

SOUTH AFRICA / JUDGMENT

Mbhele v S (A904/2015) [2017]

ZAGPPHC 1166 (11 August 2017)

[2017] ZAGPPHC 1166

COURT

North Gauteng High Court, Pretoria

BEFORE

Teffo

CASE / FILE NUMBER

A904/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO:A904/2015

11/8/2017

In the matter between:

BONGANI MIKE

MBHELE

Appellant

and

THE

STATE

Respondent

JUDGMENT

TEFFO, J:

- [1] The appellant stood trial in the Regional Court, Piet Retief together with two others where they faced one count of murder read with the provisions of section 51(2) of Act 105 of 1997 and one count of assault with intent to do grievous bodily harm. He pleaded not guilty on both counts but was ultimately convicted and sentenced to 15 years imprisonment. The two counts were taken together for purposes of sentence.

- [2] He now appeals against his conviction and sentence leave to appeal having been granted on petition.

THE APPEAL AGAINST CONVICTION

- [3] The issues raised in the appeal against the conviction of the appellant are that the trial court misdirected itself by finding that the appellant's version was false beyond reasonable doubt, by rejecting his version and that of his co-accused and accepting the version of the state witness who was a single witness. It should have accepted the appellant's version and that of his co-accused as reasonably possibly true and acquitted him. So it was accordingly argued.
- [4] The State disagreed with the submissions and argued that the appellant was correctly convicted.

THE APPEAL AGAINST SENTENCE

- [5] The sentence of the trial court was challenged on the basis that the magistrate did not attach sufficient weight to the personal circumstances of the appellant, in particular, his age, the fact that he was a first offender and his prospects of rehabilitation. Further to this, it was also submitted that the trial court did not have sufficient evidence before it at the time to enable it to determine whether there were substantial and compelling circumstances which justified it to deviate from imposing the prescribed minimum sentence of 15 years imprisonment.
- [6] The State disagreed with the submissions and argued that the sentence imposed was proportionate to the offences committed.

THE EVIDENCE

- [7] Mr Sipiwe Victor Langa Mandla ("Mr Mandla") testified that he was walking on the street with the deceased, Mr Sboniso Zwane, on 28 November 2009 at night. As they were walking, they heard the noise of a female person coming from the direction where they were heading. They saw three people and as they were approaching them, the other two who were hiding, emerged. The two men accosted them. One of them accosted the deceased and the other one attacked him. Another man from the three people approached the deceased and stabbed him with an unknown object. The man also approached him and tried to stab him. He shielded with his hand and the object he was using cut him on the outer part of his hand and on the joint. He was able to show the court a mark on his joint and another one on the other part of his hand which showed that he sustained an open wound which was about 5 cm long as a result of the incident. He ran to a nearby house, knocked at the door and the owner of the house opened the door for him. As he was about to open the burglar door, he saw his assailants coming towards him and closed the door. He picked up a bottle in the yard and threw it at his assailants. He managed to run to the back of the house where he hid himself in the garden. He heard the sound of a breaking window and subsequent thereto he could hear that his assailants were leaving. He stood up and returned to the scene where the deceased was stabbed.

