

SOUTH AFRICA / JUDGMENT

Lungisa v S (696/2019) [2020] ZASCA 99; 2021 (1) SACR 1 (SCA) (9 September 2020) [2020] ZASCA 99

COURT

Supreme Court of Appeal

BEFORE

Maya P, Dambuza JA, Nicholls JA, Weiner AJA,
Mabindla-Boqwana AJA

CASE / FILE NUMBER

696/2019

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 696/2019

In the matter between:

ANDILE LUNGISA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: Lungisa v The State (Case no 696/2019) [2020] ZASCA 99(9 September 2020)

Coram: MAYA P and DAMBUZA and NICHOLLS JJA and WEINER and MABINDLA-BOQWANA AJJA

Heard: Matter disposed without oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 9

September 2020. Ukuwiswa: Esi sigwebo sawiswa ngeintanethi, ngokusiwa kubathetheleli bamacala onke ngeimeyili, nangokupapashwa kwisiza sonxi-belelwano seNkundla yeziBheni ePhakamileyo nangokufakwa ku-SAFLII. Umhla nexesha lokuwiswa kwaso uthathwa njengokuba ngulo: ngu-15h00 ngomhla we-9 kweyo Msintsi ka 2020. Summary: Sentence – appeal against imposition of effective sentence of two years’ imprisonment for assault with intent to cause grievous bodily harm to fellow municipal councillor – whether trial court exercised discretion improperly -- whether sentence is disproportionate --- appeal dismissed. Isishwankathelo: Isohlwayo – isibheni esichasa ukunikwa kwesohlwayo sokuvalwa entolongweni iminyaka emibini ephelileyo ngenxa yokuhlasela ngenjongo yokwenzakalisa kakubi emzimbeni ugxa wakhe ongomnye wooceba bakwamasipala – ingaba inkundla eyavavanya ityala yasebenzisa ilungelo layo lokwenza isigqibo ngokungafanelekanga na -- ingaba isohlwayo sigqithisile na --- isibheni sachithwa.

ORDER UMYALELO

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Roberson J and Renqe AJ (concurring) sitting as a court of appeal):

1. Condonation for the late filing of the appellant’s notice of appeal is granted.
2. Condonation for the late filing of the respondent’s heads of argument is granted.
3. The appeal is dismissed. Kwisibheni esivela: KwiSahlulo SeNkundla ePhakamileyo SaseMpuma Koloni, eGrahamstown (NguRoberson J noRenqe AJ (bevumelana) behleli njengenkundla

yesibheni):

1. Isicelo sombheni sokuxolelwa kokungeniswa kade kwesaziso sakhe sokubhena siyavunyelwa.
2. Isicelo somphenduli sokuxolelwa kokungeniswa kade kwezihloko zakhe zengxoxo siyavunyelwa.
3. Isibheni siyachithwa.

JUDGMENT

ISIGWEBO

Mabindla-Boqwana AJA (Maya P and Dambuza and Nicholls JJA and Weiner AJA concurring):
NguMabindla-Boqwana AJA (uMaya P noDambuza noNicholls JJA noWeiner AJA bevumelana):

- [1] The appellant, Mr Andile Lungisa, appeared before the Port Elizabeth Magistrates' Court (Mr Cannon) on a charge of assault with intent to cause grievous bodily harm. He pleaded not guilty to the charge and was subsequently convicted of that charge on 17 April 2018. On 9 May 2018 he was sentenced to three years' imprisonment, of which one year was suspended for a period of five years on condition that he was not convicted of assault with intent to cause grievous bodily harm or assault, committed during the period of suspension.
- [1] Umbheni, uMnu. Andile Lungisa, wayevele phambi kweNkundla yeeMantyi yaseBhayi (kuMnu. Cannon) emangangalelwe ngokuhlasela ngenjongo yokwenzakalisa kakubi emzimbeni. Waliphika ityala, waza emva koko wafunyanwa enalo elotyala ngowe-17 kuTshaz'iimpuzi ka-2018. Ngowe-9 kuCanzibe ka-2018 wanikwa isohlwayo sokuvallelwa entolongweni iminyaka emithathu, ekwathi unyaka omnye kuloo minyaka waxhonywa ithuba eliyiminyaka emihlanu, phantsi komqathango wokuba engasayi kufunyanwa kwakhona enetyala lokuhlasela ngenjongo yokwenzakalisa kakubi emzimbeni okanye elokuhlasela, ekwenza ngelixesha lokuxhonywa kwawo.
- [2] With the leave of the Eastern Cape Division of the High Court, Grahamstown (the high court), he appealed against both his conviction and sentence. His appeal was dismissed on 2 April 2019 and the high court only adjusted the condition attached to the suspended portion of his sentence.[1] He thereafter lodged a petition with this Court and was granted special leave to appeal against his sentence only, on 27 May 2019.
- [2] Wathi ke ngemvume yeSahlulo seNkundla ePhakamileyo yaseMpuma Koloni, eGrahamstown (inkundla ephakamileyo), wabhena ngakwisigwebo esi sokuba netyala, kwanesohlwayo eso wayesinikiwe. Isibheni sakhe sachithwa ngowesi-2 kuTshaz'iimpuzi ka-2019 yaza inkundla yalungelelanisa nje lamqathango uhamba nalaandawo ixhonyiweyo yesohlwayo sakhe. Uye emva koko wafaka isicelo sokubhena kuleNkundla, waza wanikwa imvume ekhethekileyo yokuba abhene ngakwisohlwayo kuphela, ngowama-27 kuCanzibe ka-2019.
- [3] The parties agreed to have the appeal determined without the hearing of oral argument in terms of s 19(a) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). An issue to be disposed of before consideration of the merits of the appeal relates to two condonation applications brought by both parties, one pertaining to the late filing of the notice of appeal by the appellant and the other relating to the late filing of the heads of argument by the respondent. Both applications were unopposed and, having perused the relevant affidavits, I am satisfied that good cause has been shown for condonation to be granted.
- [3] Umbheni kunye nombuso bavumelana ukuba isibheni eso siqwalaselwe kungakhange kuviwe zingxoxo mpikiswano ngqo ngokomlomo, oko kusenziwa ngokwemimiselo yesolotyalingu s19(a) woMthetho weNkundla eziNgentla we-10 ka-2013 (uMthetho weNkundla eziNgentla). Umba ekufuneka kuqalwe ngawo phambi kokunika ingqalelo kwinkqu yesibheni esi zizicelo ezibini zoxolelo ezingeniswe ngawo omabini amaqela, omnye uphathelele nokungeniswa kade kwesaziso sokubhena ngumbheni, omnye ingulowo

wokungeniswa kade kwezihloko zengxoxo ngumphenduli. Zozibini ezi zicelo zange kubekho cala liziphikisayo; ke, ndakuba ndiwagocagocile amaxwebhu obungqina, ndanelisekile kukuba zikhona izizathu ezivakalayo zokuba eziziphene zixolelwe.

