



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No: CA&R 119/14

Heard on: 11-12-2014

Delivered on: 27-02-2015

In the matter:

JACOBUS VAN SCHALKWYK

APPELLANT

And

THE STATE

RESPONDENT

Coram: Tlaletsi AJP et Phatshoane J

JUDGMENT ON APPEAL

Phatshoane J:

1. Mr Jacobus Van Schalkwyk, the appellant, a farmer at Bertiesdraai Farm in Groblershoop, Northern Cape, was tried by an Acting Regional Court Magistrate, Mr Kganyago in the Regional Court sitting in Upington on two counts: (1) that on or about 14 February 2011 at or near Bertiesdraai he murdered a 45 year old Mr Jan (Lucky) Klaaste and (2) that on the same date he attempted to defeat or obstruct the course of justice. On 06 October 2013 he was convicted on both counts and sentenced on 11 February 2014 to 8 years' imprisonment for murder, 2 years of which was suspended for three years on certain condition. In respect of the second count, twelve months imprisonment was imposed. The sentences were ordered to run concurrently.

2. Following a petition to this Court on both convictions leave was granted to the appellant on 28 August 2014 on a narrow ambit of whether the State, on the facts, proved its case beyond a reasonable doubt that he murdered the deceased with *dolus eventualis* as the form of intention.
3. The grounds of appeal as set out in the Notice of Appeal are as follows:

“The honourable Court *a quo* misdirected itself by finding that the State proved its case beyond reasonable doubt and could therefore convict the appellant with regard to the following:

1. [T]hat *dolus eventualis* was proved and that the appellant did foresee that the fatal injury could have occurred causing his death, although the Court initially found that he ought to have foreseen the likely outcome of his action.
2. The Court *a quo* erred in considering the issue of intention to kill and the test whether the appellant foresaw the possibility that the act in question would have fatal consequences and persisted regardless of the consequences.
3. In determining the above the Court *a quo* erred further as follows:
 - 3.1 The Court *a quo* did not properly take into account the contradictions of the state witnesses individually and between them.
 - 3.2 The Court *a quo* did not take into consideration the fact that the state witnesses deviated from their affidavits and contradicted the oral testimonies with their statements.
 - 3.3 The Court *a quo* misdirected itself by not addressing the medical evidence of Dr Isaacs with regard to the version of the state witnesses contradicting the infliction of the injury. Dr Isaacs indicated that the traction of the injury was from a lower to a higher point. The state witnesses indicated from top to bottom and/or horizontal from left to right.
 - 3.4 The Court *a quo* misdirected itself with regard to certain concessions of Dr Isaacs indicating that if exhibit 1 [the hay-bale hook] was used in a downward movement to strike the deceased it would have been inevitable that the left lung would also have been penetrated which was not the finding. He further, amongst others, conceded that if the deceased was pulled towards the appellant, after he struck him with exhibit 1, which the witness want the Court to accept, one would have expected different or more injuries.
 - 3.5 The Court erred further by not adequately considering the evidence of Dr Wagner, who testified that if one takes into consideration the version of the State witnesses explaining how the instrument (exhibit 1) was used by not penetrating

the left lung before the right ventricle of the heart was “impossible”. The wound track of how the appellant explained it had happened corroborates the external appearance of the wound and therefore the evidence of Dr Wagner.

