

REPUBLIC OF SOUTH AFRICA



GAUTENG HIGH COURT
JOHANNESBURG LOCAL DIVISION

CASE NO: A609/2008
DPP REF: AP2009/0018

Reportable: No
Of Interest To Other Judges: No
Revised.

20 April 2015

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SIGNATURE

In the matter between:

Hicks Paddy

First Appellant

Hicks Granwell

Second Appellant

And

The State

Respondent

Judgment

Vally J

Introduction

1. The appellants were indicted in the Regional Court on 22 June 2005 on the charge of murder, in that on 26 October 2003 at La Rochelle they unlawfully and intentionally killed one Brendan Eugene Ian Pompie (Mr Pompie). They were duly informed that s 51 as well as Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) providing for

minimum sentences should they be found guilty was applicable to their case. They pleaded not guilty. On 29 March 2007 the court *a quo* pronounced them to be guilty of the offence of murder, and on 30 March 2007 they were each sentenced to serve a period of twelve (12) years in prison.

2. Aggrieved by those decisions and with the leave of the court *a quo*, they call for the intervention of this court to remedy what they claim to be a misdirection on the part of the court *a quo*.

The proceedings in the court *a quo*

The State's case

3. The appellants appointed separate legal representatives to attend to their respective cases. Upon being arraigned, they both pleaded not guilty to the charge. Immediately thereafter, appellant 1 elected to provide “a *short plea explanation*”. It was to this effect:

“The accused will admit that on 26 October 2003 he was at La Rochelle. This was at 20:00 where he and his co-accused spoke to the deceased. The deceased grabbed accused 1 on his chest, accused 1 pushed him away and said I am leaving. The deceased then hit accused 1 with a fist, and he wanted to hit the accused again, so the accused defended himself and he hit the deceased once with the fist. And the deceased fell against the front of the bakkie that was parked there. He fell against the bulbar, the deceased then got up and walked into the house, and accused 1 and his co-accused left.”

4. This “*short plea explanation*” was meant to be an admission in terms of section 220 of the *Criminal Procedure Act, 51 of 1977* (the CPA). An admission made in terms of s 220 of the CPA is supposed to be an

admission of “*any fact placed in issue at (a criminal proceeding) and any such admission shall be sufficient proof of such fact.*” This statement must therefore be read to mean that appellant 1 does not place in issue the date, time, place of incident or the identity of the deceased. The reference to the deceased was clearly a reference to the person referred to in the indictment, viz, Mr Pompie.

5. Appellant 2 chose to exercise his right to silence and thereby declined the opportunity to make any admission in terms of s 220 of the CPA.
6. The State led the evidence of four witnesses: Ms Melinine Sinisello (Ms Sinisello), Mr Godfrey Shaun Williams (Mr Williams), Dr Kevin James Fourie (Dr Fourie) and Mr Leon Wade (Mr Wade). Ms Sinisello alone witnessed the alleged assault on Mr Pompie. The rest of these witnesses only got involved in this matter after the alleged assault had taken place.
7. Ms Sinisello testified that the two appellants came to visit Mr Pompie on 26 October 2003. They spoke to him in the lounge. She knew that they had come to confront him about having an affair with their sister who was a married mother of two. She went to the bathroom. A very short while later they left but asked Mr Pompie to accompany them outside. She heard a scream and went to look from the balcony where she saw that the two appellants were assaulting Mr Pompie. She was not able to enlighten the court on the issue of whether the appellants initiated the assault or whether it was a consequence of Mr Pompie first assaulting appellant 1.

However, during the assault she had witnessed, Mr Pompie had not retaliated to any of the many blows inflicted upon him by the appellants. She witnessed the appellants push Mr Pompie with force against a wall, as a result of which the back of his head hit the wall hard. Whereafter he fell on his knees and then on the tarmac. While he was lying on the tarmac both appellants kicked him several times on his stomach and on the back of his body. The appellants left. The assault on Mr Pompie lasted between ten and fifteen minutes. Mr Pompie managed to lift himself and walk into the house. He was bleeding from his left eye (which had swollen), the back of his head and down his thighs. He fell to the floor. She administered some water over the wound around his eye and back of head and cleaned off some of the blood over his body. Mr Pompie began to experience convulsions. She called for help. An ambulance was summoned, but took too long to arrive and so Mr Pompie was transported to the hospital in a private car. After the assault by the appellants no further injuries were inflicted upon Mr Pompie. When she went to visit him the next day she found that he was housed in the intensive care unit of the hospital.