- [8] He found him lying down, picked him up and proceeded to a certain house where he sought help. The police and an ambulance were called. The police arrived and he and the deceased were taken to the hospital. He was treated and taken back home.
- [9] In the morning the police came to him and asked if he knew their assailants. He took them to the appellant's parental home and they did not find him. They proceeded to Mr Magugu Nkosi's ("Mr Nkosi") parental home where they only found Ms Ntombi Nkosi, the lady who had been making noise on the street on the night of the incident.
- [10] From the Nkosi residence they proceeded to a shop called Magogo where they found the three accused. Mr Nkosi fled the scene. The police gave chase and managed to apprehend him. The four of them were eventually arrested.
- [11] The police asked him what happened. He told them that Mr Sikumbuze Hlanhle (Accused 1) assaulted him, Mr Thulani Mavuso (Accused 2) assaulted the deceased and the appellant who was in possession of an unknown object, stabbed the deceased with it.
- [12] Accused 1 assaulted him with open fists and they grabbed each other. The appellant also joined the fight.
- [13] He further testified that he grew up with the appellant. The appellant used to fetch water at his parental home. He knows Accused 1 and 2 very well. Accused 1 used to have a market in the area where he resided. Accused 2 used to visit a friend who rented a place to stay at his neighbours. Although he did not look at the time, the incident happened after 21:00. He and the deceased were from his mother's place on their way to his grandparents' place when the incident happened. The deceased was his friend and he resided next to his grandmother's place.
- [14] Under cross-examination by counsel for Accused 1 he testified that he was not drunk at the time of the incident and he did not take any drink on that day. There were enough lights on the street where they were walking. He knew the accused and would not confuse them with anybody. The road where they were walking, was a gravel road and there were houses on the sides of the street. He did not have any problems with the accused prior to the incident. He did not know if there were problems between them and the deceased. The accused's conduct that night surprised him. During the attack as he was facing Accused 1 trying to defend himself, the appellant came to him. He did not have the opportunity to run away as he was attacked out of the blue. He had to defend himself. When the appellant came to him, he was already from the deceased. He left the deceased and came to him.
- [15] The fight between Accused 1 and him did not take ten minutes but lasted for more than five minutes. At that time he was assaulting him with fists while he was trying to grab him. He only ran away after the appellant had stabbed him.

- [16] At the time of the fight between him and Accused 1, Mr Nkosi and the lady they had heard making noise, were just standing and they eventually left the scene. The people who followed him after he ran away were accused 1, accused 2 and the appellant. Mr Nkosi and the lady were not among them.
- [17] He denied that he and the deceased attacked the accused and that there was another incident where they fought again. He maintained that there was one incident and after he was attacked by the appellant, he ran away, came back and picked up the deceased who was injured. He was away from the scene for plus-minus 5 minutes. After he was attacked, he ran away. He could not tell what happened in his absence.
- [18] Under cross-examination on behalf of Accused 2 he was adamant there was never a first fight after which he ran away and the second fight which took place after he came back with the deceased. He denied that after he ran away Accused 1 and Mr Nkosi left the scene and only Accused 2 and the appellant remained at the scene. He further denied that after returning to the scene where he found Accused 2 and the appellant, he just started assaulting them and the deceased did not say anything. He reiterated that there was one fight and he ran away. He came back, found the deceased lying on the ground and all the accused had already left the scene. He denied that in the first fight, he fought with accused 1 and Mr Nkosi and when he returned to the scene after running away, he fought with Accused 2 and the appellant. He maintained that he and the deceased fought with the three accused (accused 1 and 2 and the appellant) immediately after they met all of them in the street.
- [19] He denied that he injured Accused 1 with an unknown object but admitted that he threw bottles at him while he was at the door of the house where he ran after the appellant stabbed him on his hand. He also denied that at some stage he and the deceased fought with the appellant. He maintained that although the incident happened at night, there were streetlights at the scene and he was able to see all his assailants.
- [20] Under cross-examination by counsel for the appellant he did not comment when he was told that the appellant's version was that the incident took place at approximately 24:00 as he testified that he did not look at the time. When asked whether that was possible, his response was that he did not know. He denied that he was at the tavern on the night of the incident. He denied that he attacked Accused 1 and Mr Nkosi who were walking in front of the appellant and Accused 2 on their way to the second tavern after he saw them at the first tavern with a certain lady. He also denied that he fell in the process of the fight, stood up and ran away. He further denied that after Accused 1 and Mr Nkosi had ran away from the scene, he returned to the scene from the veld, asked Accused 2 and the appellant why were they assaulting him and after they told him that they were not the people who assaulted him, he assaulted Accused 2 with a bottle. He also denied that after Accused 2 was assaulted with a bottle, he bled profusely and the appellant then confronted him about this. He denied that thereafter he hit the appellant with the bottle, it broke and the appellant picked it up and stabbed him with it on his hand while Accused 2 ran away and he also ran away. He denied

that the appellant hit him with a bottle to defend himself from him as he testified that he did not have any reason to fight with him.