- [4] The appellant's conviction emanates from events which took place in the Nelson Mandela Bay Municipality Council (the Council) chamber at a meeting held on 27 October 2016. At that meeting the appellant, who is a member of the African National Congress (ANC) and was, at the time of the incident, its leader in the Council, grievously assaulted one Mr Ryno Kayser (the complainant), a Democratic Alliance (DA) councillor. The incident, which was recorded by Mr Ronaldo Gouws, also a DA councillor, on his cell phone, occurred during a debate involving the conduct of another ANC Councillor, Mr Sabani, at a

previous meeting. Due to the fact that a matter concerning him was to be discussed, the Speaker, Mr Jonathan Lawack had requested Mr Sabani to leave the Chamber. Mr Sabani refused to do so causing the Speaker to call for security personnel to remove him. Security members were prevented from approaching Mr Sabani by certain members of the Council, including the appellant.

- [4] Ukufunyaniswa enetyala kombheni lo kususela kwizehlo ezenzeka kwigumbi leBhunga lika-Masipala waseNelson Mandela Bay (iBhunga) kwiintlanganiso eyayibanjwe ngomhla wama-27 kweyeDwarha ngo-2016. Kuloo ntlanganiso umbheni lo, olilungu lombutho i-African National Congress (i-ANC) nowaye, ngelo xesha kusenzeneka lento, eyinkokheli yawo lo mbutho phaya kwelaaBhunga, wahlasela ngokuyingozi uMnu. Ryno Kayser (ummangali), uceba weDemocratic Alliance (i-DA). Esi sehlo, esathi sashicelelwa nguMnu. Ronaldo Gouws, naye enguceba we-DA, kumnxebe wakhe oyiselula, sehla ngexesha lengxoxo-mpikiswano eyayi-malunga nokuziphatha komnye uceba we-ANC, uMnu. Sabani, kwintlanganiso eyayingaphambili. Ngenxa yokuba kwakuza kuxoxwa ngomba omalunga naye, uSomlomo, uMnu. Jonathan Lawack, wayemcelile uMnu. Sabani ukuba aphume kulo iGumbi elo. UMnu. Sabani wala ukwenjenjalo, nto leyo eyabangela ukuba uSomlomo abize abezokhuselo ukuza kumkhupha. Amalungu ezokhuselo athintelwa ukuba asondele kuMnu. Sabani ngamalungu athile eBhunga elo, ekwakukho kuwo nombheni lo.

- [5] A motion which caused consternation among ANC councillors was adopted by the Council in respect of Mr Sabani. The meeting then descended into chaos. At this point, the appellant and another ANC councillor, Mr Feni, approached the Speaker's precinct. Mr Feni grabbed the Speaker by the arm and the complainant moved towards the Speaker's table to intervene. It is at this stage that the appellant hit the complainant on his head with a glass jug filled with water. The complainant fell to the ground and bled profusely. He became unconscious and was taken to hospital, where he received medical treatment. He sustained a three centimetre long, one centimetre deep laceration with an underlying haematoma on the left temple, a small flap laceration on the left ear, multiple linear abrasions (about five to ten centimetres long) on the left side of the neck

from which pieces of glass had to be surgically removed, and a 'deep' four centimetre long abrasion on the upper

chest. The laceration on his left temple was sutured.

[5] Kwabakho ke isiphakamiso esabangela ukunxunguphala phakathi kooceba be-ANC esathi samkelwa liBhunga ngokubhekise kuMnu. Sabani. Intlanganiso ke ngoku yasuka yaba ngumbhodamo. Kwesi sithuba, umbheni lo kunye nomnye uceba we- ANC, uMnu. Feni, baya ngakwiqonga likaSomlomo. UMnu. Feni wanqakula uSomlomo ngengalo waza ummangali wasondela ngasetafileni kaSomlomo ukuya kungenelela. Kwaba kwesi sithuba ke apho umbheni lo wabetha ummangali entloko ngejagi yegilasi ezele amanzi. Ummangali wawa phantsi, wopha ngamandla. Wakhe wemkelwa ziingqondo waza wasiwa esibhedlele, apho wafumana unyango loogqirha. Waba nenxeba elinzulu elinokudlakazeka, elibude buzii-sentimitha ezintathu, nobunzulu obuyisentimitha enye, likwanalo negazi elenze ihlwili apha ngaphantsi kwalo, kwintlafuno yasekhohlo, kwabakho neline inxeba lokukrazuka endlebeni yasekhohlo, imigruzuko emininzi ebude (bumalunga neesentimitha ezintlanu ukuya kutsho kwezilishumi) kwicala langasekhohlo lentamo apho kwakhutshwa iingceba zegilasi ngokusikwa athungwe; kwabakho nenxeba 'elinzulu' eliziisentimitha ezine kumantla esifuba. Laa mgruzuko ukwintlafuno yasekhohlo wathungwa.

[6] In convicting the appellant, the trial court found the appellant to have been an extremely poor witness who tailored his version as the trial progressed. The high court echoed the findings of the trial court and confirmed the appellant's conviction in its well-reasoned judgment. As to sentence, the trial court expressed that a non-custodial sentence would be inappropriate as it 'would over-emphasise the personal circum-stances of the accused to the detriment of the seriousness and prevalence of the offence, as well as the community interest and the interest of the complainant.' It observed that despite the appellant being a first offender, he was convicted of a serious crime. The high court declined to interfere

with the trial court's sentencing discretion holding that, whilst the sentence was robust, in its view, the difference

between what it would have imposed and the actual sentence imposed by the trial court was not so significant as to justify its interference.