8. During cross-examination she was pressed about her claim that she witnessed the appellants assaulting Mr Pompie. On this issue (as on all the other material issues relating to her testimony), she was adamant. The cross-examination did not, in any significant way, give cause to doubt the veracity of her testimony.

9. Mr William's testimony is of no value to this case. He testified that as an employee of the Emergency Management Services stationed at a nearby fire station, he visited the home of Mr Pompie in response to the call for an ambulance by someone. By the time he got there Mr Pompie was already transported to the hospital. The defence made an issue of the fact that in his statement made at the time of or soon after the visit he stated that he had transported Mr Pompie to the hospital. During his oral testimony he disavowed this claim in the statement and explained that it was not written by him and not read back to him, but he was asked to sign it, which he did without reading it. In my view, his testimony sheds no light on the factual issues before the court and, therefore, requires no further entertainment by the court.
10. Dr Fourie conducted the post-mortem examination on body number 2721/2003 on 21 November 2003. According to him the cause of death was complications that followed as a result of a head injury suffered by the deceased. The head injury was caused by the infliction of a blunt force to the head, which in turn caused brain swelling and bruising to the head. He noted that the deceased, on admission to the hospital, had needed a tracheotomy for purposes of ventilation through the throat as he could not *"breathe effectively by himself"*, and that his consciousness was low. He found that the deceased suffered from a subcutaneous haemorrhage over the left parietal region. He noted that the deceased had required dialyses while being treated for his injuries. He found further that:
 - there were scabbed abrasions on both knees;

- there was subcutaneous haemorrhage over the left parietal region (haemorrhage over the left back of head under the skull);
- there was a generalised oedema of the body;
- there were scattered abrasions over the right upper limb, both thighs, the left shin and the left chin;
- there was a 5cm x 6cm trophic ulcer over the left buttock (i.e. a bedsore);
- there was a 2cm surgically incised tracheostomy wound (indicating that the deceased could not breathe on his own);
- the intracranial contents indicated that the surface vessels were congested and that there was flattening of the *gyri*, and narrowing of the *sulci* was present (which suggested that there was increased pressure on the brain) and that there was resolving cortical contusion of the left frontal lobe inferiorly (indicating that the deceased was unconscious).

11. During cross-examination the legal representative of the second appellant introduced the hospital record of Mr Pompie, and Dr Fourie was asked to comment on the injuries recorded there. It was, no doubt, accepted, at least by appellant 2, that the body examined post mortem by Dr Fourie was of the same person whose hospital records were being scrutinised by the legal representative of the second appellant. Of that there can be neither doubt nor debate. After all, the purpose of this cross-examination was to show that there was no causal connection between the death of the

deceased and the injuries inflicted upon Mr Pompie during the assault. It may be that this was done with the purpose of establishing the existence of a *novus actus interveniens* that was the ultimate cause of death, but no definitive finding in this regard can be made as it was not pursued at the court *a quo* nor in this court.

12. The hospital record indicates that the following injuries were sustained by Mr Pompie:

- Periorbital Bruising (Blunt injury to head, i.e. at the front of eye-socket);
- Adult Respiratory Distress Syndrome (a condition that arises from a head injury)
- Frank Haematuria (blood in the urine)
- Profoundly acidic on ABG (decrease in the blood pH level)

13. The hospital record further reflects that during his stay there he suffered an acute renal failure, developed an infection in the blood (septicaemia) and then in the lung. Dr Fourie explained that the lung infection was directly related to the head injury as “*when you have a blow to the head, there is massive release of adrenaline or noradrenaline from the adrenaline glands and then that causes pulmonary oedema, or fluid build up in the lungs*”¹