- 3.6 The Court *a quo* erred in failing to address the on-going explanation of Dr Wagner of the human model (doll) which was dissected and almost the size of a normal human, removing and physically showing the lungs and the heart, removing and replacing them into the model, explaining how the instrument penetrated the body towards the right ventricle which clearly indicated that the State witnesses’ version of how the wound was inflicted, was impossible.
- 3.7 The Court *a quo* erred in not finding that the appellant, in his evidence never contradicted himself and explained his experience of the incident which was corroborated by the medical evidence and therefore finding that the appellant had intent (*dolus eventualis*).
- 3.8 The Court *a quo* erred in not finding that the appellant’s evidence is at the very least, reasonably possibly true.
- 3.9 The Court *a quo* erred in not finding that the respondent failed to prove beyond reasonable doubt that the appellant intentionally caused the death of the deceased.
- 3.10 The Court *a quo* erred in finding that the appellant by striking the deceased with the hook on the left side of the chest ought to have foreseen that death may occur and is not “merely a question of the hand not reinstating what the mind intended to say” and therefore could not have had any intent including *dolus eventualis* to cause the death of the deceased.
- 3.11 The Court *a quo* further erred in not taking the emotional state of the appellant into consideration after he realized that the deceased was fatally injured indicating that he at no stage considered to fatally injure the deceased.”
4. The crucial issue for consideration is how the deceased sustained the injury that led to his demise. The State contends that the appellant murdered the deceased intentionally whereas the appellant argued that the deceased died following an unfortunate accident. The factual matrix is as follows. The deceased, a farm worker at Bertiesdraai Farm, had neglected feeding the cattle during the weekend of 12/13 February 2011 because he drank liquor throughout the weekend. When he reported for duty on Monday 14 February 2011 he was in an inebriated state. From the Forensic Chemistry Laboratory results his blood specimen obtained during the post-mortem examination showed that his blood alcohol level was in the region of 0.26 grams/100 ml. He busied himself with the hay bales in an attempt to feed the animals he

neglected during the weekend. His co-worker, Mr Erin Kalani, was instructed by the appellant to load some empty crates on the trailers which were needed by other farm workers to put the harvested grapes in.

5. Kalani testified that he and Kiewiet hooked two trailers on which the crates were to be loaded to the tractor. At that stage the deceased stood on top of one of these trailers holding two hay hooks while the other workers were busy loading the crates on the trailers. The deceased was difficult that morning and did as he pleased. The appellant instructed him to alight from the trailer. He refused to comply. The appellant was angry and 'rough'. The appellant pulled the two hay hooks out of the deceased's arms. He then struck the deceased once with one of the hooks with extreme force and pulled him towards himself. The appellant discarded that hook in front of the shed. The deceased staggered and fell while he was still on top of the trailer. He then jumped from the trailer and ran to the other side of the shed.
6. The appellant drove off without rendering him any first aid. After a while he approached Kalani and requested him to climb on the back of the bakkie. They drove to the place where the deceased was lying. The appellant requested Kalani to turn the deceased over as he was lying on his stomach. The appellant wanted to check where the deceased was injured. He noticed a wound on the deceased's chest. The deceased was still gasping for breath. When Kalani informed the appellant that he hit the deceased on his chest the appellant took off his hat and said that he 'did not mean to kill the man'. The appellant requested him not to reveal that he struck the deceased with the hay hook but instead that the deceased fell onto the hook.
7. Regrettably the hay hook identified by Kalani, depicted on photo 4 of Exhibit "A" (the photo album), was not properly described when it was handed in evidence as Exhibit 1 save to state that it was an Iron hook. The photo depicts it as a metal hook with elongated shaft and a handle almost ellipse-shaped. See photo 4 of exhibit "A" below.



Photo 4 Exhibit "A"

8. The evidence of Mr Samuel Persoon, also a fellow employee on the farm, largely corroborates that of Kalani. He says that the appellant in a fit of anger uttered some unprintable epithets that he desired to axe the deceased into his mother's private parts (derogatory terms used) and grabbed the two hay hooks from him. The appellant struck the deceased on the left side of his chest with the other hook. Persoon says later during this fateful day the appellant requested him to climb onto his bakkie. They drove on the farm and at some point the appellant alighted from his bakkie and held his head in his hands and said: *"Here help my ek het nie bedoel om hierdie man dood te maak nie"* and went further to tell Persoon *"ek moet hom nie probeer dood te sweer nie by die polisie nie"*.