[21] He also denied that it was not the appellant who stabbed the deceased and that the appellant last saw the deceased at the first tavern. He reiterated that he was with the deceased on their way to his grandmother's place when they were assaulted and stabbed by the appellant and his co-accused.

[22] A confession statement made by Accused 2 before Captain Khaliswayo was handed in by agreement as exhibit "C" and read as follows:

" During November 2008 I was with my friends namely Bongani Mbhele, Magugu surname unknown and Skhumbuzo Hlanze. We were at a certain tavern. We decided to go to another tavern at Welverdiend. We all departed to Welverdiend direction. On our way to Welverdiend at Phoswa location, we met a male by the name of Simphiwe. Sphiwe is well known to all of us. Magugu and Skhumbuzo Hlanze approached Simphiwe and they both attacked him and assaulted him. They were assaulting him by clinched fists. Simphiwe ran away to the nearest homestead. Both Magugu and Skhumbuzo left and I remained behind with Bongani Mbhele. While we were standing then emerged Simphiwe and other male. I saw that the other male was Sboniso Zwane. Simphiwe came direct to us and he hit me on my forehead by an unknown object and I bled. He proceeded to Bongani and hit him on his head and he sustained an open wound because he also bled. Bongani Mbhele fought back and I saw that he was in possession of a knife. He stabbed Simphiwe on his hand and I also saw when stabbing Sboniso Zwane. Bongani Mbhele stabbed Sboniso Zwane on his upper part of his body. Sphiwe and Sboniso Zwane ceased or stopped on attacking us. Bongani Mbhele and myself left Simphiwe and Sboniso Zwane behind. We all arrived at the tavern Welverdiend where we met Magugu and Skhumbuzo. We proceeded drinking beers until the following morning at about 06:00. The police arrived and found three of us at Welverdiend and we were arrested. It was myself, Bongani Mbhele and Skhumbuzo. Magugu was found at the police station and he was already arrested."

[23] That concluded the state case.

[24] The three accused, namely, Mr Skhumbuzo Freddie Hlanze (Accused 1), Mr Thulani Gift Simelane (Accused 2) and Mr Bongani Mike Mbhele (the appellant) testified on their own in defence of the cases against them without calling witnesses.

[25] Accused 1 testified as follows: On 28 November 2009 he was in a group of four males and one female walking on the street. Accused 2 and 3 were walking behind them. The group left the deceased at a certain tavern called Magwenzi. The state witness, Mr Mandia was not present at Magwenzi. As they were walking, he appeared and he was heavily under the influence of liquor. They were also drunk and the lady who was in their company was seated on the grass on the payment crying. Mr Mandia just walked between them and approached the lady who was in their company. He wanted to take her with him. He refused and Mr Mandla asked him if he had a problem. He further told him that he can see that he had a problem. He and Mr Mandla started fighting and Mr Mandia fell down. He stood up and ran away to a certain

house. He chased after him and realised that the place where he ran to, was dark. He decided to turn back and went to Mr Mandla's grandmother's place where they sell alcohol with Mr Nkosi.