¹Record, p 98, lines 23-25

14. Drawing from this hospital record the cross-examination of Dr Fourie was directed at the fact that Mr Pompie suffered from kidney damage and other infections that he developed whilst in the hospital and which were independent of the assault. Dr Fourie had no difficulty admitting to the fact that there was deterioration in the health of Mr Pompie (it must be remembered that at this stage in the cross-examination the discussion was directly related to Mr Pompie's hospital record) during his stay in the hospital, and he had no difficulty in conceding that his view that a tracheotomy was inserted upon admission of Mr Pompie was an assumption derived from his theoretical understanding of head injury rather than on direct knowledge of what occurred during the admission of Mr Pompie. He also pointed out that Mr Pompie developed a specific infection unique to hospital conditions that made it impossible for him to recover from his head wound. In his words:

“Well I must say the MRSA that you have mentioned at the bottom of that page stand for Methicillin-Resistant Staphylococcus Aureus which is a specific kind of infection that one develops in a hospital, and you develop or once you are infected by that particular bacteria there is very little we can do, it is resistant to almost every bacteria, every antibiotic we know. It is what we call a noscomial infection, which means that you can only get it in a hospital, and they obviously, that may have results of these renal failure and things like that, but simply because they knew that he MRSA, they would have had to treat him with whatever antibiotics they had.”²

15. Having acknowledged these facts, Dr Fourie remained unshaken in his opinion that the cause of death was a fatal blow to the back of head that Mr Pompie was subjected to on 26October 2003. He noted from the moment Mr Pompie was admitted to the hospital on 26 October 2003 until 19 November 2003 his condition deteriorated. This fact he drew from the

²Record, p 101, lines 4-12

hospital record which reflected that on 19 November 2003, *“in view of poor prognosis & MODS decision to step down care taken in conjunction with knowledge of mother.”*³ Dr Fourie stated:

“If (Mr Pompie) had not been taken to hospital at all, he would have died sooner than within three weeks, because he would have had a suppressed level of consciousness, he would not have been able to breath for himself at all. So at the end of the day he would have died possibly within first couple of days, with the brain swelling that occurred afterwards, etcetera.”⁴

And:

“You cannot separate the initiating cause. The blow to the head lead to this individual being admitted to hospital where he was actively treated with a tracheotomy and all the rest of it. Those the complications arise from that is unavoidable unfortunately.”⁵

16. His testimony, thus, concluded on the note that but *“for the initial injuries”*⁶ death would not have ensued. Mr Pompie died on 19 November 2003. Lastly, there was no dispute that from 26 October 2003 until 19 November 2003 Mr Pompie was unable to communicate with anybody. In fact, he never regained full consciousness from the date of his admission.

17. Mr Wade testified that he was called by Ms Sinisello to assist her while Mr Pompie was lying on the bed and experiencing convulsions. His testimony was never transcribed as the recording of it was lost. There is, therefore, no verbatim record of his testimony. The magistrate and the legal representatives of the State and the appellants made an effort to reconstruct it as best they could. Of this we should, and hereby do, record our gratitude to them. His testimony was that when he got to the home of

³Record, p 252

⁴Record, p 102 line 23 – p 103 line 2

⁵Record, p 96, lines 2-5

⁶Record, p 103 lines 6-7.

Mr Pompie he found Mr Pompie lying on the bed. Mr Pompie was bleeding from his left eye and from the back of his head. He tried to communicate with Mr Pompie but this was in vain. He called for an ambulance, but as it took too long to arrive, he arranged for Mr Pompie to be transported by private vehicle to the hospital.

18. There is no account of the cross-examination of Mr Wade but as all the parties were agreed that the reconstructed record correctly reflects the material aspects of his testimony, it has to be taken that there was nothing said by him during cross examination that was different from what is recorded in the previous paragraph.
19. That constituted the sum total of the State's case.

