

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

A631/2010

5 **DATE:**

4 MARCH 2011

In the matter between:

SIYATHEMBA TSHANYELA

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T15 **GOLIATH, J:**

The appellant was correctly convicted by the regional magistrate, Wynberg, on one count of murder and one count of assault with intent to cause grievous bodily harm. He was
20 sentenced to 10 years and one year imprisonment respectively. It was ordered that the sentences run concurrently. He now appeals against sentence.

The charges against the appellant arose out of an incident which occurred in Guguletu on 26 December 1999, when the
25 deceased, Eugene Maswayo, was stabbed to death and
/bw /...

Madikale Malindaswe was injured.

The incident happened after 10 o'clock in the evening. The appellant allegedly attempted to execute a shortcut home
5 through the neighbour's yard when he was refused entry by Malindaswe. The appellant subsequently got involved in an altercation with Malindaswe and stabbed him on his left arm. The deceased, in an attempt to intervene, approached the two during the altercation and was fatally stabbed by the appellant.
10 The appellant ran away from the scene, but handed himself over to the police the next day when he heard of the death of the deceased.

It transpired that during court proceedings that the record
15 reflected that the appellant was 16 years old at the time of the incident. This fact was subsequently disputed by the appellant, who insisted that he was 14 years old at the time of the incident. Appellant defaulted on his court appearance whilst in the care of his guardian and was arrested six years
20 later. At the time of sentencing he was 22 years old.

It is common cause that the count on which the appellant was convicted, that is the count of murder, falls within the ambit of section 51(2) of the Criminal Law Amendment Act 105 of 1997
25 that prescribes a minimum sentence of no less than 15 years

imprisonment for a first offender, in the absence of substantial and compelling circumstances. The trial court, however, was of the view that the relevant Act is applicable in this case and that there are substantial and compelling circumstances which
5 justified the imposition of a lesser sentence. In his judgment the learned magistrate stated those factors:

“The age of the accused, the fact that the accused consumed liquor, the social background of the
10 accused, the educational background, all cumulatively are the factors that are recorded.”

Mr Burgers, on behalf of the appellant contends that the sentence is shockingly inappropriate. He argued that the
15 regional court magistrate overemphasised the seriousness of the offence at the expense of the personal circumstances of the appellant. It was strongly contended that the sentence was inappropriate in view of the youthfulness of the appellant. It was also contended that the court *a quo* misdirected itself in
20 finding that the provisions of the Criminal Law Amendment Act was applicable in this case.

Advocate Pillay, who appeared on behalf of the state, submitted that the Act is applicable due to the fact that the
25 appellant was in fact 16 years of age at his own admission

during the commission of the offence. He, therefore, contended that the sentence imposed is appropriate under the circumstances and should not be tampered with. Advocate Pillay also mentioned the fact that the appellant's counsel in fact conceded that the appellant was 16 years of age at the time of the commission of the offence.

It is a trite principle of our law that sentencing is within the discretion of the trial court and that a court of appeal will not likely interfere with the sentence imposed. The appellant persisted with his contention that he was 14 years old at the time of the commission of the offence throughout the trial. The probation officer confirmed that the date of birth of the appellant is 18 April 1985, which is reflected in the report.

In my view the trial court erred in finding that the appellant was 16 years old at the time of the commission of the offence. Consequently, the court erred in invoking the provision of the Criminal Law Amendment Act in respect of the appellant. In the light of this misdirection, this court is entitled to interfere with the sentence and reconsider the question of sentencing afresh. The appellant was 22 years old on conviction. He is unmarried. Completed Standard 6 at school and lived with his grandparents. His mother was murdered by his father when he was very young. The probation officer's report contains a

detailed summary of the personal circumstances of the appellant, as well as his socio-economic conditions and background.

5 The appellant was convicted of a very serious offence. He executed a fatal attack on the deceased, who was not a direct threat to him. The appellant was clearly under the influence of alcohol during the commission of the offence and the community deserves protection against persons such as the
10 appellant. I have carefully considered both the mitigating and aggravating factors and I am of the view that direct imprisonment is appropriate in the circumstances. However, the youthfulness of the appellant at the time of the commission of the offence, justifies a partial suspension of the sentence of
15 direct imprisonment.

In the circumstances I would, therefore, make the following order:

- 20 1. The conviction of the appellant on charges of murder and aggravated assault is hereby confirmed.
2. The sentence of the appellant on the charge of murder is substituted with the following sentence, namely **10 (TEN)**
25 **YEARS IMPRISONMENT**, of which **TWO (2) YEARS IS**

SUSPENDED FOR A PERIOD OF FIVE (5) YEARS on
condition that the appellant is not convicted of an offence
of which violence is an element, committed during the
period of suspension and for which he is sentenced to
5 imprisonment without the option of a fine.

3. The sentence of one year on the charge of aggravated
assault is confirmed and it is hereby ordered that the
sentences imposed in respect of both charges, shall run
10 concurrently.

4. All sentences are antedated to 23 November 2007.

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GOLIATH, J

OLIVIER, AJ: I agree.

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OLIVIER, AJ