- [26] After two to three hours Accused 2 and the appellant joined them. At that time he noticed that accused 2 was injured. Accused 2 requested a place to sleep and it was given to him. They sat with the appellant and when he asked him where they had been, he informed him that they got lost on the way. He also informed him that after he and Mr Nkosi had left the scene, there was another fight. They remained at the place until in the morning. The police arrived, found them and arrested all four of them. They took them to the police station where they informed them about the murder of the deceased. They asked them to tell them what role each one of them played in the commission of the murder.
- [27] Mr Mandla told them that Mr Nkosi was not present, he assaulted him, Accused 2 was present but did not assault anybody and that the appellant stabbed him together with the deceased.
- [28] He further testified that Mr Mandla started the fight on the street. He fought with Mr Mandla with fists and at the time he was fighting with Mr Mandla, the deceased was not present. At no stage was the deceased present when he was fighting. Nobody was hurt when he left the scene.
- [29] Under cross-examination by the State he testified that he was not at the scene when the deceased was stabbed. When he was fighting with Mr Mandia, Mr Nkosi was there but just standing. He did nothing. The lady who was there is his aunt, Ms Ntombi Nkosi. They were from the tavern with her where they had been drinking. When he was fighting with Mr Mandla, Accused 2 and the appellant were standing together a distance away from them and he did not know whether they were responding to a call of nature or not. He denied the version contained in Accused 2's confession statement to Captain Khaliswayo that after meeting Mr Mandla he and Mr Nkosi attacked him. He maintained that Mr Mandla was the person who accosted them. He denied that he was afraid of the appellant.
- [30] Accused 2 also testified. He witnessed a fight between Accused 1 and Mr Mandia. He did not know what the fight was all about. He was from Magwenz'is tavern in the company of Accused 1, the appellant and Mr Nkosi and it was around 24:00 to 01:00. When they left Magwenzi Accused 1 and Mr Nkosi were walking in front of them. He and the appellant were walking behind. He suddenly saw Accused 1 fighting with Mr Mandla. Mr Nkosi was not involved in the fight. Mr Mandla ran away and within a few minutes he returned to the scene with the deceased and started assaulting him and the appellant. At that time Mr Nkosi and Accused 1 had left the scene. He does not know what Mr Mandla used to assault him. He just felt blood coming out. He did not see the deceased doing anything or participating in the fight when Mr Mandla was busy assaulting him and the appellant. Mr Mandla also assaulted the appellant. He was bleeding through his nose and he concentrated on the bleeding. He only saw the appellant being assaulted and him making a gesture like he was

stabbing. He was about 7 (seven) metres away from the appellant, Mr Mandia and the deceased. He was drunk at the time.

[31] After being told that somewhere in the confession statement, he mentioned that he saw how the deceased was stabbed, he testified that at some stage Mr Mandla and the deceased were coming or charging towards the appellant and that was when he saw the action like stabbing each other. He maintained that he did not see the weapon that was used. He only saw the gesture and not the actual stabbing. He denied what he stated in the confession statement that he saw the appellant stabbing the deceased with a knife and maintained that he knew nothing about that, he did not tell that to Captain Khaliswayo.

[32] He never fought with the deceased on the night in question. He was only assaulted by Mr Mandla. He did nothing to Mr Mandla. Mr Mandla just assaulted him. After Mr Mandla assaulted him on the forehead, he started bleeding. He did not get any medical attention as he did not have time to see a doctor because he was arrested the following day after the incident. He asked the police to take him to the hospital. They

refused and told him that he will be healed. He did not have an open wound as he was only bleeding through the nose.

[33] When the police came to arrest them at Magogo in the company of Mr Mandla, he just pointed them out and they did not talk. Mr Mandla only told the police at the police station that he was assaulted by him.

[34] Under cross-examination by counsel for the appellant, he denied that during the second fight, Mr Mandla was alone. He reiterated that he was in the company of the deceased. He denied seeing the appellant picking up something and stabbing Mr Mandla with it on his hand. He was adamant that he only saw the stabbing gesture. He admitted that they were drunk but testified that they were not that drunk. He also admitted that there were streetlights at the spot where the incident took place. He denied that he could not see what happened because he was bleeding.