[6] Ekumfumaneni enetyala umbheni, inkundla eyayivavanya elityala yamfumanisa umbheni elingqina elibuthathaka gqitha elamane ukulakha elalo icala leballi ngokuya kuqhubeka ukuthethwa kwetyala. Inkundla ephakamileyo yazingqina iziphumo zenkundla ebivavanya elityala, yakuqinisekisa ukufunyanwa kombheni enetyala, kwisigwebo sayo esasizathuzelwe kakuhle. Malunga nesohlwayo, inkundla eyayivavanya ityala yavakalisa ukuba isohlwayo sangaphandle kwejele sasiya kuba sesingafanelekanga njengoko 'sasiya kusuke sigxininise gqitha ekuboneleleni iimeko zobuqu zalo ungumtyholwa, ize loonto ikhokelele kumngcipheko wokuba bungasiwa so ububi bolu lwaphulo-mthetho nokuxhaphaka kwalo, kanti nokulungelwa kwabantu ekuhlaleni, nokulungelwa kummangali.' Inkundla leyo yatsho nokuthi, nakuba umbheni lo wayesisaphuli-mthetho esiqalayo, eli tyala wayefunyenwe

enalo lityala elibi, elinobuzaza. Inkundla ephakamileyo ke yala ukuphazamisana nendlela eye yabona ngayo inkundla eyayivavanya elityala isithi, nangona isohlwayo eso siqatha, ngokwembono yayo, umahluko phakathi kwesohlwayo ebiyakusiwisa yona kunye nesohlwayo siwisiweyo yinkundla eyavavanya ityala, wawungemkhulu ngokwaneleyo ukuba kuthetheleleke ukusiphazamisa esaa sigqibo salaankundla yokuqala.

- [7] The essence of the appeal is that the sentence imposed by the trial court is shockingly inappropriate in that the trial court did not properly balance the personal circumstances of the appellant with the seriousness of the offence and interests of society, leading to a misdirection which merits interference by this Court. It was particularly contended that the trial court downplayed the achievements of the appellant and the fact that he has a wife and children to look after. Further, it did not consider that the event happened in ‘a moment of madness’ and was ‘a spur of the moment’

attack, albeit serious and brutal. It was submitted that the appellant was sacrificed at the altar of deterrence and that a higher standard was applied in assessing his blame-worthiness because of his high political profile than would have been applied to an ordinary person. Counsel for the appellant suggested that an appropriate sentence in these circumstances would be correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act)[2] or, if this court finds that a custodial sentence is necessary, a sentence in terms of s 276(1)(i) of that Act.[3]

- [7] Oyena ndoqo wesi sibheni yile ndawo ithi isohlwayo esanikwa yin-kundla eyavavanya ityala sinokungafaneleki ngendlela eyothusayo, kuba loo nkundla zange yenze mlinganiso ufanelekileyo phakathi kweemeko zobuqu zombheni nobubi, nobuzaza bolwaphulo-mthetho olo kwanokulungelwa koluntu, nto leyo ikhokelele ekubeni kwenzeke ulahlekiso-mthethweni olukufaneleyo ukuphazanyiswa yileNkundla. Eyona nto kwaxhwithwana ngayo ngokukodwa kukuba inkundla eyavavanya ityala yazithatha kancinci izenzo zempumelelo zombheni kwanokuba unomfazi nabantwana abaxhomekeke kuye. Ngaphezulu, ayizange iyithathele ngqalelo

into yokuba esisihlo senzeka ‘ngethutyana lokuba buphambana’ saye sasiluhlaselo olwasuka lwazigqabhukela ngaloo mzuzu, nakuba eneneni luyinto enobuzaza kwakunye noburhalarhume. Kwathiwa ke umbheni unqunqelwe egoqweni ekuthiwa luthintelo-bubi, kwaza kwasetyenziswa umgangatho ongqwabalala kakhulu kunokuba kufuneka ekujongeni ukuba nobutyala kwakhe, loo nto isenziwa liwonga lakhe eliphezulu ngokwepolitiki, kunokuba bekuya kwenziwa kumntu njee. Umthetheleli wombheni waphakamisa ukuba isohlwayo esifanelekileyo kwezi meko sesokugwetyelwa ngaphantsi kweliso labezoBulungisa ngokwemimiselo yecandelo lama-276(1)(h) loMthetho weeNkqubo zoLwaphulo-mthetho wama-51 ka-1977 okanye, ukuba le nkundla ifumanisa ukuba isohlwayo esinentolongo siyafuneka, sisohlwayo ngokwemimiselo yecandelo lama-276(1)(i) lawo looMthetho.

[8] It is a well-established sentencing principle that the determination of sentence is principally a matter for the trial court's discretion.[4] Grounds upon which a court of appeal may interfere with a sentence imposed by a trial court are confined. The approach to be followed by the appellate court when dealing with sentence has been stated in many judgments of this Court. It was aptly summarised in *S v Hewitt*[5] as follows: 'An appellate court may not interfere with [the discretion of the trial court] merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at

all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking'

or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been

unreasonably exercised.' (Footnotes omitted) The appellate court must, therefore, determine whether there is any basis for interference on those circumscribed grounds.