9. The appellant denied that he hit the deceased with a hay hook. He says that he enquired from the deceased whether he and the others were not supposed to be loading the crates and what he was doing with the lucerne/hay bales. He said that the workers wanted to harvest the grapes and had no crates. He told the deceased to finish off and give him the hooks. He seized the hooks from the deceased. He demonstrated by extending his right hand towards the hooks. The deceased moved backwards, turned to the left with his upper torso, immediately moved forward and landed on his knees. One of the hooks dropped on the base of the trailer. The appellant pulled the other hook and realised that it had hooked the deceased's pair of overalls. He unhooked it and discarded it at the corner of the shed. The deceased stood up, alighted from the trailer and walked away. He did not want to kill the deceased. He co-operated with the police and did not influence any of the witnesses (as insinuated by Kalani and Persoon) to give any other evidence than what he conveyed to the Court.

10. To assist in determining the troubling question of how the deceased could have sustained the fatal injury the State called Dr George Albertus Isaacs whereas Dr Leon Wagner took the stand in the case for the defence.
11. Dr Isaacs obtained the MBCHB degree in 1983 and has been in private practice since 1986. From 2002 to 2011 he worked as a forensic medical officer in the Department of Health conducting, *inter alia*, post-mortem examinations. He conducted the post-mortem examination on the body of the deceased. The chief autopsy finding he made was that the deceased had a wound of 1x1 cm below the left nipple, with abrasions around the edges, 10 cm deep, entering the chest between ribs 4 and 5 with transection (fracture) of rib 5 and passing through the front wall of the right ventricle of the heart. In other words the two ends of ribs 4 and 5 were separated from each other. There was an entrance and exit wound (two wounds of 1 cm through the front wall of the right ventricle) which were two centimetres apart caused through one action. He found 1000ml blood in the left chest cavity. As a result the left lung had partly collapsed due to blood accumulation. There was also 300ml blood in the pericardial sac around the heart. The deceased also had superficial abrasions of the left eyebrow and cheek. He recorded the cause of death as a stab in the heart with hypovolemic shock (rapid or excessive blood loss).
12. Judging from the wound and its trajectory Dr Isaacs was of the view that the weapon which caused the wound pierced the deceased's left side and moved to his right side. He explained that it is difficult to quantify the amount of force that may have been applied to cause the wound. According to him the nature of the injury goes hand in hand with the sharpness of the weapon. The sharper the weapon the lesser the amount of force would be required, but if the weapon is blunt more force would be required. He went on to say that the rib fracture points to increased amount of force used. His view is fortified by the presence of abrasions around the wound which suggested to him that the point of weapon was not sharp.
13. Dr Leon Wagner is a qualified forensic pathologist with many years of experience in post-mortem examinations. He did not conduct the post-mortem

examination on the body of the deceased but relied on the oral and documentary evidence presented during the trial. He testified that the wound the deceased sustained was round-shaped and not oval. With an oval wound one would have a direction by which a penetrating force would have been applied. He intimated that Dr Isaacs had not described the precise location of the rib fracture or how it looked like. This would have assisted in determining from which direction force was applied.

14. Dr Wagner proceeded to say that the round-shaped wound contradicts the suggestion that a large amount of force had by any means being used to inflict the injury. He added that, considering the deceased's small physique and weight of about 40.5 kg, not a large amount of force was necessary to inflict the injury. He suggested that if extreme force was used the direction of the wound; more extensive abrasions on the external dermis; fracture of the ribs, dislocation of the sternocostal junction (where the ribs articulate with the sternum) would have been present which was not the case.
15. In *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f the principle central to the hearing of appeals was re-affirmed as follows:

“ . . . (T)here are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by the appellate courts to factual findings of the trial court are so well known that restatement is unnecessary.”

See also *R v Dhlumayo and Another* 1948 (2) SA 677 (A); *S v Francis* 1991 (1) SACR 198 (A) at 204c-e; *S v Mlumbi en 'n Ander* 1991 (1) SACR 235 (A) at 247g - h.