[35] Under cross-examination by the State he was referred to the discrepancies in the confession statement and his evidence in court and he testified that Mr Nkosi and Accused 1 assaulted Mr Mandla upon meeting him. Mr Nkosi assaulted Mr Mandla with fists but cannot say how many times. When told that Accused 1 testified that Mr Nkosi just stood there, he testified that although they were all together he does not know if that is a lie or not but it was possible that he could be lying. He could not say whether Mr Mandla was telling lies or not after being told that he also testified that Mr Nkosi was just standing there and did nothing. He admitted that he also said so. He further admitted that in the confession statement he said Accused 1 and Mr Nkosi attacked Mr Mandla. He did not know why the lady in their company was crying. He denied that he stated in the confession statement that he saw the appellant stabbing the deceased with a knife and Mr Mandla. He testified that he saw him stabbing them but did not see the weapon that was used.

[36] On a question by the court he confirmed his evidence that only Mr Mandla assaulted him and could not explain why he said in his plea explanation that the deceased also assaulted him.

[37] The appellant testified as follows: On the day of the incident he was in the company of Accused 1 and 2, the deceased and Ntombi at Magwenzi tavern. They were drinking but Ntombi and the deceased did not drink. When

they left Magwenzi, Ntombi and the deceased disappeared and left him, Accused 1 and 2 behind. He did not know where they went. The last time he saw the deceased was when he left Magwenzi. While they were on the way after leaving Magwenzi and about to cross a dam or a river, Mr Mandla appeared from the bush. There was a conflict between Mr Mandia, Accused 1 and Mr Nkosi. At that time he and Accused 2 were a bit far from the others as they were reacting to a call of nature. He saw Accused 1 kicking Mr Mandla. He could not say whether Mr Nkosi assaulted Mr Mandla but when he was assaulted, they were together. Mr Mandla was on the ground and when he stood up, he ran away. Accused 1 and Mr Nkosi did not follow him. Mr Mandla returned to the scene with a bottle and approached him and Accused 2. He asked them why did they assault him? They told him that they did not assault him. Suddenly he hit Accused 2 with the bottle he was carrying, on his face. Accused 2 started bleeding. He asked Mr Mandla as to why was he assaulting Accused 2. Mr Mandla also hit him with the bottle. He fought back by picking up a broken bottle and hit him on his arm. He cut him on the outer part of his arm (above the wrist). When he hit Mr Mandla with the broken bottle, Accused 2 was facing down as he was bleeding. He subsequently left Mr Mandla, rushed to Accused 2 and took him away.

[38] The incident took place near Mr Mandla's parental home. He and Accused 2 went to look for Accused 1 and Mr Nkosi as he did not know what Mr Mandla could further do. They met with Accused 1 and Mr Nkosi in the area where the deceased resided. Accused 2 was seriously injured. He asked for a place to sleep at the place where they went and he was provided with same. He, Accused 1, and Mr Nkosi continued enjoying themselves until in the morning. They drank alcohol the whole night and in the morning, the police arrived.

[39] When he hit Mr Mandla with the bottle, Mr Mandla was alone. He denied the evidence of Accused 2 to the effect that when he cut Mr Mandla with a bottle on his arm, he was with the deceased. He reiterated that he did not see him. He does not know how the deceased died. He only learnt about his death when he was at the police station after his arrest. He cut Mr Mandla with a broken bottle on his arm because of anger. He wanted to defend himself. Mr Mandla was carrying a bottle and he injured one of his friends. He also assaulted him with the bottle.

[40] Under cross-examination by counsel for Accused 1 he testified that Accused 1, Mr Nkosi and Mr Mandla were the only people who were involved in the first incident and reiterated that he never saw the deceased and Ntombi at the scene of the incident.

