



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A180/2023

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| 1. | REPORTABLE: YES / NO |
| 2. | OF INTEREST TO OTHER JUDGES: YES /NO |
| 3. | REVISED: YES /NO |

16 April 2025
DATE

In the matter between:

PRINCE MANGANTHANE MAELANE

First Appellant

FRANCOIS RAYMOND VISSER

Second Appellant

and

THE STATE

Respondent

The matter was heard in open court. The judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading to the electronic file of this matter on Caselines. The date of the judgment and order is deemed to be 16 April 2025.

J U D G M E N T

MAZIBUKO AJ (MUNZHELELE J CONCURRING)

INTRODUCTION

- [1] Prince Maelane ('the first appellant') and Francois Raymond Visser ('the second appellant') were arraigned before the Benoni Regional Court ('the trial court') with one count of murder.
- [2] The appellants were duly informed of the implications of section 51(1) provisions of the Criminal Law Amendment Act 105 of 1997 in relation to the offences they were facing. They were legally represented during the trial.
- [3] They pleaded not guilty to the charge. They provided an explanation that they each assaulted the deceased once with a beer bottle on the head. The first appellant was defending himself against the deceased, and the second appellant was assisting the first appellant as the deceased attacked them. They denied having used knives or a panga in assaulting the deceased.
- [4] The trial court convicted and sentenced the appellants to life imprisonment and declared them unfit to possess a firearm. They have an automatic leave to appeal in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013. The appellants now approach this court to appeal against their conviction and sentence.

THE DECISION OF THE TRIAL COURT

- [5] The issue before the court a quo was whether the appellants exceeded the private defence. The trial court was satisfied that the appellants exceeded the boundaries of self-defence and acted in common purpose in killing the deceased.

GROUND OF APPEAL

- [6] In respect of the conviction, the appellants contend that the trial court, among

others, erred in:

- [6.1] finding that the state proved its case beyond a reasonable doubt, and rejecting the appellant's version as not being reasonably possibly true regarding the self-defence.
 - [6.2] failing to attach sufficient weight to material contradictions in the state's case.
 - [6.3] finding Mohale and Mabitla to be credible witnesses.
- [7] With respect to the sentence, the appellants submit that the effective sentence of life imprisonment is unduly harsh and induces a sense of shock. The trial court erred in:
- [7.1] failing to impose a lesser term of imprisonment.
 - [7.2] over-emphasising the seriousness of the offence and the interests of the community at the expense of the appellants' personal circumstances.
 - [7.3] finding that no substantial and compelling circumstances existed to justify a deviation from the prescribed minimum sentence and
 - [7.4] failing to consider that, at the time of the offences, the appellants were still in their youth and first-time offenders.

ISSUE

- [8] The issue for determination in this appeal is whether the trial court correctly found that the appellants exceeded the boundaries of self-defence.

AD CONVICTION

STATE'S CASE

- [9] The state relied on the evidence of two eyewitnesses, Clement Mohale (Mohale) and Ntimba Mabitla (Mabitla), as well as Dr Glenda Mabitsela (Dr Mabitsela) and Dr Tsele Thladi (Dr Thladi), to prove the appellants' guilt.

Testimony of Mohale

- [10] Mohale testified that on the morning of the incident, they had been drinking at a tavern since the previous night. He, together with the deceased, left the tavern on their way home when they met the appellants. An altercation ensued between the first appellant and the deceased over money, R50, owed by the first appellant to the deceased. The deceased held the first appellant by the waist belt and could not let go of him, and started assaulting him with an open hand.
- [11] The second appellant was sent to fetch money but returned with a panga instead. The first appellant took the panga and hit the deceased in the middle of the head. The deceased fell to the ground and did not fight back. Thereafter, both appellants stabbed the deceased with knives on his chest. They threw bottles at the deceased. They ran from the scene when Ntimba arrived. The deceased's jacket was full of holes. Ntimba arranged for a vehicle to take the deceased to the hospital.

Testimony of Mabitla

- [12] His testimony was that Busi called him into the scene, and it was just outside of his yard. On his arrival, he found both appellants armed with knives and busy stabbing the deceased, who was already lying in a pool of blood. He knows both appellants very well. The first appellant was armed with a big knife, which was approximately 52cm long, and the second appellant with a three-star okapi knife. The deceased was stabbed in the head and his body. He saw injuries on the left side of his body.

[13] Under cross-examination, he testified that he noticed no bottles on the scene.

Testimony of Dr Mabitsela

[14] Doctor Mabitsela testified, referring to the hospital file of the deceased and the notes reflecting the injuries sustained. According to the notes, two lacerations, one 0.5cm above the left eye and the other 4cm on the left parietal area, were observed by the doctor who examined the deceased. After a CT scan was done, it was determined that the deceased had a fracture of the left parietal area with a subarachnoid bleed. No injuries were noted in the file. He explained that a laceration is a cut or break to the skin caused by penetrating or blunt trauma. Penetrating means that a sharp object enters the body, while blunt refers to an object 'hitting' the body.

