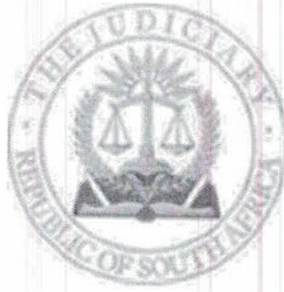


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

17 SEPTEMBER 2024

DATE

SIGNATURE

Case Number: 267/2024

In the matter between:

MICHAEL BRAAM

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant, Michael Braam was convicted of attempted murder on 07 March 2022. The appellant was sentenced to undergo eight years imprisonment plus a further seven years imprisonment which was wholly suspended for five years on condition that he is not convicted of any offence involving infliction of grievous bodily harm committed during this period of suspension.
2. The appeal against sentence was argued on the basis that the Magistrate erred in finding that the offence was pre-planned and hence the harsh sentence. Initially the application for leave to appeal was dismissed by the court *a quo*. Upon petitioning the High Court, leave to appeal was dismissed against conviction and granted against sentence. Before the parties could proceed with appeal arguments the court enquired from them if they have any objection if one of the presiding officers sitting on appeal also decided the petition. Both counsels indicated that they do not have an objection.
3. The appellant also alleged in the grounds of appeal that the learned Magistrate erred in imposing the above-mentioned sentence.

BACKGROUND FACTS

4. In the course of proving the case in the court *a quo* the state called five witnesses to testify on its behalf. The state called the complainant, Wessel van der Merwe together with his two friends, Andre Combrinck and Christo de Jager. They informed the court that on the night of 08 July 2016 at Boardwalk Chefs, Pretoria East, they were together at the time the incident unfolded. They were enjoying themselves drinking alcohol and then decided to go home just before midnight.

5. They were travelling in the complainant's vehicle, when he tried to reverse at the parking lot, and he realised that the vehicle belonging to the appellant had blocked the road. The complainant then approached the appellant's vehicle and tapped on the roof top. As he then bent down to speak to the appellant, before any communication, he was stabbed by the appellant. The appellant then drove away.
6. As a result of the stabbing, the complainant drove himself to the hospital to receive medical assistance.
7. A witness by the name of Reginald Nyembe was also called. He was a security guard at Boardwalk Lakeside, the same place where the incident occurred. He was on duty at the time, and he saw everything when it unfolded, including when the vehicles drove off.
8. The last state witness was Dr Pieterse, a district Surgeon, who was on duty when the complainant arrived at the Pretoria East hospital after the incident. She informed the court that she took him to surgery immediately where he was operated on and treated for stab wounds.
9. After the state closed its case, an application for Section 174 was brought on behalf of the appellant and it was dismissed. The appellant then testified and related his version of the incident. He stated that he was with his friends drinking alcohol that evening and left around midnight. He got into his car and was undecided whether to leave or to go back to continue drinking. At some point when he was at the stop sign in the parking area this incident unfolded. When he saw them approaching his vehicle on both sides, the complainant coming to his window he became afraid. He grabbed the butcher's knife from the pocket of his car and quickly hit with it at the direction of the complainant. He drove away and indicated that at that point he was not aware of the injury to the complainant. Accordingly, he sped away from a

threatening situation. He indicated that he thought he was in imminent danger when all this happened.

10. Counsel for the appellant confirmed that the typed record of 15 March 2022 does not form part of the record. Although the Magistrate includes the evidence of the appellant and his witnesses in mitigation, giving a short summary of the evidence during her judgment. The parties agreed that the appeal can proceed without the typed version of 15 March 2022.

AD SENTENCE

11. The counsel on behalf of the appellant submitted that the Magistrate erred in finding that the offence was pre-planned and that the aggravating circumstances of this case therefore calls for a tough sentence. The counsel further submitted that there is no evidence to support the finding that the appellant pre-planned the incident. The appellant did not know the complainant and his friends and had no motive to stab the complainant.

12. It was further submitted on behalf of the appellant that the Magistrate failed to consider the following facts:

- i. the complainant is the one who approached the appellant;
- ii. that the complainant could have used another route;
- iii. that the complainant came very close to the appellant's car;
- iv. that the complainant conceded during cross-examination that on the same facts he could have felt threatened.

13. On behalf of the Respondent, submissions were made in respect of sentence. Initially counsel submitted that the sentence was fair and justified but later acknowledged that a lesser sentence might be appropriate.