- [41] Under cross-examination by the State when asked why he did not open a case against the person who hit him with a bottle, he testified that as he was intending to do so, one police officer came to him and assaulted him. He told him that he wanted to open a case against them. He was victimised at the police station and had to change places where he was kept. He was further asked why he did not report the matter at a different place where he was kept. He testified that he did not know how to lay a charge. When told that according to Accused 2's evidence the deceased and Mr Mandla assaulted accused 2 and then proceeded to him, he denied this and reiterated that all what he knew was that he and Accused 2 were assaulted by Mr Mandla. He was adamant that when he and Accused 2 were assaulted, the deceased was not there and Accused 1 and Mr Nkosi had already left the scene.
- [42] He also denied that when they met Mr Mandla, they were with Ntombi. He testified that Mr Nkosi and Accused 1 were part of the first fight. Mr Mandla was already in a fighting mood when he came to the scene. He came from the bushes out of the blue and asked who they were. Suddenly he picked up a fight with accused 1 and Mr Nkosi and Accused 1 and assaulted him. According to his evidence he only saw the wrestling between Mr Mandla and Accused 1. Accused 1 grabbed Mr Mandla, tripped him and he fell down. After Mr Nkosi went to them, he did not see what happened. Accused 1 also kicked Mr Mandla. He did not count how many times. When he and Accused 2 were approaching the scene, Mr Mandla stood up from the ground and ran away. The kicking was more than once. At that time he did not pay attention to what Mr Nkosi was doing. After the first fight, Accused 1 and Mr Nkosi did not chase after Mr Mandla. They continued walking.
- [43] He denied that they chased Mr Mandla up to where he entered a certain house. He further denied that Mr Mandla was drunk and maintained that it was him and the people in his company who were drunk that night. When asked as to why he hit Mr Mandla with a broken bottle and not just slap him with an open hand, he testified that he acted out of anger.
- [44] The principles applicable to an appeal on the merits and the approach to be followed by the court of appeal were articulated in *S v Francis* 1991

(1) SACR 198 (A) at pages 198J-199A where the following remarks were made:

"The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness's evidence - a reasonable doubt will not suffice to interfere with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

[45] Section 208 of Act 51 of 1977 ("the Criminal Procedure Act") provides that an accused person may be convicted of any offence on the single evidence of a competent witness. It is, however, a well-established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (*S v Stevens* 2005 (1) All SA 1 (SCA)).

[46] The correct approach to the application of the so-called 'cautionary rule' was set out by Diemont JA in *S v Sauls and Another* 1981 (3) SA 172 (A) at 180E-G where he said the following:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness ... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth had been told. The cautionary rule referred to by De Villiers JP in *R v Mokoena* 1932 OPD 79 at

may be a guide to a right decision but it does not mean that 'the appeal must succeed if any criticism however slender, of the witnesses' evidence were well founded ... ' It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[47] In proving its case the State led the evidence of a single witness, Mr Mandla, who testified that when the deceased was stabbed, he was with him. He explained as to how it came about that the deceased and him were stabbed by the appellant, where they were and in whose company the appellant was. His evidence was short, clear and straight to the point. The trial court found that his evidence was credible and could be relied upon after it was corroborated by Accused 2's version to the effect that at some stage he observed an action from the appellant in the form of a stabbing gesture towards the deceased. Upon being cross-examined extensively about this aspect and in relation to what he stated in the confession statement he made before Captain Khaliswayo that he observed the appellant stabbing the deceased with a knife, he further testified that he did not tell Captain Khaliswayo that he saw the appellant stabbing the deceased with a knife but that he did not see what he used to stab the deceased. Mr Mandla's evidence was further to the effect that he did not have any grudge against the appellant and his co-accused and he did not know if the deceased had any grudge against them. It was clear from his evidence which was corroborated by Accused 2 that at no stage did the deceased fight the appellant when he stabbed him and that as and when Accused 1 and 2 accosted him and the deceased Mr Nkosi and the lady were just standing there.