[8] Ngumgqaliselo ekudala wasekwayo ukuba ukuqingqwa kwesohlwayo ngumbandela oselungelweni lwenkundla eyavavanya ityala. Izizathu enokuthi inkundla yezibheni iphazamisane ngazo nesohlwayo esinikwe yinkundla evavanya ityala zimbaleka. Inkqubo elandelwa yinkundla yezibheni xa iphethe isohlwayo ixeliwe kwizigwebo ezininzi zaleNkundla. Yashwankathelwa ngokuchanekileyo ku- *S v Hewitt* ngolu hlobo lulandelayo: 'Inkundla yezibheni mayingaphazamisani [nelungelo lokwenza isigqibo lenkundla eyavavanya ityala] ngesizathwana njee

sokuba yona ibiyakunika isohlwayo esahlukileyo. Ngamanye amazwi, akwanele ukugqiba kwelokuba isohlwayo esikhethwe yiyo siso ebesiya

kuba sisohlwayo esifanelekileyo. Kufuneka into ethe chatha; kufuneka igqibe ukuba isohlwayo esikhethwe yiyo sesona sohlwayo

sifanelekileyo kwanokuba isohlwayo ebesikhethwe yinkundla ebivavanya ityala asisiso esifanelekileyo. Ngoko, inkundla

yezibheni kufuneka izanelise ukuba inkundla evavanye ityala yenze ulahlekiso-mthethweni oluluhlobo, isigaba nobuzaza ezibonakalisa

ukuba, ayikhange ilisebenzise ilungelo lokwenza isigqibo konke-konke okanye yalisebenzisa ngendlela engafanelekanga okanye

engacingeliyo xa yayinika isohlwayo eso. Ngoko ke, uphazamiso luthetheleleka kuphela apho kukho ukwahlukana 'okugqamileyo'

okanye 'okothusayo' okanye 'okunxubisayo' phakathi kwesohlwayo senkundla eyavavanya ityala neso ibiyakusinika inkundla yezibheni. Kwizehlo ezinjalo ke, ilungelo lokwenza isigqibo lenkundla evavanye ityala lithathwa

njengelisetyenziswe ngendlela engacingeliyo.' (Amanqakwana ange-zantsi ashiyiwe.) Inkundla yezibheni imele, ke ngoko, ukuba ijonge ukuba ingaba sikhona na isizathu sokuphazamisana nesohlwayo kuloo mida isikiweyo.

[9] In exercising its discretion, the trial court must weigh both mitigating and aggravating factors, focused on the nature of the crime, the personal circumstances of the offender and the interests of society. As indicated above, the contention in this case, is that although the offence committed by the appellant was particularly serious, the trial court accorded

insufficient weight to the personal circumstances and exaggerated the moral blameworthiness of the appellant.

[9] Ekusebenziseni ilungelo layo lokwenza isigqibo inkundla evavanya ityala kufuneka ivelele iimeko ezibunciphisayo ubutyala nezo zibongezayo, iqwalasele ukuba lityala elinjani, neemeko zobuqu zomaphuli-mthetho lowo, kunye neemeko zokulungelwa koluntu ngokubanzi. Njengoko sekuxeliwe ngasentla apha, isikhalazo sombheni kweli tyala, kukuba nakuba ulwaphulo-mthetho lwakhe lwalunobuzaza ngendlela eyodwa, inkundla eyavavanya ityala, iimeko zobuqu zakhe zange izinike ukubaluleka okwaneleyo, yakubaxa nokuziphatha kwakhe.

[10] The appellant was 38 years old at the time of sentencing. He is married with seven children. He is gainfully employed as a municipal councillor and as an ad hoc writer. His parents and siblings are also dependent on him. His achievements and contribution to society as a political activist have gained him the respect of many within his community. It was submitted on the appellant's behalf that he was respected by a number of his fellow councillors, had a good relationship with

the complainant prior to the assault incident and is a first offender. These factors must be considered together with the

nature and seriousness of the offence and the interests of society.

[10] Umbheni wayeneminyaka engama -38 ubudala ngexesha enikwa isohlwayo esi. Utshatile, enabantwana abasixhenxe. Uqeshiwe ngokunenzuzo njengoceba wakwamasipala ekwangumbhali wamaxesha ngamaxesha. Abazali bakhe kwanabantakwabo bakwaxhomekeke kuye. Izenzo zakhe eziyimpumelelo kwanegalelo lakhe eluntwini njengesiquququ sezepolitiki zimenze waba ngumntu ohlonitshiweyo ngabaninzi ekuhlaleni. Kwatshiwo ke, egameni lombheni lo, ukuba wayehlonitshiwe liqela loogxa bakhe abangoceba, kwaye wayenobudlelwane obuhle kunye nommangali ngaphambi kwesehlo

sohlaselo, waye ekwangumntu oqalayo ukona. Ezizinto ke maziqwalaselwe kunye nobunjani, kwanobubi obunobuzaza bolwaphulo-mthetho olu, kwakunye nokulungelwa koluntu ngokubanzi.

- [11] It was conceded on the appellant's behalf that the offence he committed was 'particularly serious and even egregious'. The respondent highlighted the fact that the 'weapon' used in assaulting the complainant was particularly dangerous. The complainant was hit with such force that the glass jug shattered. The assault, which was applied on a sensitive part of the complainant's head, his temple, could have resulted in death or brain damage. It was

also stressed that the complainant was told by the doctor that he was 'lucky to be alive'. The medico-legal report

clearly evidences the life threatening nature of the injuries sustained by the complainant.

- [11] Kwavunywa kona, egameni lombheni, ukuba ulwaphulo-mthetho olu walwenzayo 'lwalunobubi obunobuzaza ngendlela eyodwa, kunjalonje lutsibe ilitye likaphungela. Umphenduli (uMbuso) wayigqamisa inyaniso yokuba 'isikhali' awahlasela ummangali ngaso sasinobungozi ngokukodwa. Ummangali wabethwa ngamandla kangangokuba loojagi yegilasi yaqhekeka yaziingceba. Ummangali wabethwa kwindawo e ethe-ethe entloko, entlafunweni, nto leyo yayinokumbulala okanye imenzakalise ubuchopho. Yagxininiswa nento yokuba ummangali waxelelwa ngugqirha ukuba kwabalithamsanqa ukuba abe usaphila. Ingxelo yoogqirha neyasemthethweni inika ubungqina obucacisayo ukuba amaxeba ommangali ayenobungozi.

- [12] It is not in dispute that the attack has had adverse, long term effects on the complainant. He still suffers from short-term memory loss, migraines, and emotional distress. The trial court cannot be faulted for underscoring the gravity of the offence. The concession as to the seriousness of the offence and its impact on the complainant was well made by the

appellant's counsel.

