spent in detention awaiting trial must be given due consideration.

[35] There is no underscoring the seriousness of offence and the circumstances in which it was committed. It was an unprovoked attack on the complainant in the presence of his mother and young ten year' old daughter. This must undoubtedly have been very traumatic. The attack occurred simply because the complainant chose not to return to a life of gangsterism. Dr Raveedran concluded that the complainant suffered life threatening injuries to the neck with subsequent injury to the lung. The complainant spent between six (6) to seven (7) days in the Intensive Care Unit (ICU) before being moved to a normal hospital ward where he was treated for three (3) to four (4) days, before being discharged. The ramifications of the injury inflicted on the complainant lingered on, well after the day of its occurrence.

- [36] The interests of society completes the triad. It is an important consideration. In *S v Banda and Others* 19 91
- (2) SA 352 (BG) at 356E, it was pointed out that courts fulfil a vital function in applying the law in the community. The Court operates in society, and its decisions impact individuals in the ordinary circumstances of daily life. It covers all possible grounds. The Court promotes respect for the law through its decisions and the imposition of appropriate sentences. In doing so, it must reflect the seriousness of the offence and provide just punishment for the offender while also considering the offender's circumstances.
- [37] The aggravating factors inherent in the crime speaks for itself and merits no repetition, save to reiterate that the complainant is fortunate to have escaped death. The accused showed absolute contempt for the complainant. The lack of contrition on the part of the accused is clearly apparent.
- [38] The most suitable form of punishment, having regard to all the factors enunciated above is direct imprisonment. Considering the almost eight
- (8) months that the accused spent awaiting trial, I am satisfied that a period of four (4) years imprisonment is appropriate in the circumstances. The crime of assault with intent to do grievous bodily harm by implication involves violence. In terms of section 103(1)(g) of the Firearms Control Act 60 of 2000, "Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of – any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;..". No facts exist to make an order contrary to the automatic declaration of unfitness to possess a firearm which follows ex lege in terms of the Firearms Control Act. The accused shall accordingly remain unfit to possess a firearm.
- [39] In the result, the following order is made:
- (vi) The conviction and resultant sentence of the accused on the charge of attempted murder is reviewed and set aside.
- (vii) The conviction is replaced with a conviction of assault with intent to do grievous bodily harm as a competent verdict to robbery in terms of section 260(a) of the Criminal Procedure Act 51 of 1977.
- (viii) The accused is sentenced to four (4) years imprisonment.
- (ix) In terms of section 103(1)(g) of Firearms Control Act 60 of 2000, the accused shall remain unfit to possess a firearm.
- (x) The sentence and order in terms of the Firearms Control Act is antedated to 28 August 2023, in terms of section 282 of the Criminal Procedure Act 51 of 1977.

A REDDY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

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