The case of appellant 1

20. Having failed to secure a discharge in terms of s 175 of the CPA, appellant 1 elected to testify in his defence. He stated that on 26 October 2003 at around 20h00 he, together with appellant 2, who is his elder brother, visited Mr Pompie to encourage Mr Pompie to terminate the romantic relationship Mr Pompie had with their sister as she had threatened to commit suicide. Their sister was married and had young children. The relationship between Mr Pompie and their sister had a detrimental effect on the children, with one of them threatening to quit school because of this romantic relationship. Upon their arrival at the home of Mr Pompie they were invited in by Ms Sinisello. They met with Mr Pompie in the kitchen.

Ms Sinisello left them to their business. They spoke gently to Mr Pompie who agreed with them that the continuation of the romantic relationship would not serve the best interests of anyone. Thereafter, they decided to leave. Mr Pompie saw them out by accompanying them to their vehicle (bakkie). Appellant 1 intended to enter the vehicle from the left front door ("passenger door"). Just prior to entering the vehicle, Mr Pompie, who came from the right-hand side of the vehicle towards him, said to him that he (Mr Pompie) did not think what they had agreed to was correct and that he was "*a big man*". Mr Pompie then pushed him on the chest. He retaliated by punching Mr Pompie. The further developments are crucial and they are best captured in the words of appellant 1 himself, which according to the record are:

"He hit me on the chest and I hit him once in the face. He fell more on the point of the bonnet, my bakkie has a bulbar, then he hit his head on the bonnet, not on the bonnet, on the bulbar. So he fell with his head on the bulbar and then he fell with his face on the floor. He stood up and said it is all right and then he walked into the house. And me and my brother got into the bakkie and left."⁷

21. During his cross-examination he was pressed to embellish this version with more specific details, but was unable to shed much more light on the assault. At the close of his testimony his account of how he came to assault Mr Pompie remained vague.

The case of appellant 2

22. Appellant 2 chose not to testify. As soon as appellant 1 closed his case appellant 2 followed suit. It would appear that he relied on the success of

⁷Record, p 121, lines 12-25

appellant 1's defence to absolve him of all responsibility. This is certainly how he presented his case in this court. Both he and appellant 1 were represented by the same set of attorney and counsel in this court, although in the court *a quo* they elected for separate representation.

23. It was contended on behalf of appellant 2 that should the factual narrative of Ms Sinisello be found to be unreliable or untrue, then like appellant 1, he should be acquitted, as the State would have failed to provide any evidence to show that he was involved in the assault of Mr Pompie. Furthermore, if it was found that appellant 1 should be acquitted on the basis that appellant 1's version of what occurred was accepted as being reasonably possibly true, then he, too, should be acquitted as that version refers to facts that are directly applicable to him. I am not so sure that he is correct in this regard. There is no version on his part that can be said to be reasonably possibly true. He did not even put a version to Ms Sinisello when cross-examining her. In any event, given my finding in this matter, there is no need for me to engage with this conundrum.

24. In this appeal both appellants challenged the usefulness of the post-mortem report in determining their innocence or guilt because, they say, there was no evidence before the court that the *post mortem* examination by Dr Fourie was carried out on the body of Mr Pompie. But this issue was not canvassed with Dr Fourie. It was not unambiguously raised in the court *a quo*. It was also not raised in the application for leave to appeal or in the original notice of appeal. An application was made to this court to amend

the notice of appeal to include this ground of appeal. The application was unopposed by the State. It was granted.