- [12] Ayiphikiseki into yokuba olu hlaselo luye lwaba neziphumo ezibi, neziyakuphela emva kwexesha elide kummangali. Ummangali usamane ukulahlekwa kukukhumbula izinto ezisanda kwenzeka, ekhathazwa kukuqaqanjelwa kakhulu yintloko nakukudandatheka ngokweemvakalelo. Inkundla eyavavanya ityala ayinakugxekwa ngokububeka buce gca ubunzulu bobubi bolu lwaphulo-mthetho. Nomthetheli wombheni lo ubuvume ngokuphandle ububi nobuzaza bolu lwaphulo-mthetho kwanomphumela walo kummangali.

- [13] The trial court also correctly found that the community is entitled to expect a high level of responsible behaviour and maturity from its leaders. Municipal councillors are entrusted with making decisions that profoundly affect the quality of lives and livelihoods of their communities. As the forum where these decisions are made, the council chamber is intended to provide a safe platform for the exposition of differing viewpoints, opinions and robust debates. Political party representatives should be exemplary in their keen understanding of the values of freedom of expression and respect for rules of engagement.

The integrity and credibility of the municipal administration in the eyes of the community should not be compromised. The community expects its representatives to uphold the law and to act in accordance with the rules. If councillors resort to aggression and violence when decisions do not favour them, the interests of society are undermined.

- [13] Inkundla eyavavanya ityala yenza okulungileyo ngokufumanisa ukuba uluntu lunelungelo lokulindela ukuziphatha okukwinqanaba eliphezulu ngenkathalo nokuvuthwa kwengqondo ngokwezenzo kwiinkokeli zalo. Ooceba bakamasipala baphathiswe umsebenzi wokwenza izigqibo ezichaphazela ngokunzulu udidi nomgangatho wobomi kunye neendlela zokuphila zabantu kwiindawo zabo zasekuhlaleni. Njengeqonga ezenzelwa kulo ezizigqibo, igumbi leBhunga limiselwe ukuba libe yindawo ekhuselekileyo apho kuboniswa ngeembono ezahlukeneyo, nezimvo ezingafaniyo kunye neengxoxo ezishushu. Abameli bamaqela ezopolitiko bamele ukuba babe yimizekelo njengabantu abayiqonda nzulu imithetho yenkululeko yokuvakalisa izimvo nokuhlonipha imigaqo yothetha-thethwano nokuxoxa. Ukunyaniseka kwanokuthenjwa kolawulo loomasipala emehlweni oluntu mayingabi zizinto ezithotywa isithozela. Uluntu lulindele ukuba abameli balo bathobele umthetho, baziphathe ngokwemigaqo. Ukuba

ooceba babhenela kwiingcwangu nobungxwaba-ngxwaba obunezigalo xa izigqibo zingahambisani nabo, ukulungelwa koluntu kunyhashelwa

phantsi.

- [14] As a leader of the ANC in the Council, who was responsible for instilling discipline among his fellow councillors and was a role model for aspiring political leaders, the appellant had a responsibility to lead by example. Instead he did the opposite and his fellow councillors indeed took their cue from him and also threw glasses at other councillors. The trial

court was correct in its description of the councillors' conduct as that of 'street thugs' and in remarking

that the appellant's conduct should not be tolerated.

- [14] Njengenkokeli ye-ANC phaya kulo iBhunga, eyayinoxanduva lokuphembelela ingqeqesho phakathi koogxa bayo abangoceba ekwangumzekelo ophambili kwiinkokeli zepolitiki ezisakhulayo, umbheni wayenoxanduva lokukhokela ngokuba ngumzekelo. Endaweni yoko, wenza obekungalindelekanga kuye, baze ke oogxa bakhe abangoceba, ngokwenene, bazeka mzekweni, benza njengaye nabo, bagibisela iigilasi kwabanye ooceba. Inkundla eyavavanya ityala yayinyanisile xa yayithelekisa ukuziphatha kwabaceba njengokuziphatha 'kwemigulukudu yasesitalatweni' nangokutsho ukuba isimilo sombheni lo masinganyanyezelwa.

- [15] Our country presently suffers from uncontrolled and unacceptable levels of violence. The community expects the courts to impose sentences that recognise this prevalence and show its repugnance and contempt for such conduct. Assault with intent to cause grievous bodily harm is one of those offences that are pervasive in our society. While custodial sentences are

not the ultimate solution, they play a role in sending a message not only to the appellant but to would-be offenders, that regardless of one's position in society, the law will take its course and appropriate sentences will be meted out.[6] This is not to sacrifice the appellant at the altar of deterrence, but to levy a sentence fitting of the particular circumstances of the case. I may add that the sentence imposed by the trial court would, in my view, equally befit even an ordinary member of society, if due regard is had to the seriousness of the offence.

[15] Ilizwe lethu kunamhla nje liyonakala ngamanqanaba angalawulekiyo nangamkelekanga obungxwaba-ngxwaba obunezigalo. Abantu ke balindele ukuba iinkundla ziwise izohlwayo ezikubonisayo ukunanzwa koluxhaphako nokungamkeleki koku kuziphatha kunje. Uhlaselo ngenjongo yokwenzakalisa kakubi emzimbeni lusesinye sezozenzo zolwaphulo-mthetho ezigubungele uluntu lwethu. Noxa izohlwayo ezihamba nentolongo zingesiso izisombululo esigqibeleleyo, ziyayenza indima yokuthumela umyalezo ongayi kumbheni lo kuphela, kodwa oya nakwabanye abaseceba ukwaphula umthetho, othi nokuba sele ubani enewonga eluntwini, umthetho wona uya kuyi dlala indima yawo, ziwiswe nezohlwayo ezifanelekileyo. Oko ayikokunqunqela umbheni lo egoqweni lothintelo-bubi kodwa kwenzelwa ukuba kubekwe isohlwayo esifanelene ncam neemeko ezizodwa zeli tyala. Ndingongeza ndithi, ngokokwam ukubona, uhlobo lwesohlwayo esibekwe yinkundla eyavavanya ityala, besiya kufaneleka kanye nakumntu njee olilungu loluntu, xa kujongwe ncakasana ubuzaza belityala.

[16] The further submission made on behalf of the appellant as a mitigating factor, that the atmosphere in the council chamber was charged with anger and that members of all the political parties in the Council exhibited unruly behaviour towards each other, does not take the matter any further. The submission was that the incident happened 'in a state of uncontrollable anger . . . and in a brief yet volatile and insane attack on the complainant, all of which took a very short time.'