Testimony of Dr Thladi

[15] Doctor Thladi testified that he is a pathologist and that he conducted a post-mortem on the deceased. He observed a stapled laceration of the left parietal area of the head, a bruise of the left parietal area sailing around the left eye, a fracture to the left skull and temporal area and a 4cm abrasion of the right parietal area of the head. He found that the cause of death was a skull fracture caused by any force or hard object like a panga.

DEFENCE CASE

[16] The appellants testified in their own defence. No witnesses were called to testify on their behalf.

Testimony of the first appellant

[17] The first appellant testified that he was assaulted by the deceased over R50 that he owed the deceased. The deceased had grabbed hold of him, dragged

and assaulted him while calling the name of Ntimba. When they came near the house of Ntimba, he ultimately hit the deceased once with a full beer bottle to free himself from him. He was scared of what Ntimba might do to him, as Ntimba had previously assaulted him.

Testimony of the second appellant

[18] The second appellant testified that he was with the first appellant and left to buy a cigarette. On his return, the deceased was dragging the first appellant by the waist belt and assaulting him with an open hand. He reprimanded the deceased. However, the deceased warned him not to interfere. He overheard that the first appellant owed R50 to the deceased.

[19] He was sent to find the R50 and was unable to find it. He returned with their two beers, which he took from the ladies who were in their company earlier at the tavern. The first appellant hit the deceased with a bottle to free himself from the hold of the deceased. The deceased turned on the second appellant and started to assault him. The second appellant, who was still in possession of a beer bottle, hit the deceased with the bottle on the side of the deceased's head.

DISCUSSION

[20] The court of appeal will only interfere with the trial court's factual findings where the trial court has materially misdirected itself.

[21] To succeed on appeal, the appellants must persuade this court, on adequate grounds, that the trial court misdirected itself in accepting the state's evidence and rejecting their version as not being reasonably possibly true. There are well-established principles governing the hearing of appeals against findings of fact. In the absence of demonstrable and material misdirection by the trial court,

its findings of fact are presumed to be correct. They will only be disregarded if the recorded evidence shows them to be clearly wrong.¹

- [22] In *S v Chabalala*,² the Supreme Court of Appeal held: 'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'
- [23] It is beyond dispute that the deceased assaulted the first appellant with an open hand and was assaulted by the appellants. What is in dispute is the object used to assault him and whether the assault went beyond self-defence.
- [24] Mohale's testimony was that the deceased was first hit by the first appellant on the head using a panga, not the beer bottle, as testified by the appellants. In their own version, the appellants assaulted the deceased on the head with full beer bottles. They disputed that after hitting him on the head, he fell, and they continued to assault him using knives. The post-mortem report revealed that the deceased's cause of death was a skull fracture caused by any force or hard object like a panga.
- [25] The evidence was that the second appellant brought the panga and the okapi knife into the scene. The panga and the okapi knife were used to assault the deceased on the head. According to him, he brought the full beer bottles, which the first appellant and himself used to assault the deceased on the head. In my view, the trial court was correct in finding that the object used by the appellants in assaulting the deceased caused the skull fracture, which led to his death. To the extent of the appellants' own version that they assaulted the deceased with full beer bottles on the head, and both doctors testified that a full beer bottle could cause injuries to the deceased, the question of what object or weapon was used becomes immaterial.

¹ *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f. See also: *S v Monyane and Others* 2008(1) SACR 543 (SCA) at para 15; *S v Francis* 1991 (1) SACR 198 (A) at 204e.

² 2003 (1) SACR 134 (SCA) at [15].

- [26] The only criticism levelled against Mohale's testimony was that he could not describe the knives that he testified were used. Further, the post-mortem report did not reveal that there were stab wounds on the chest. The trial court will consider the merits and demerits of the case and, having done so, decide whether, despite the fact that there are shortcomings, defects, or contradictions in the testimony, it is satisfied that the truth has been told. I agree with the trial court that the discrepancy found in the evidence of Mohale and Mabitla was not material in nature and cannot be rendered to disregard their evidence and to influence their credibility when regard is had to the totality of evidence.
- [27] The appellants indicated in their plea explanation and testimony that they had acted in self-defence. A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is not more harmful than necessary to ward off the attack.³
- [28] Even though the appellants stated that the deceased was 34 years old and a 'big guy' than them, it was not explained why the first appellant hit the deceased on the head in an attempt to free himself. He could have hit the deceased anywhere else, including the hand that was holding him on his waist. It is not clear why the second appellant handed over the beer bottle to the first appellant instead of the R50 he was sent to fetch. Further, why he hit the deceased on the head with the full beer bottle when he had earlier been warned by the deceased not to interfere.
- [29] I find that the appellants did not plan to assault the deceased; however, the second appellant actively participated in the deceased's assault, which led to his death. In **S v Mgedezi** 1989 (1) SA 687 (A), it was stated that in the absence of prior agreement, an accused can be liable on the basis of common purpose only if certain pre-requisites exist. These pre-requisites are the following: (i) he must have been present at the scene where violence was committed; (ii) he

³ CR Snyman in Criminal Law 4th edition, page101 para 14.

must have been aware of the assault; (iii) he must have intended to make common cause with those who actually perpetrated the assault; (iv) he must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of others; (v) he must have had the requisite mens rea. All these prerequisites fit the action taken by the appellants. The trial court found correctly that the appellants acted in common purpose when assaulting the deceased.