25. In my view, this belated contention on the part of the appellants lacks merit. To begin with the first appellant in his short plea explanation made reference to the “*deceased*”, and it was common cause that that was a reference to the “*deceased*” in the indictment, which in unequivocal terms stated that the deceased was Mr Pompie. Thereafter, their entire case in the court *a quo* was fought on the footing that Mr Pompie had indeed died from his wounds and that it was his body that was examined by Dr Fourie. The cross-examination of Dr Fourie was conducted on the basis that it was Mr Pompie’s body that had been forensically examined *post mortem*. Furthermore, during the application for a discharge in terms of section 174 of the CPA the first appellant sought to discredit the evidence of Dr Fourie by claiming that, as he had only examined the deceased (by which he clearly meant, and which was understood by all to clearly mean, Mr Pompie) *post mortem* and not while he was still alive, his evidence was unreliable. Then there is the fact about the number assigned to the body that was examined by Dr Fourie. The number assigned was 2721/2003. It is reflected on the hospital record which, as we know, was used extensively by appellant 2 during his cross-examination of Dr Fourie. There is an affidavit made in terms of s 212(7) of the CPA by a Mr Puledi Mathias Chokoe (Mr Chokoe) who is a driver employed by the South African Police Services and who transported a body bearing the number 2721/2003 to the government mortuary for safekeeping. Dr Fourie in his

testimony stated that he works at that mortuary, where he conducted the *post mortem* examination on body number 2721/2003. No issue was made of this chain of factual evidence in the court *a quo*, or about the number 2721/2003 as reflected on the hospital record, the affidavit of Mr Chokoe or on the report of Dr Fourie. It must be borne in mind that the question of the identity of the body examined by Dr Fourie is a factual and not a legal issue. Any concessions made by appellants, whether directly or implicitly, by the appellants at the court *a quo* are concessions they cannot escape from. In these circumstances, it is not open to the appellants to now claim that the State did not prove that the body was that of Mr Pompie. By doing so, they merely attempt to now, at appeal, open an issue that was not pressed at the court *a quo* and which they, by dint of the stance they adopted, accepted was not a matter that court need concern itself with. In a word, not only is their claim without merit, it also, in my view, constitutes a last minute attempt to ambush the State and this is to be frowned upon.⁸

Discussion on the facts as relayed in the evidence

26. Ms Sinisello's evidence on some of the injuries inflicted upon Mr Pompie was confirmed by the independent evidence of the hospital record, the post mortem report and the *viva voce* evidence of Dr Fourie. Therefore, in my view, it was an honest and true account of what had occurred between Mr Pompie and the appellants on the evening of 26 October 2003. The evidence of Ms Sinisello that Mr Pompie fell on his knees before he fell on the floor is supported by the post mortem report which records that, even

⁸See: *S v Balkwell* [2007] 3 All SA 465 (SCA) at [12]

after spending three weeks on a hospital bed (where he developed a severe bedsore), the “*scabbed abrasions on both knees*” were still present. The evidence of Ms Sinisello that the assault was severe is supported by the post mortem report that, again after spending three weeks in hospital recuperating, the “*scattered abrasions over the right upper limb, both thighs, the left shin and the left chin*” were still present. In these circumstances, the contention that her evidence cannot be relied upon because she was a single witness is misplaced. There was nothing inherently contradictory in her evidence to make it unreliable. Moreover, it was supported by the objective evidence of the hospital record and the post-mortem report.

27. The appellants make much of the fact that Mr Pompie initiated the violence that was unleashed on the evening of 26 October 2003. If we accept Ms Sinisello’s evidence (as I, without hesitation, do) as reflecting a true account of how Mr Pompie came to be so injured that he had to be hospitalised for three weeks, without regaining full consciousness, before he succumbed to those injuries then, in my view, it is irrelevant as to who initiated the physical conflict. Even if Mr Pompie was the first to hit appellant 1, the brutality of the response from both appellants was not justified. Ms Sinisello’s evidence was clear that they hit him several times, pushed him forcefully against the wall causing him to suffer a fatal blow to the back of his head, fall to his knees on the tarmac before they kicked him several times at the front and back of his body while he was harmless and helpless.

28. In my view, the account of appellant 1 cannot, in the face of all the evidence before the court *a quo*, be said to be reasonably possibly true. It is entirely inconsistent with the nature and extent of the injuries inflicted upon Mr Pompie; it is simply unreasonable and fails to survive even the most basic forensic scrutiny. Apart from the fact that his account of the assault bears no resemblance to the nature of the assault as inferred from the hospital record read together with the post mortem report, his evidence that Mr Pompie did not shed any blood after the assault cannot be correct when placed against the evidence of Ms Sinisello and Mr Wade who dealt with Mr Pompie immediately after the assault. Their evidence corresponds with that of the hospital record, which reflects that the injuries to the head and the left eye were severe. According to his version there would at best be a single wound to the eye or chin (he was never clear where he hit Mr Pompie)⁹ and a single wound at the back of the head. This, unlike the evidence of Ms Sinisello, is inconsistent with the objective evidence such as, for example, that “*there were scattered abrasions over the right upper limb, both thighs, the left shin and the left chin*”.

