



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: CA & R 36/2022

In the matter between:

BONGILE MSHUMPELA

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

GQAMANA J

- [1] This is an appeal against both the conviction and sentence of the appellant by the Regional Court, East London (“the court *a quo*”). The appellant was arraigned before the court *a quo* on a charge of murder, read with the

provisions of section 51(2) of Act 105 of 1997 and was sentenced to 15 years' imprisonment.

- [2] Briefly, the State's case was that, on or about 23 September 2017, the appellant unlawfully and intentionally killed Mr Simphiwe Maxusi (hereinafter referred to as "the deceased"), by assaulting him with a plank on his body and stomping on his head and body with booted feet while he was lying on the ground. The deceased died few days later at Frere Hospital. According to the postmortem report the cause of death was a head injury.
- [3] The State called three witnesses in order to prove its case against the appellant. Only one eyewitness, Ms Sinazo Marhewu that saw the incident. The deceased was her uncle. According to her evidence, she was alerted by a neighbour that the appellant was assaulting the deceased. She went to the place where the alleged assault was taking place. Upon her arrival at the scene she saw the appellant stomping on the deceased's head with booted feet and also hitting him with a plank on his body. The size of this plank was less than a metre. The deceased was lying on the ground helpless as the appellant was assaulting him. She watched the assault which took place for a while. After a few minutes the appellant stopped assaulting the deceased and left him still lying on the ground. She approached the deceased, lifted him up and took him home. The deceased had a bruise on his face. She was uncertain on whether the assault occurred on 23 or 24 September 2017. Further, she did not know what triggered the whole incident because on her arrival at the scene, the appellant was already assaulting the deceased. She reported the incident to her mother, Mrs Qasho the same evening.

- [4] Mrs Qasho confirmed that, she received a report from the witness mentioned above. When the report was given to her the deceased was asleep, but she saw that he had an injury on his face. In the middle of the night, the deceased woke up complaining of headache. Her first thought was that he had a hangover and she instructed him to go back to sleep. In the early hours of the day while they were asleep, she saw something like a foam exuding out of the deceased's mouth. At that moment the deceased was also making abnormal symptoms (like someone who is gasping) and sweating. Frantically she woke him up, and after a while the deceased looked at her confused without uttering a word. Concerned of his wellbeing she suggested to the deceased that an ambulance be summoned to take him to hospital, but he declined.
- [5] In the morning before leaving for work, she repeated her suggestion that the deceased should go to the hospital. The deceased acceded to her suggestion and he was taken to a day hospital by his mother. She was informed that the deceased refused treatment and discharged himself from hospital.
- [6] On her return from work, later the same day, she again saw a discharge like a foam coming out the deceased's mouth and his whole body was stiff. She decided to summon an ambulance to take the deceased to hospital. The deceased was then admitted at Frere hospital. He died few days later while still in hospital.
- [7] The district surgeon, Dr Matrose gave evidence and confirmed that he conducted a postmortem on the deceased's body. The only abnormalities he

could find on his examination were on the head. When he opened the deceased's scalp, he saw bruises under the skin which on his opinion were caused by a blunt trauma. The skull was not fractured but when he opened it, he discovered the subdural hemorrhage, meaning that, there was blood under the membrane which divides the skull and the brain. His postmortem report was admitted and handed in as an exhibit at the trial. The cause of death was the head injury.

- [8] The appellant in his defence testified and denied that he assaulted the deceased on the 23rd September 2017. On his version, the assault incident happened on 2nd September 2017 and it was the deceased who assaulted him first and as result he had to defend himself. Further after the incident of 2nd September, the deceased and he reconciled and he never assaulted the deceased again. In addition, his evidence was that on 23 September, he met the deceased at a place where they were drinking traditional beer and there was no fight between them, instead their relationship was good. He only became aware on 25 September that the deceased was admitted in hospital.
- [9] The court *a quo* accepted the evidence of Ms Marhewu and concluded that the State proved its case beyond reasonable doubt. It is evident from the judgment that the court *a quo* approached the evidence of Ms Marhewu with caution because she was a single witness. It was satisfied that although she was a single witness, but her evidence was corroborated by the other objective facts in particular the injuries recorded in the postmortem reported and the evidence of the district surgeon, Dr Matrose. The court *a quo* rejected the appellant's version as a not reasonably possibly true. It concluded that the assault

occurred between 22 and 23 September. The appellant does not take issue with such findings. We, also cannot fault such findings by the court *a quo*.

[10] The nub of this appeal is whether the appellant acted with *dolus eventualis* when he caused the death of the deceased.

[11] It is trite principles that, the test for *dolus eventualis* is two-fold:

(a) Did the appellant subjectively foresee the possibility of the deceased's death ensuing from his conduct; and

(b) did he reconcile himself with that possibility.¹

[12] In *S v Makgatho*,² Shongwe JA held that:

“A person acts with intention, in the form of *dolus eventualis*, if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively foresees the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may ensue, and he reconciles himself to this possibility.”