14. A court of appeal will only interfere with the sentence imposed by the trial court if it is vitiated by an irregularity or misdirection or when the sentence is shockingly severe, disturbing, inappropriate and totally out of proportion to the offence committed. Additionally in **S v Bogaards** 2013 (1) SACR1 CC at para [41] Khampepe J in the Constitutional Court judgment held the following:

"It can only do i.e interfere with the sentence imposed where there has been an irregularity that results in the failure of justice, the court below misdirected itself to such an extent that its decision on sentence is so disproportionate or shocking that no reasonable court could have imposed it"

15. In the present case the issue is whether the court *a quo* in sentencing the appellant erred in finding that the offence was pre-planned and that the aggravating circumstances therefore calls for a tough sentence. The minimum sentence is not applicable in this case therefore the court *a quo* was at liberty to apply its discretion fully.

16. The appellant was a first-time offender and had no previous convictions. It is evident that the court *a quo* misdirected itself. The court found that the appellant pre-planned this incident, which is clearly incorrect from the undisputed facts. From the evidence summarised above, it is clear that the appellant and the complainant did not know each other before the day of the incident. The incident unfolded spontaneously and therefore, it cannot be said that the whole incident was pre-planned. It also appears from the way the sentence is formulated that the appellant was sentenced twice for the same offence.

17. It is trite law that when the court consider an appropriate sentence all factors should be given due weight. Punishment must fit the criminal, as well as the crime, be fair

to society and be blended with a measure of mercy. When sentencing an accused, a court is required to consider the four objectives of punishment (deterrence, prevention, rehabilitation and retribution) in view of the triad of factors as set out in **S v Zinn** 1969 (2) SA 537 (A).

18. These factors are

- (i) the personal circumstances of the offender, including his character, conduct in life and personality, and everything that influenced the commission of the offence;
- (ii) the nature and seriousness of the offence committed; and
- (iii) the interests of the community, including the necessity for a level of uniformity in sentencing.

19. In **S v Van Loggenberg** 2012 (1) SACR 462 (GSJ) Willis J held that a sentence has five important functions (at [6]):

- (i) It must act as a general deterrent, in other words, it must deter other members of the community from committing such acts or thinking that the price of wrongdoing is worthwhile;
- (ii) it must act as a specific deterrent, in other words, it must deter this individual from being tempted to act in such a manner ever again;
- (iii) it must enable the possibility of correction, unless this is very clearly not likely;
- (iv) it must be protective of society, in other words, society must be protected from those who do it harm;
- (v) it must serve society's desire for retribution, in other words, society's outrage at serious wrongdoing must be placated.'

20. It is my view that these factors were not taken into account resulting in a misdirection by the learned Magistrate.

21. Sentencing is widely accepted as particularly difficult part of the criminal justice process. As set out in **S v Kok** 1998 (1) SACR 532 (N) 551. Given the above, sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant facts.

22. In **S v Magwanyana** (CC14/2021P) [2023] ZAKZPHC 132 the court sentenced the accused to 5 years imprisonment for attempted murder in terms of section 51(2)(c) with no deviation because there were no substantial and compelling circumstances justifying a lighter sentence.

23. The Appellant in **Khumalo v S** (A052/2024) [2025] ZAGPHC 282 was convicted and sentenced to 10 years imprisonment on a count of attempted murder which was substituted with the statutory minimum of 5 years imprisonment. Mdalana-Mayisela J held at para 8:

“In this appeal the lower court failed to consider whether there are substantial and compelling circumstances and if so, to spell out and enter on the record those circumstances. The lower court has committed a material misdirection. Therefore, this court is entitled to interfere with the sentence and consider whether the appellant’s personal circumstances cumulatively taken amount to substantial and compelling circumstances.”

24. The Supreme Court of Appeal in **Mabena v S** (709/22) [2024] ZASCA 89 also confirmed a sentence of 5 years for attempted murder.

25. Based on the above submissions and where an attempted murder was not planned but rather spontaneous this further reduces moral blameworthiness and I conclude that the court *a quo* erred in finding that the offence was pre-planned and the appeal court is therefore at liberty to interfere with the sentence imposed.

26. In the circumstances and for the reasons set out above, the following order is made:

ORDER:

1. The appeal against sentence is upheld.
2. The sentence of the court *a quo* is set aside and replaced with a sentence of five (5) years imprisonment.
3. The sentence is ante-dated to 22 March 2022.

[REDACTED]

BMT MORE, AJ
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION, PRETORIA

I, agree

[REDACTED]

R FRANCIS-SUBBIAH, J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:

22 JULY 2025

JUDGMENT DELIVERED ON:

17 SEPTEMBER 2025

COUNSEL FOR THE APPELLANT:

ADV L AUGUSTYN

INSTRUCTED BY:

LEGAL AID SOUTH AFRICA

COUNSEL FOR THE RESPONDENT: ADV C PRUIS

INSTRUCTED BY: DPP PRETORIA

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 17 September 2025.