29. It follows then that I, without doubt or hesitation, hold that the State has proven that the appellants brutally assaulted Mr Pompie on the evening of 23 October 2003, and that Mr Pompie eventually succumbed to these injuries; their actions were the cause of the premature termination of his

⁹See para 20 above.

life (it was the *sine qua non* of the death). That the assault was unlawful is also not an issue.

30. The question that now arises is did they intend to cause his death. The State did not show that there was any preconceived plan or determination on their part to take his life. Instead, the State relies on the concept of legal intention (*dolus eventualis*) to prove that they are guilty of murder.
31. The fundamental question in a case where the State relies on the concept of *dolus eventualis* to prove that the requisite *mens rea* was present is whether the State has shown beyond doubt that the appellants subjectively foresaw that their actions could result in Pompie's death but persisted in their conduct nonetheless. This question contains two elements: The first is whether each of the appellants subjectively foresaw the possibility of the death of Mr Pompie ensuing from their assault, brutal as it was, upon him.

“the subjective foresight required for *dolus eventualis* is the subjective appreciation that there is a reasonable possibility that the proscribed consequence will ensue.”¹⁰

32. This second is:

“(w)hether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible [consequences] he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.”¹¹

¹⁰*S v Van Wyk* 1992 (1) SACR 147 (NmS) at 161b

¹¹*S v Humphreys* 2013 (2) SACR 1 (SCA) at [17] see also: *S v Tonkin* 2014 (1) SACR 583 (SCA) at [12]; *S v Makghotho* 2013 (2) SACR 13 (SCA) at [10] – [11]

33. The State has to prove both elements if it is to succeed.¹²
34. When subjective foresight is sought to be proved by inference, it must be the only inference which can reasonably be drawn.¹³ Appellant 1 did not testify as to the state of his mind during the assault. This followed from his defence that there was no major assault upon Mr Pompie, just a single punch to the face in retaliation to being pushed or being punched (first he said after he was pushed, then he said he was pushed and he pushed back, then he was punched so he punched back). His case is that he was entitled to punch Mr Pompie to defend himself. This is a case of private defence. On my finding of fact this defence does not avail him. Appellant 2, on the other hand, did not testify at all. In his case, too, there is no direct evidence as to his state of mind at the time of the assault on Mr Pompie. Thus, their respective intentions would have to be determined using inferential reasoning. It must be borne in mind that:
- “(w)here a question of the state of mind of a accused person is in question it is not easy for a Court to come to a conclusion favourable to the accused as to his state of mind unless he has himself given evidence on the subject.”¹⁴
35. The assault was a particularly brutal one. It was conducted simultaneously by both of them. They did not explain why they did it, how they felt about it at the time or how they felt about it at the end of the trial. We know from the evidence of appellant 1 that they were motivated by a concern to put

¹²*S v Humphreys (op cit)* at [12]

¹³See: *S v Sigwahla* 1967 (4) SA 566 (A)

¹⁴*R v Mohr* 1944 TPD 105 at 108; *R v Deetlefs* 1953 (1) SA 418 (A) at 422F-G

an end to the romantic relationship between Mr Pompie and their married sister. But that was their motive, not their intention. It is important not to conflate the two: “*intention is the operation of the will directing an overt act,*” whereas “*motive is the feeling which prompts the operation of the will.*”¹⁵ At best, we can say that their motive was to persuade Mr Pompie to terminate the romantic relationship with their sister. According to the evidence there were two ways in which they expressed this motive: passively, by trying to persuade him through dialogue and actively, by assaulting him. Thus, we know from their actions that their intention was to assault him. The intention to assault does not prove the intention to murder. Murder may have been the consequence of the assault, but it is still necessary for the State to show that the intention to assault carried with it the intention to murder. Thus, the State has to prove that each of the appellants subjectively foresaw the possibility of the death of Mr Pompie ensuing from their assault on him, and that each of the appellants subjectively reconciled himself with that possibility.