[48] Accused 1's evidence which corroborated the appellant's version regarding the fact that they left the deceased at Magwenzi is of no assistance to the appellant. Accused 1 testified that he had already left the scene when whatever happened between the appellant and the deceased happened. He only heard from the appellant that after they had left the scene, there was a

second fight between him and Mr Mandla. The evidence of Accused 1 is also not of assistance to the appellant in that it did not corroborate his evidence that much but differed to a large extent. Both Accused 1 and the appellant distanced themselves from the murder scene. They both did not see the deceased at the scene and had not witnessed the assault on him. Accused 2 testified that after the first fight between Mr Mandla and Accused 1, Mr Mandla ran away and came back to the scene where he attacked him and the appellant. According to him Accused 1 and Mr Nkosi were no longer at the scene when Mr Mandla assaulted him and the appellant. He bled from his nose while the appellant sustained an open wound and also bled. He did not see the appellant picking up something which he used to stab the deceased. The appellant denied Accused 2's version that he was also assaulted by the deceased and that as a result of Mr Mandla's assault, he sustained an open wound and also bled. It is not probable that two people who were bleeding as testified, could proceed to go to another drinking spree very late at night and continue drinking or ask for a place to sleep at a drinking spree. Both the appellant and Accused 2 would have called it a night and went home after being assaulted by Mr Mandla. It is also not probable that Mr Mandla could fight so many people alone. It does not make sense that after he was assaulted and having ran away, he would return to the scene and fight again. The evidence shows that Mr Mandla and the accused knew each other very well. He would not confuse them with other people. It is not probable that he could accuse accused 2 and the appellant, who were some distance away from him when he was assaulted by accused 1, of assaulting him. His evidence was clear that he was accosted by accused 1 and not by accused 2 and the appellant.

[49] From the totality of the evidence there cannot be an issue of the appellant acting in self-defence against Mr Mandla and/or the deceased. He was clear in his evidence that he cut Mr Mandla's hand with a broken bottle because he was angry that he assaulted him and Accused

2. According to his

[52] It is trite that in every appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal:

"(a) should be guided by the principle that punishment is 'pre- eminently a matter for the discretion of the trial court' and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

(see *S v Rabie* 1975 (4) SA 855 (A) at 8570-F).

The test under (b) is whether the sentence is vitiated by any irregularity or misdirection or is disturbingly inappropriate (see also *S v Giannoulis* 1975 (4) SA 869 (A); *S v Barnard* 2004 (1) SACR 191 (SCA) at 194C- D; *S v Mayisela* 2013 (2) SACR 129 GNP at [13].)"

[53] The court in *S v Malgas* 2001 (1) SACR 469 (SCA) at 478E-H held that the appeal court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence

that the appellate court would have imposed had it been the trial court, is so marked that it can be described as 'shocking' , 'startling' , or 'disturbingly inappropriate' (see also *Madiba v S* [2015] JOL 33686 (SCA)).

[54] The following personal circumstances of the appellant were placed on record in mitigation of sentence: He was 23 years old at the time of his sentence. The incident happened in 2009 and he was convicted and sentenced in 2011. This means that he was 21 years old at the time of the commission of the offence. He was not married and had one child who was one year old at the time. He went to school up to Grade 11 and at the time of his arrest he was working where they were building RDP houses and he earned a salary of R600,00 per month. He was a first offender. After referring to the case of *S v Mokgara* 2015 (1) SACR 634 (GP), it was argued on his behalf that the trial court ought to have requested his legal representative to address it on whether there were substantial and compelling circumstances that justified it to deviate from imposing the prescribed minimum sentence. It was further argued that the trial court did not attach sufficient weight to the personal circumstances of the appellant, his age, the fact that he was a first offender and his prospects of rehabilitation.

[55] In aggravation of sentence the State made the following submissions: The offence was serious and prevalent, a weapon was used during the commission of the offence, the assailants acted as a group and the deceased died as a result thereof.