[13] The court *a quo* in convicting the appellant made the following findings:

“The evidence accepted by the court which was adduced by the State through Sinazo Marhewu is that the assault on the deceased was sustained by the accused, it took place over a period of time. He had stomped on him on his head, on his body with booted feet and had assaulted him with a stick on his head. And it is the accused's evidence that he left him lying there. He never arranged any form of transportation for him to be taken to hospital or to receive any medical attendance or treatment. He must have known that if the deceased lay there without being attended then he would possible die from the injuries that he had sustained. And that when he left him lying

¹ *S v De Oliveira* 1993 (2) SACR 59 (A) at 65 i-j; *S v Humphrey* 2013 (2) SACR 1 (SCA) at 8a-b.

² 2013 (2) SACR 13 (SCA).

there he must have reconciled himself with the eventual occurrence of the death of the deceased.

I am, therefore satisfied that at least the intention was there in the form of *dolus eventualis* and the accused is subsequently found GUILTY of murder where the intention was in the form of *dolus eventualis*.”

- [14] Firstly, the court *a quo* committed a misdirection in its finding that, the appellant assaulted the deceased with a stick/ plank on his head. Such conclusion is not borne out of the evidence of Ms Marhewu. Her evidence was that, the appellant assaulted the deceased on his body with a plank and stomped on his head and body with booted feet. Nowhere in her evidence did she mention that the appellant assaulted the deceased on his head with a stick/plank.
- [15] The test in respect of intention is subjective and not objective. The objective test is applicable for negligence and not intention.³ The State conceded that in light of the misdirection by the court *a quo* on the evidence of Ms Marhewu, its conclusion on *dolus eventualis* is unsustainable. From the evidence it cannot be said that the appellant foresaw that, by stomping on the deceased’s head with booted feet and assaulting him with a plank on his body could cause the death of the deceased and that he reconciled himself with that. According to the postmortem report and the evidence of the district surgeon, the deceased died as a result of the head injury which was caused by a blunt trauma. In light of such evidence, the injury must have been caused by the appellant stomping on the deceased’s head with booted feet.

³ S v Ngubane 1985 (3) SA 677 (A) at 685 D-F.

- [16] Secondly, it is evident from the judgment that the court *a quo* in arriving at its conclusion on *dolus eventualis*, took into consideration the appellant's conduct after the assault, that is, his failure to arrange medical treatment for the deceased soon after the assault, despite the fact that the deceased had sustained injuries and also the fact that he left the deceased lying unattended. The appellant's conduct after the assault are irrelevant to establish *dolus eventualis*.
- [17] In the circumstances, the conviction on murder ought to be set aside because the State did not establish the requisite intent to cause the death of the deceased. However, we are satisfied there is sufficient evidence to justify a conviction for culpable homicide.
- [18] In light of our findings above, some adjustment of the sentence would be required. The appellant was sentenced to 15 years' imprisonment in accordance with the provisions of section 51 (2) of Act 105 of 1997. The appellant's personal circumstances are the following; he was 46 years of age at the time of his conviction on 12 September 2018. He was self-employed as a "moneylender". His highest standard of education was standard 10 which he passed in 1993. He was unmarried, but was residing with his partner. He has four children from different mothers. He had one previous conviction of assault with intent to cause grievous bodily harm dated 10 October 2015 which he was sentenced 24 months' correctional supervision. He was in custody for 11 months awaiting trial. Not much was said about the deceased and the impact of his death to his family.
- [19] In consideration of the sentence, the court must take into account that punishment should fit the criminal as well as the crime, be fair to the accused

and to society and be blended with a measure of mercy. Although the appellant is not found guilty of murder but the deceased lost his life because of the appellant's conduct. It is not clear from the evidence what triggered this incident and as result we are unable to understand the motive behind the entire incident. However, the society deserve protection from violent persons like the appellant. The appellant had a previous conviction which also involved violence. He showed no remorse, instead he concocted a false version that, he did not assault the deceased on the day in question. Having considered all the facts herein and for purposes of rehabilitation, a lengthy sentence of direct imprisonment would be appropriate.

[20] In the results, the following order is issue:

1. The conviction of murder is altered to guilty of "culpable homicide".
2. The sentence of 15 years' imprisonment is reduced to 6 years imprisonment, antedated to 12 September 2018.

N GQAMANA
JUDGE OF THE HIGH COURT

I agree:

I BANDS
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant	:	<i>Adv K. M. Kgatwe</i>
Instructed by	:	Director of Public Prosecutions Makhanda
Counsel for the Respondent	:	<i>Mr V M Sojada</i>
Instructed by	:	Legal Aid Makhanda
Heard on	:	11 October 2023
Judgment Delivered on	:	08 November 2023