36. Notwithstanding their refusal to say anything regarding their state of mind prior to or during the assault, I am not satisfied that the only reasonable inference to be drawn from the established facts is that the appellants subjectively foresaw that, as a consequence of their conduct, the death of Mr.Pompie would ensue, or that they subjectively reconciled themselves with that eventuality. The circumstances of the assault are particularly relevant. Ms Sinisello’s evidence, it will be recalled, was that the appellants pushed Mr Pompie against the wall

¹⁵S v Kola 1966 (4) SA 322 (A) at 327H

with sufficient force that he hit his head on the wall, that they hit him in the eye, and kicked him on his front and back once he had fallen to the ground. It is not disputed that after the assault Mr Pompie was, at least, able to stand up and walk inside the house unaided. The appellants did not use any weapon in the assault (other than their bare fists and shoed feet). On these facts, it cannot be said that the only inference to be drawn is that they subjectively foresaw his death resulting from their assault and that they reconciled them with that consequence.

37. It follows that on the basis of the evidence led by the State (whether directly or through cross-examination of appellant 1) I believe that the State has failed to prove that either appellants are guilty of murder. That, however, is not the end of the matter. The provisions of the CPA makes it necessary to examine whether the appellants' conduct as captured above calls for censure by virtue of a "*competent verdict*" arising from the charge of murder to which they were indicted. The provisions of s 258 of the CPA is applicable and it provides:

"258 Murder or attempted murder

If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, attempted murder, but-

(a) the offence of culpable homicide;

(b) ...,

the accused may be found guilty of the offence so proved.

38. Culpable homicide “*is the unlawful negligent causing of the death of fellow human being.*”¹⁶ The only question in this case is whether there was negligence on the part of each of the appellants since the other elements (unlawfulness, causation and death of Mr Pompie) of this offence had been proven by the State.¹⁷ If either of them was found not to be negligent in causing the death of Mr Pompie then he may still be found guilty of assault, but that issue need not detain us for the moment and may never arise.
39. A number of factors, viewed cumulatively, show that the assault was anything but trivial. It is, further, clear from the factual findings that the appellants intended to teach Mr Pompie a lesson by beating him up. It was brutal and it continued for some time, even though they encountered no resistance from Mr Pompie. They pushed him against a brick wall with sufficient force for him to incur an injury to the back of his head, punched him in the face (and on his hands as he tried to ward off the blows to his face and body – this explains the injuries to his limbs) and kicked him in the body once he had fallen onto the tarmac. In these circumstances, in my view, a reasonable person in the capacity of each of the appellants would have foreseen that Mr Pompie would die from an assault so severe and the same said reasonable person would have taken steps to prevent that outcome by, at the very least, not persisting with the assault for so long (10-15 minutes), and not assaulting him as severely as they did.

¹⁶*S v Mtshiza* 1970 (3) SA 747 (A) at 752 D-E

¹⁷See para 29 above

Finally, it is clear that they did not do so. Accordingly they are guilty of culpable homicide.

40. It is necessary for me to say that the conclusions reached here are independent of what the magistrate found. There were so many problems with the way the magistrate dealt with the case, the way that he analysed the evidence and with the conclusions he reached that the only way to do justice to this appeal was to examine the evidence independently of the magistrate's findings and to draw conclusions solely on the basis of the evidence as a whole. In my view, the totality of the evidence demonstrates without doubt that the appellants are guilty of culpable homicide.