16. The conviction is primarily challenged on the basis that the Acting Regional Court Magistrate found that the State proved its case beyond a reasonable doubt that the appellant killed the deceased with intent in the form of *dolus eventualis*. In an attempt to illustrate that the Acting Regional Court Magistrate erred in concluding as he did, the appellant explored the inconsistencies in the

evidence presented by the State witnesses. It was also contended on his behalf that their oral testimony differed materially from what was set out in the statements they made to the police. Adv Edeling, for the appellant, *inter alia*, suggested that the following are such contradictions:

- 16.1 That Persoon contradicted himself concerning where he, Kiewiet, and Kalani stood at the time of the fatal incident;
 - 16.2 That Persoon contradicted himself by testifying that the incident happened immediately the tractor came to a halt and later said that it was when one of the trailers was disengaged from the tractor and another trailer was hooked;
 - 16.3 That Kalani never heard the crude words said to have been uttered by the appellant before he hit the deceased whereas Persoon testified that the appellant hurled insults at the deceased;
 - 16.4 That Kalani said that after the deceased was struck he staggered whereas Persoon said he jumped from the trailer.
17. Immaterial deviations do not impact the outcome of a case. The two witnesses are unsophisticated. Kalani passed Std 4 while Persoon did not attend school at all. The Magistrate was alive to the minor contradictions that were apparent from the evidence of the State witnesses and correctly came to a conclusion that these were immaterial. in *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) the headnote captures the summary of the approach to contradictions as enunciated by the SCA at 593e - 594g as follows:

“The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the

person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings."

Compare *Commissioner for Inland Revenue v Pick 'n Pay Wholesalers (Pty) Ltd* 1987 (3) SA 453 (A) at 469F – G where the Court made the following remarks:

"Human memory is inherently and notoriously liable to error. One knows that people are less likely to be complete and accurate in their accounts after a long interval than after a short one. It is a matter of common experience that, during the stage of retention or storage in the memory, perceived information may be forgotten or it may be modified, or added to, or distorted by subsequent information. One is aware too that there can occur a process of unconscious reconstruction."

18. For the most part, in his attempt to show that he was not responsible for the deceased's death the appellant's argument centred around the medical evidence and the demonstrations made by the two State witnesses with regard to how the appellant struck the deceased with the hay hook. Kalani is recorded as having demonstrated that the appellant held the hook with his right hand at 90 degrees above his head with the sharp edge of the hook facing forward and had swung the hook half in a circular way forward towards the deceased, whereas Persoon demonstrated an almost half circular movement to the front and where the movement stopped he pulled the hook. The observation was further that the swing was more of a lateral nature. I should mention that counsel disagreed at length on how Kalani had demonstrated the attack i.e. whether the movement he made was more perpendicular (vertical) which denotes an angle of 90 degrees to the given line, plane or surface; in contradiction to a horizontal line, which denotes an angle parallel to the plane of the horizon.

19. Dr Isaacs's testimony is that the evidence of the State witnesses to the effect that the deceased was struck with the hay hook was consistent with his findings. This is what appears on record:

"Prosecutor: Dokter ek wil aan u stel wat die vorige staats getuie getuig het en dan will ek net vra of sê of daardie aksie dalk inpas by die bevindings of nie. As ons kyk na die voorwerp voor die hof (Bewysstuk 1) die getuie wie gister getuig het het getuig dat die beskuldigde na bewering daardie hak gebruik het om die oorledene te kap. Hy het sy hand na die agterkant gebring en 'n voorentoe swaai beweging gemaak na die linker bors. Pas dit in met wat u daar bevind het, kon die wond moontlik op daardie manier veroorsaak gewees het en met daardie tipe wapen?-----Dit is nou twee in een, kom ons vat eers die wapen, die wapen wat daarvoor is kan defeneties die wond veroorsaak wat ek gesien het. Die teenwoordigheid van die skaafwonde rondom die wond aan my dui dit daarop dat die wapen nie baie skerp was nie soos wat jy met 'n mes punt kon he nie. Die rigting van die wond vanaf links na regs in die oorledene sal inpas met 'n besering opgedoen wanner jy 'n regshandige persoon het wat aangesig tot aangesig met die oorledene gestaan het en dan van links na regs die beweging uitvoer het van die aanvaller se oorgpunt."