[30] The trial court was correct in rejecting the appellants' version with regard to the deceased calling the name of Ntimba and that they were afraid of him. Ntimba was not there when the second appellant was sent to fetch the R50 and returned to the scene after 10 minutes and when both appellants hit the deceased with the bottles on his head. It was not contested that Ntimba came to the scene after being called by Busi, not because the deceased called him.

[31] Even if it were to be accepted, which I do not, that the deceased attacked both the appellants, I find that they exceeded the boundaries of self-defence when they allegedly ward off his attack. No evidence was presented that the deceased was armed. It was not disputed that he assaulted the first appellant with an open hand. On the second appellant's return with the beers, the first appellant was held by his waist so that he could not run. He was not being assaulted. Therefore, the appeal against conviction is void of merit, and the appeal against the conviction ought to be dismissed.

AD SENTENCE

[32] It has been held that in every appeal against a sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal should be (a) guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial court'; and (b) careful not to erode such discretion; hence the further

principle that (c) the sentence should only be altered if the discretion has not been 'judicially and properly exercised.'⁴

- [33] The punishment should (a) fit the criminal as well as the crime, (b) be fair to society, and (c) be blended with a measure of mercy according to the circumstances and consider the complainant. It is of paramount importance to have an offender adequately profiled before the sentence is imposed.
- [34] It is trite that meticulous care must be taken not to over-emphasise the appellant's circumstances. It is crucial to properly balance considerations against the serious nature of the offence committed, the aggravating circumstances, and the consequences for the victim and the interests of society.
- [35] The appellants' counsel made submissions in mitigation of sentence from the bar. There was no pre-sentence report relating to the appellants' background, social and psychological aspects of the offence, the impact of the crime on the deceased's family, appellants, their family, and their view now that they are convicted. In my view, the trial court would have achieved a more balanced approach to sentencing with this information at its disposal.
- [36] The concept of 'substantial and compelling circumstance' refers to a combination of factors. When the sentencing court finds the existence or presence of such a circumstance, it will be accepted that the imposition of the prescribed sentence would be unjust or disproportionate to the crime, the offender, the complainant and society's legitimate needs.
- [37] The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.⁵

⁴ S v Rabie 1975 (3) 855 SA (A).

⁵ S v Malgas 2001 (1) SACR 469 (SCA), D.

- [38] The trial court considered the nature and gravity of the offence, the interest of society and the appellants' personal circumstances. However, it overemphasised the crime's prevalence and seriousness and society's interest at the expense of the appellants' circumstances, including their youthfulness.
- [39] It was submitted that the first appellant was 21 years old, went to school up to grade 10, was unmarried, had no children, and was a first-time offender employed as a plumber and doing recycling, earning about R1 500 per month. Regarding the second appellant, it was submitted that he was 23 years old, with grade 10, unmarried, had no children, was a first-time offender, and was self-employed as a street vendor.
- [40] In **S v Mabuza**⁶ paragraph 23, it was held: 'the legislature has clearly intended youthfulness no longer to be regarded as per se mitigating factor. However, a court cannot, therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an accused offender in deciding on an appropriate sentence; in so doing, it would deny the youthful offender the human dignity to be considered capable of redemption".
- [41] The trial court was required to consider the youthfulness and that they were making a living through respective self-employment. In my view, had the trial court considered the appellants' youthfulness as one of the factors, it would have found that they were capable of rehabilitation or candidates for rehabilitation and sentenced them to a lesser sentence than it did.
- [42] An argument was advanced on behalf of the appellants that they had been in custody since their arrest on 22 September 2020 until sentence was imposed on 01 August 2022. The witnesses, appellants and the deceased were under the influence of alcohol. The deceased was unarmed when he was attacked, and he assaulted the appellants with an open hand. The killing was brutal and senseless. I agree with the views expressed by the appellants' counsel that the deceased initiated the altercation by holding and dragging the first appellant with his waist belt and assaulting him.

⁶ 2009(2) SACR 435 (SCA), para 23.

[43] I am of the view that the trial court incorrectly found that there were no substantial and compelling circumstances justifying a deviation from the prescribed minimum term of life imprisonment. Accordingly, the appeal against sentence should succeed.

[44] As a result, I propose the following order.

Order:

[44.1] The appeal against conviction is dismissed.

[44.2] The appeal against sentence succeeds, and the sentence by the trial court is set aside and replaced with the following sentence:

[44.2.1] The appellants are sentenced to 20 years' imprisonment and declared unfit to possess a firearm. The sentence is antedated to 01 August 2022.



N G M MAZIBUKO

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered.



M MUNZHELELE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing:

20 February 2025

Judgment delivered:

16 April 2025

Appearances:

For the appellant:

Adv F Van As

Attorneys for the appellant:

Legal Aid South Africa

For the respondent:

Adv G Khosa

National Director of Prosecutions