Sentence

41. It is trite that a sentencing court should evaluate the interests of society, the interests of the convicted person as well as the nature and gravity of the crime (the triad) when deciding on what an appropriate sentence should be. At the court *a quo* both appellants made factual submissions supporting their claims that a non-custodial sentence should be preferred by the court *a quo*. These factual submissions were:

- 41.1. Appellant 1 was 33 years of age as at date of sentence, 30 March 2007. He was employed as a shop-fitter earning approximately R10 000.00 per month. On 6 January 1993 he was convicted of theft and sentenced (the actual sentence passed is not on record and he did not enlighten the court of the sentence). On 11 June 1998 he was convicted of assault for which he was sentenced to R5000.00 or ten months in prison, with R4 000.00 or 8 months suspended for

a period of 5 years on condition that he was not convicted for the same offence during the period of suspension. He was married. He had two children aged 8 and 4 at the time. His wife was employed earning R9 000.00 per month. These factors, it was submitted at the hearing in the court *a quo*, warrant a non-custodial sentence.

41.2. Appellant 2 was 37 years of age when sentenced on 30 March 2007 in the court *a quo*. He was married, had two children aged 17 and 13 at the time. He had a no previous convictions. He was employed in the construction business earning approximately R10 000.00 per month. He said that he employed 8 persons as sub-contractors for the work that he was to perform. They would all have to be dismissed should he receive a custodial sentence. As with appellant 1, it was submitted at the court *a quo* that these factors are of such force that they mitigate against a custodial sentence.

42. However, in this court they submitted that if the court finds them guilty of either murder or culpable homicide it should refer the matter back to the court *a quo* for further evidence and submissions concerning an appropriate sentence, as there has been significant changes in their personal circumstances since the hearing in the court *a quo*. This, they claim is necessary if the court is to have proper regard to their interests when evaluating the triad of factors. This appeal has taken eight years to be finalised. The long delay in the finalisation cannot be blamed on the

appellants alone, and there is no doubt that if proper regard is to be had to their interests and circumstances (as they presently are) they should be allowed to place further evidence and make further submissions to the court. The court *a quo* is best placed to receive this evidence and submissions.

General comment

43. Before closing it is necessary for me to record my concern with the way the magistrate treated Ms Sinisello during her short tenure on the witness stand. He was rude and sarcastic towards her and made comments that were gratuitous and unhelpful. During one of these engagements with Ms Sinisello, the magistrate is recorded to have “asked” her the following question:

“Did you, did you, when Tessa and her husband and the other people who were there, did you interfere and use vulgar words, like *saying voertsek, of away, she is having an affair, so what? Go away, do not come and make noise here*. Did you say something like that you know?”¹⁸
(italics in original)

44. Ignoring for the moment the fact that there was no factual basis at all for raising such a question, the question is actually irrelevant; whatever Ms Sinisello said or did not say to the sister of the appellants and her husband when they visited earlier that day has no bearing on the issues in this case. There are many more examples of such remarks or “questions” from the magistrate which demonstrate that he was rude and disrespectful towards the witnesses, especially Ms Sinisello, but no purpose would be served to include them in this judgment. All I wish to say is that the resort

¹⁸Record, p 49, lines 19-22

to invective in court by a judicial officer can under no circumstances be justified. The conduct of the magistrate on the whole is disturbing.

Order

45. The following order is made:

- 45.1. The appeal of appellant 1 against his conviction for murder and the sentence of twelve (12) years imposed upon him is upheld;
- 45.2. The appeal of appellant 2 against his conviction for murder and the sentence of twelve (12) years imposed upon him is upheld;
- 45.3. Appellant 1 is found guilty of culpable homicide;
- 45.4. Appellant 2 is found guilty of culpable homicide;
- 45.5. The matter is remitted to the Regional Court for the Regional Division of Gauteng, Johannesburg for determination of an appropriate sentence.

Vally J
Gauteng High Court, Johannesburg Local Division

I agree.

Van Niekerk J
Gauteng High Court, Johannesburg Local Division

Appearances:

For the appellants :	Adv P A Wilkins instructed by Marx Attorneys
For the State:	Adv D Barnard from Office of Director of Public Prosecutions
Date of hearing :	10 April 2015
Date of judgment :	20 April 2015