20. Dr Wagner stated that if the appellant had hit the deceased with the hay hook by executing a downward movement as one of the witnesses had testified it would mean that the lower side of the skin would have been compressed while at the top the skin would have stretched and therefore the wound would not be round. It is pertinent to note that Dr Isaacs explained that the wound was not a typical bullet round wound because it had an area of abrasions of the skin extending from front to back at the point of entry into the skin. He went on to say that the shape of the wound is not necessarily in the perfect form of a weapon used.
21. Much was also made of the fact that on the demonstration made by the witnesses the left lung ought to have been perforated. On this score Dr Wagner made some demonstrations in Court using a typical scientific laboratory model of the human torso showing human anatomy (internal organs). He stated that the heart is situated in the middle of the chest between the two lungs. In the centre of the heart there is a blood vessel dividing the heart into a right and left side (ventricles). The left ventricle has a much thicker muscular structure than the right ventricle. The right side receives blood and pumps it to the lungs while the left ventricle pumps oxygenated blood to the whole of the human body. Therefore, the left ventricle performs much more work than the right ventricle.

According to Dr Wagner, gathering from what was said by the witnesses, the deceased had been injured by a blow wherein the sharp point of the instrument would have come from the left to the right. He stated that if that was the case the left lung and left ventricle ought to have been perforated or penetrated. That it does not appear from the post-mortem examination and report by Dr Isaacs that the left lung was injured.

22. Furthermore, Dr Wagner explained that regard being had to the fact that the left lung and the heart lie on the diaphragm, injuries to the diaphragm and other internal organs such as the stomach would have been present. He stated that this fact was not described in the post-mortem report.
23. Dr Isaacs testified that the left lung had partly collapsed due to blood accumulation. He conceded that if the deceased was struck through execution of a downward movement of the weapon into the right ventricle the left lung ought to have been perforated. It was put to him that it was impossible that the deceased was hit through the execution of a downward movement but through a lateral blow. His response was that due to the nature of the weapon used it was possible because unlike a knife the hay hook has a long shaft that can move and rotate. That even if the action could have been through a downward movement from above the head it could still rotate and end in the lateral way.
24. The other avenue of escape that the appellant places reliance on is that the State witnesses testified that once the appellant had hit the deceased he pulled him towards himself. Dr Isaacs was asked during cross-examination whether pulling the deceased towards him with the instrument stuck in the wound would not have resulted in extensive tissue injury than that recorded by him. His response was in the affirmative. However, there is nothing in the evidence to show that the weapon was still present in the wound when the appellant allegedly pulled the deceased. In any event the deceased wore an overall. Kalani intimated that the overall was torn when the appellant pulled the hook. He had to unzip the overall jacket later during that day, on the appellant's request, to see where the deceased was hit. The appellant testified that *"die ander hak was in my hand dié het ek getrek toe het ek gesien hy hak aan die*

overall". This should put paid any suggestion that the deceased ought to have sustained more injuries.

25. I hasten to say that certain issues articulated by Dr Wagner in his evidence bring into sharp focus the flaws in his hypothesis. The following extract from the record of the proceedings is apposite:

"Prosecutor: But we will remember that the accused said he did not pull on the object? -----Your worship in all reality yes the accused said he did not pull but this whole tragedy this whole incident happened in a matter of milliseconds I do not think if he [the accused] cannot recall it, it does not say it did not happened. So if in reasonability this is something which happened very rapidly and I do not think one can actually recall everything that happened rapidly that is just my opinion your worship. (My emphasis)

Exactly doctor and it was also asked of the accused when the deceased moved backwards whether he at least resisted that movement of the deceased and he said that the only, what he actually said is that his arm was only pulled forward a bit so it is clear that he did not put up a lot of resistance from his version? --- Your worship if I take the version of the accused as the state witness testified here just before me and I compare his version with Dr. Isaacs post-mortem report it is very clear that very little force was implicated in this whole incident. That is why I said 2/3 or 3/10 maximum is basically a small amount of force. There is no indication there is no confirmation by means of any of the injuries that a large amount an excessive amount of force that been attempted or tried or done to cause the demise of the deceased.