Interestingly, at the trial the appellant never contended that he was provoked. His version was that he had acted in self-defence

when the complainant and other DA party members approached him in a threatening manner. Further, later on the night of the incident, he laid with the local police a charge of attempted murder against the complainant. In the relevant part, his statement to the police read: '[the complainant] punched me with a clenched fist. I ducked he missed and in the period gunshots were fired. I then started running towards the door. I then felt fists beating me on my back . . . There was also a councillor with false teeth who dove trying to take me down, I jumped over him.' Conspicuously missing from this statement was the crucial fact that he struck the complainant on the head with a glass jug, which shattered and cut his own fingers as well. Instead he told the police that he did not know how he sustained the cuts. His statement to the police was clearly untruthful and measured to manipulate the incident to his advantage. The video footage firmly disproved his version in a number of respects and his attempts to salvage what was left of his version only made matters worse. Both the trial court and the high court carefully highlighted these contradictions in their judgments.

- [16] Okunye okuthethiweyo egameni lombheni njengombandela onokunciphisa ububi betyala kukuba umoya phaya kwigumbi lebhunga wawu ngowomsindo, amalungu awo onke amaqela opolitiko endlongondlongo kwamanye, akuwuhambiseli phambili lo mcimbi. Kuthiwe esisehlo senzeka 'kwimeko eyayinemisindo engalawulekiyo . . . kwaye nokuhlaselwa kommangali kwenzeka ngesiquphe esasiqhambuk' umlilo nesasingekho zingqondweni, izinto ezathatha ixesha elincinane kakhulu xa zizonke.' Into etsala umdla yile yokuba ngexesha lokuxoxwa kwetyala umbheni lo zange akhe amise ngelithi waye eqale woniwa. Wayesoloko esithi yena waye ezikhusela xa ummangali kunye namanye amalungu eqela le-DA ayesiza kuye ngendlela egrogriso. Ngaphezu koko, ngobusuku beso sehlo, waya kumangala emapoliseni asekuhlaleni esithi ummangali ebezama ukumbulala. Kule ndawo ifaneleneyo, ingxelo yakhe kumapolisa yayifundeka ngolu hlobo: '[ummangali] undibethe ngenqindi. Ndiye ndaphepha, wandiphosa, kwaza ngelo xesha kwabakho udubulo ngemipu. Ndaza ndaqalisa ukubaleka ndisiya ngasemnyango. Ndaza ndeva amanqindi endibetha emqolo . . . Kwakukwakho noceba owayenamazinyo okwenziwa, owazijulayo ezama ukundiwisa, ndatsiba phezu kwakhe.' Into eyayibonakala gca ukuba ayikho kule ngxelo yayiyile ingundoqo, eyokuba yena wabetha ummangali lo entloko ngejagi yegilasi, eyaphukayo yaza naye yamsika eminweni. Endaweni yoko, wawaxelela amapolisa ukuba akazi ukuba wawafumana njani loo manxeba okusikeka. Ingxelo yakhe emapoliseni yayibubuxoki, ibonakala ukuba yayilungiselelwe ukuba isijike esaa sehlo isenze sibe sesilungiselela yena. Imiboniso yeevidiyo yayiphikisa into ayithethileyo ngokungathandabuzekiyo, kwimiba eliqela; yathi nemizamo yakhe yokuhlangula loo nto ishiyekileyo yecala lakhe leballi, yayenza imeko yambi nangakumbi. Kwizigwebo zazo zombini ezi nkundla, le yavavanya ityala kunye nenkundla ephakamileyo, zaye zazigqamisa ngenkathalokazi ezi ziphikisi-nyaniso.
- [17] Ultimately the appellant was proved to have been the aggressor on the day of the incident. He led the other councillors in acting in defiance of the Council rules and the Speaker's instructions. His explanation for approaching the Speaker's precinct, purportedly to speak to him, which he admitted was impermissible, amounted to a further falsehood and was contradicted by the evidence of the respondent's witnesses that Mr Feni, his co-aggressor, grabbed the Speaker by the arm.
- [17] Ekugqibeleni yaba nguye umbheni owafunyaniswa ukuba yayinguye owaqala ukuhlasela ngomhla wesehlo. Nguye owakhokela abanye ooceba ukuba benze izenzo zokungayithobeli imiyalelo yeBhunga nekaSomlomo. Inkcazo yakhe yesizathu sokuya ngakumhlaba kaSomlomo, esithi ke wayesiya kuthetha naye, nto ke leyo phofu awayivumayo naye ukuba yayingavumelekanga, loonkcazo yaphinda yaba kokunye ukungathethi nyaniso, waza waphikiseka bubungqina bamangqina omphenduli obuthi uMnu Feni, owayengumhlaseli kunye naye, wanqakula uSomlomo ngengalo.
- [18] The appellant showed no remorse for his actions. In his communication with the correctional supervision officer, he clearly did not accept responsibility for his actions as it was recorded in his pre-sentence report that '[t]he accused does not admit guilt of the count

but ... respects and accepts the verdict of the court.’ His explanation for what happened displayed no unequivocal acceptance of wrongdoing or penitence of the kind described in *S v Matyityi*.^[7] The Court in *Matyityi* observed, that ‘before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.’ The appellant has shown none of this. On the contrary, he changed his version several times, in an attempt to place blame on others for the altercation, perjured himself in court by giving false evidence, which was clearly contradicted by the video footage, continued to deny any wrongdoing and gave a false statement to the police.