[56] When considering the appropriate sentence coupled with the totality of the factors in aggravation and mitigation of sentence, the trial court took into account that the appellant did not show any remorse throughout the trial and after injuring the deceased as a result of stabbing him with an unknown object, he continued to also stab Mr Mandla with the intent to cause him grievous bodily harm.

[57] There is no onus on an accused person to prove the presence of substantial and compelling circumstances but if he wishes to persuade the court to impose a sentence less than the prescribed sentence pertinent circumstances for consideration should be raised. In order for the court to make a finding on the existence or otherwise of substantial and compelling circumstances, it has to deal with all the mitigating and aggravating circumstances present as well as all other facts that can have an effect on sentence (see *S v Malgas* and *S v Dodo*

[2001] ZACC 16; 2001 (1) SACR 594 (C)).

[58] Younger persons are treated more leniently when it comes to sentencing because it is thought that younger people are less mature, more susceptible to influence from others and are perhaps more irresponsible in general. However, youthfulness is not an automatic factor leading to a determination of substantial and compelling circumstances when it is assessed against other factors such as the gravity of the offence and the gravity of the offence outweighs the accused's youthfulness.

[59] The court in *S v P* 2010

(2) SACR 187 (ECG) said the following about a 19 year old appellant who had been convicted of child rape at 195A:

"The appellant, although youthful, is no longer a child. He cannot be said to be more vulnerable or susceptible to negative influences and outside pressures or that his character like children under 18 is not yet fully informed and he therefore is uniquely capable of rehabilitation."

The court further held that if youth is a mitigating factor for an offender at the age of 31, then the concept becomes meaningless.

[60] In *S v Matyityi* 2011 (1) SACR 41 SCA it was held that a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 years the respondent could hardly be regarded as a callow youth. The appellant did not lead evidence in the trial court to prove that he was immature, vulnerable or susceptible to negative influences and outside pressures. At his age, he cannot be regarded as immature and be said not to be responsible for his actions.

[61] The fact that an accused person is a first offender cannot on its own be regarded as a substantial and compelling factor warranting the court to deviate from imposing the prescribed sentence. It must be considered with other mitigating factors. Prescribed sentences are applicable to all offenders including first offenders.

[62] In *S v Dyantji* 2011 (1) SACR 540 at p 26 para 552C the court said the following:

"In considering the prospects or possibility of rehabilitation of the offender as a factor in determining an appropriate sentence, it should be borne in mind that the seeds of rehabilitation, can in a manner of speaking, germinate only if a convicted person, him or herself has first and foremost expressed the contrition for his or her criminal wrongdoing, thereby accepting the gravity of the criminal act of which he or she has been convicted, and commits to return to the path of rectitude. Without the expression of contrition any hope of rehabilitation become illusory and thus an unrealistic expression."

[63] The trial court correctly found that the appellant did not show any remorse throughout the trial. He is therefore not a candidate for rehabilitation.

[64] In the Malgas matter and endorsed in *S v Dodo* 2001 (2) SACR 594 (CC) at 602-603, it was held that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess upon a consideration of all the circumstances of a particular case, whether the prescribed sentence is indeed proportionate to the particular offence.

[65] Taking into account all the factors in mitigation and aggravation of sentence and the facts in this matter, I am satisfied that the sentence imposed is proportionate to the offence committed. The legal representative of the appellant did not address the trial court on substantial and compelling circumstances and the trial court did not find any from the mitigating factors which were placed before it. It considered and took into account all the factors in mitigation and aggravation of sentence, the principles of sentence and the totality of the evidence to reach its conclusion and correctly found that there were no substantial and compelling circumstances that justified it in imposing a lesser sentence. I cannot find any misdirection on the part of the trial court and in my view there is no reason to interfere with the sentence imposed by the trial court in this matter.

[66] In the result I make the following order:

66.1 The appeal against conviction is dismissed.

66.2 The appeal against sentence is dismissed.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/1166.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mbhele-v-s-unknown-topic-agpphc-2017>

Prepared on 26 October 2026 · Esheria