[18] Umbheni lo akabonakalisanga kuzisola ngezenzo zakhe. Kuqhakamshelwano lwakhe negosa lokugada leSebe lezoBulungisa zange aluvume uxanduva lwezenzo zakhe njengoko kwakubhaliwe kwingxelo yakhe yaphambi kokuba kunikwe isohlwayo kwathiwa, ‘lo mtyholwa akavumi ukuba unetyala ngale nto kodwa ... uyasihlonipha, esamkela ke isigqibo senkundla’. Inkcazo yakhe malunga nento eyayenzekile zange ibonakalise ukuba uyamkela ngaphandle kokuthandabuza nangokungenamavel’etshona ukuba wenza into engalunganga, okanye ukuzisola okulolu hlobo luchazwe ku- *S v Matyityi*. INkundla phaya ku-Matyityi yathetha yathi, ‘phambi kokuba inkundla ibe nako ukufumanisa ukuba umntu obekwa isityholo uyazisola ngokunyanisekileyo, kufuneka ukuba iqondisise kakuhle ukuba, phakathi kwezinye izinto: yayiyintoni eyayimqhubile lo mtyholwa ukuba enze eso senzo wasenzayo; kwenzeke ntoni ukususela ngoko eyenze ukuba aguquke entliziyweni; nokuba ingaba unako nyhani na ukuziqonda kakuhle iziphumo zezo zenzo.’ Lo mbheni akabonisa nanye yezi zinto. Endaweni yoko, uliguqule ibali lakhe amaxesha aliqela, ezama ukubeka ityala lalo mlo phezu kwabanye abantu, uziveze enkundleni njengexokisa-mthetho ngokunika ubungqina obungeyonyaniso, obaphikiswayo ngokucacileyo yimiboniso yeevidiyo, waqhubeka ukukhanyela mpela ukuba wenze into engalunganga, wanika nengxelo engeyonyaniso emapoliseni.

[19] In all the circumstances I find that the high court was correct in its finding that there was no misdirection or improper exercise of the discretion by the trial court. All the relevant factors were appropriately balanced. That being the case, the appellate court is not at large to interfere with the sentence imposed by the trial court. I must, however, disagree with the high court on one aspect, which is that the sentence imposed is a robust one. The period of three years’ imprisonment of which one year is suspended on certain conditions (effectively a sentence of two years’ imprisonment), meets the circumstances of this case and is in keeping with sentences that have been imposed by the courts in similar cases. One similar case is *S v Eales*^[8] where the appellant had been convicted of assault with intent to do grievous bodily harm for striking the complainant on the head with a beer glass, in an unprovoked attack at a hotel. The attack caused injuries and scarred the complainant’s face. The appellant was sentenced to three years’ direct imprisonment. On appeal, the sentence was altered by suspending one year of the three years’ imprisonment for five years on certain conditions. The exact sentence has been imposed in this case. Notably, the appellant

in Eales was an 'ordinary' offender.

[19] Kuzo zonke ezi meko ndifumanisa ukuba inkundla ephakamileyo yagqiba ngokufanelekilyo ekufumaneni kwayo ukuba zange kubekho

lulahlekiso-mthethweni okanye kusetyenziswa gwenxa kwelungelo lokwenza isigqibo yinkundla evavanye ityala. Yawabeka onke amasoloty esikalini ngendlela efanelekileyo. Xa kunjalo ke, inkundla yezibheni ayikwazi kusiphazamisa isohlwayo esabekwa yinkundla eyavavanya ityala. Kodwa ke, kukho indawo enye endingavumelani ngayo nenkundla ephakamileyo; le ithi esi sohlwayo sinikiweyo siqatha. Ixesha lokuvallelwa entolongweni iminyaka emithathu, elinyaka mnxe oxhonyiweyo phezu kwemiqathango ethile (ngokwenene esona sohlwayo sibe yiminyaka emibini entolongweni), lizifanele iimeko zeli tyala kwaye lihambelana nezohlwayo esezakhe zawiswa ziinkundla zamatyala kwimibandela efana nalo. Elinye ityala elifanayo leluka S v Eales apho umbheni waye efunyenwe enetyala lokuhlasela ngenjongo yokwenzakalisa kakubi emzimbeni kuba wayebethe ummangali entloko ngebhotile yegilasi, emhlasela engamenzanga nto, ehotele ethile. Olo hlaselo lwabangela amanxeba neziva ebusweni bommangali. Loo mbheni wanikwa isohlwayo esikukuyakudontsa entolongweni iminyaka emithathu ngqo. Wathi akubhena, isohlwayo eso saguqulwa ngokuxhonywa konyaka omnye kuleya yokuyakudontsa entolongweni, exhonyelwa iminyaka emihlanu phantsi kwemiqathango ethile. Esi sohlwayo sinikiweyo kweli ityala siyafana nqwa nesiya. Into eqaphelekayo ke kukuba lo mbheni uphaya ku-Eales wayengumaphuli-mthetho ongumntu 'nje' wasekuhlaleni.

[20] In *Makhudu v Director of Public Prosecutions*, [9] this Court found the position of the appellant, as a police officer, to be a relevant aggravating factor. It found his actions to have been utterly reprehensible, calling for a severe response. The Court imposed a sentence of five years'

imprisonment for assault with intent to cause grievous bodily harm.

[20] Ku-*Makhudu v Director of Public Prosecutions*, le Nkundla yafumanisa iwonga lombheni, owaye elipolisa, ilisoloty elilenza libi ngakumbi tyala. Yafumanisa ukuba izenzo zakhe zazisonyanyeka ngokugqithisileyo, zifanelwe sisohlwayo esiqatha.

INkundla ke yamisela isohlwayo seminyaka emihlanu esentolongweni ngokuhlasela omnye ngenjongo yokwenzakalisa kakubi emzimbeni.

[21] I do not read any of the cases cited on behalf of the appellant to be supportive of the view that custodial sentences are not suitable for first offenders in cases of serious assault. In some of these cases a sentence of direct imprisonment with a portion suspended was considered appropriate. It must be remembered that there is no uniformity in sentencing. While similar cases serve as a useful guide, the particular circumstances of the offender, the nature of the offence and interests of society remain the litmus test. These circumstances may differ in each case, attracting different responses. As was stated in *S v Fraser*, [10] 'it is idle exercise to try to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence. Each case should be dealt with on its

own facts, connected with the crime and the criminal...'

[21] Kuwo onke amatyala abhekise kuwo umbheni andifundanga ndafumana nto ixhasa oluluvo lokuba izohlwayo ezihamba nentolongo azifanelekanga kubantu abaqalayo ukona kwiimeko zohlaselo olubi olunobuzaza. Kwezinye zezimeko isohlwayo sokuya ngqo entolongweni ekukho inxenye yaso exhonyiweyo zabonwa zizezifanelekileyo. Makukhunjulwe ke ukuba akukho mfano ncam ekumiseleni isohlwayo. Nangona amatyala afana namanye encedisa ukunika isikhokelo esincedayo, iimeko ncakasana zomoni, ubunjani balo ulwaphulo-mthetho olo, kunye nokulungelwa koluntu ngokubanzi zihlala ziluvavanyo oluziphumo ziyicacisayo imeko. Ezi meko zingohluka kwityala ngalinye, zifune ke iimpendulo kuzo ezahlukileyo. Njengoko kwatshiwo ku-S v Fraser, 'yinto engasi ndawo ukuzama ukufanisa imibala yetyala elichotshelweyo kunye nemibala yamanye amatyala ngenjongo yokufikelela kwisohlwayo esifanelekileyo. Imeko nganye mayijongwe phezu kwezayo izibakala ezinxulumene nolwaphulo-mthetho kwelotyala kunye nomaphuli-mthetho lowo...'

[22] In the result, the following order is made:

1. Condonation for the late filing of the appellant's notice of appeal is granted.
2. Condonation for the late filing of the respondent's heads of argument is granted.
3. The appeal is dismissed.

[22] Isiphumo ke ngulomyalelo ulandelayo:

1. Isicelo sombheni sokuxolelwa kokungeniswa kade kwesaziso sakhe sokubhena siyavunyelwa.
2. Isicelo somphenduli sokuxolelwa kokungeniswa kade kwezihloko zakhe zengxoxo siyavunyelwa.
3. Isibheni siyachithwa.

N P MABINDLA-BOQWANA

ACTING JUDGE OF APPEAL

IJAJI YEZIBHENO EBAMBELEYO

APPEARANCES / ABATHETHELELI:

For Appellant/ Omele UMbheni: T N Price SC

Instructed by/ Eyalelwa ngaba: Nettletons, Grahamstown

Symington & De Kock Attorneys, Bloemfontein

For Respondent/ Omele uMphenduli: N C Turner

Instructed by/ Eyalelwa ngaba: Director of Public Prosecutions, Grahamstown

Director of Public Prosecutions, Bloemfontein

- [1] By adding the words ‘and for which the accused is sentenced to unsuspended imprisonment without the option of the fine.’

Ngokufakela la mazwi: ‘asinikelwa yona umtyholwa lo isohlwayo sokuvallelwa entolongweni kungaxhonywa ndawo yaso kungekho nethuba lokuhlawula umdliwo.’

- [2] Section 276(1)(h) of the Criminal Procedure Act provides for correctional supervision as one of the forms of punishment which a sentencing court can impose on a convicted person. Correctional supervision is defined in s 1 of the Criminal Procedure Act as ‘a community based sentence to which a person is subject in accordance with Chapter V and VI of the Correctional Service Act, 1998, and the regulations made under that Act . . .’ The term is defined in the Correctional Services Act 111 of 1998 as ‘a form of community corrections contemplated in Chapter VI.’ This, amongst other objectives, affords sentenced offenders an opportunity to serve their sentences in a non-custodial manner. ICandelo lama-276(1)(h) loMthetho weeNkqubo zoLwaphulo-mthetho libonelela ukugadwa kwabo banobutyala benziswe imisebenzi ethile njengenye yeendlela zesohlwayo

esisenokumiselwa yinkundla eyenza loonto. Isohlwayo sokugadwa ngabeSebe lezoBulungisa sichazwe kwicandelo 1 loMthetho weeNkqubo zoLwaphulo-mthetho ngokuba sisohlwayo sokusebenza phakathi koluntu ngokwezahluke zesi-V nesi-VI zoMthetho weeNkqubo zezoBulungisa, 1998, kunye nemigaqo eyenziwe phantsi koMthetho lowo . . .’ Eligama lichazwe kuMthetho weeNkqubo zezoBulungisa we-111 ka-1998 kwathiwa, ‘uhlobo oluthile lwezilungiso ezenzelwa phakathi koluntu oluqingqwe kwiSahluko sesi-VI.’ Le, phakathi kwezinye iinjongo-kwenza, inika aboni abanikwe isohlwayo ithuba lokuphumeza izohlwayo zabo ngendlela ebagcina bengayi

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entolongweni.

- [3] Section 276(1)(i) of the Criminal Procedure Act provides for imprisonment from which a convicted person may be placed under correctional supervision in the discretion of the Commissioner or a parole board. ICandelo lama-276(1) (i) loMthetho weeNkqubo zoLwaphulo-mthetho libonelela ngendlela yokuvallelwa anokuthi xa esuka kuyo umntu obefunyenwe enetyala abekwe phantsi kokugadwa ngabeSebe ngabezoBulungisa ngokubona kukaKhomishinari okanye ibhodi yezoxolelo.
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- [4] S v Sadler [2000] ZASCA 13; 2 All SA 121 (A) para 8.
- [5] S v Hewitt [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 8.
- [6] See S v Dalindyebo [2015] ZASCA 144; [2015] 4 All SA 689 (SCA); 2016
- (1) SACR 329 (SCA) para 82, where this Court held: ‘The lesson that cannot be emphasised enough is that persons in positions of authority such as the appellant are obliged to act within the limits imposed by the law, and that no one is above the law. The Constitution guarantees equal treatment under the law.’ Ku-S v Dalindyebo [2015] ZASCA 144; [2015] 4 All SA 689 (SCA) kumhlathi 82, leNkundla yathi: ‘Isifundo esingenakugxininiswa ngokwaneleyo kukuba abantu abikwizikhundla zolawulo njengombheni lo banoxanduva lokuziphatha ngokwasemthethweni, kwaye kungekho mntu ongaphezu komthetho. UMgaqo-Siseko uqinisekisa impatho yabantu elinganayo phantsi komthetho.’
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[7] S v Matyityi [2010] ZASCA 127; [2010] 2 All SA 424 (SCA); 2011

(1) SACR 40 (SCA) para 13.

[8] S v Eales 1991 (1) SACR 160 (N).

[9] Makhudu v Director of Public Prosecutions [2001] ZASCA 21; 2001 (1) SACR 495 (SCA) para 16.

[10] S v Fraser 1987

(2) SA 859 (A) at 863 A-D.

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Prepared on 10 October 2026 · Esheria