Doctor for that object to end up in the heart of the deceased as it happened in this particular instance, taking into account exactly where deceased was hit as visible from the photo and also the post-mortem that object in relation to the body of the deceased must have been at least more to the front of his body than under his arm into the back before it entered his body? ---That is possible your worship."

26. An expert called by any of the parties to the litigation should assist the Court in arriving at a just decision in a case. It goes without saying that he ought to remain dispassionate, neutral and objective. He should not be influenced as to form or content by the exigencies of litigation. See *Schneider No and others v AA and another* 2010 (5) SA 203 (WCC) at 211J - 212B; *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E-F; *Diners Club SA (Pty) Ltd v Singh and another* 2004 (3) SA 630 (D) at 660F-H. *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 (1) SA 139 (SCA) at 148 para 15.
27. The manner in which the appellant described how the deceased sustained his injury is difficult to comprehend. His version that the deceased sustained a 10 cm deep wound by turning onto a hook he (appellant) held in his hand is simply contrived and cannot reasonably possibly be true. According to him the

deceased died through an accident in which he fatally injured himself. This does not explain why he went out of his way to persuade the State witnesses to protect him by suppressing the evidence. The evidence of Kalani, on this aspect, appears on the reconstructed record as follows:

“When I told the accused that he hit him on his chest, the accused only took off his hat and said he did not want to kill the man. When I saw his mouth opening and closing I told the accused that I think Luckie is busy dying. Then Mr Van Schalkwyk told me that if there is anyone who can assist him is me. *Mr Van Schalkwyk told me that I must not say he struck Luckie.* I must say Luckie fell into the hook. I said yes I am going to say he fell into the hook”

Mr Edeling was constrained to concede that in the light of the above damning piece of evidence he could not say that the appellant had not stuck the deceased with the hay hook. Persoon is recorded saying:

“Toe het Meneer Van Schalkwyk aan sy kop gevat en gesê “Here help my ek het nie bedoel om hierdie man dood te maak nie....toe het Meneer Van Schalwyk (onhoorbaar) vir my dood sweer by die polisie....Hy het vir my gesê ek moet hom nie probeer dood te sweer nie.”

28. The appellant was convicted of an attempt to defeat or obstruct the course of justice on the strength of the evidence mentioned in the preceding paragraph. The appeal before us does not lie against that conviction because he did not succeed in obtaining leave to appeal against it. Therefore it cannot avail him to argue that the witnesses were untruthful that he urged them to subvert the truth. In any event, the evidence of the two State witnesses remained unshaken that the appellant was angry when he hit the deceased with the hay-bale hook. As more fully appearing on the quoted excerpts in para 27 above these witnesses also gave evidence favourable to the appellant on certain aspects. Out of exasperation over the deceased's misconduct during the weekend of 12/13 February and the morning of 14 February 2011 the appellant struck him with the hay hook. The Acting Regional Court Magistrate's rejection of the accidental death is justifiable on the facts.
29. What remains is whether the deceased's death was caused with the intent in the form of *dolus eventualis* or through negligence. It was argued on the appellant's behalf that if it be found that he hit the deceased with the hay hook,

at worst for him, he should be convicted of culpable homicide. This was so, it was contended, because following the deceased's death, the witnesses testified that the appellant broke into tears lamenting that he did not mean to kill him. In my view, the *ex post facto* melancholic reaction by a perpetrator can in most of the cases be expected.

30. Where, on a murder charge, the intention element is in dispute the trier of fact is required to have regard to all the evidential material which, in the light of available knowledge of how the human faculty of volition functions, is relevant to the determination of the state of mind of an accused person. Provocation or anger, as in this case, may be of a degree that affects a person's mind that the requisite intention to kill is absent. Under certain circumstances the provocation may, far from negating an intention to kill, actually cause it. In that event the crime would be murder and not culpable homicide. See *S v Mokonto* 1971 (2) SA 319 (A) at 326A-D.
31. In *S v Mtshiza* 1970 (3) SA 747 (A) at 752D-E culpable homicide is defined as the unlawful, negligent causing of the death of a human being. A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or causing of the unlawful result is not his main aim but (a) subjectively foresee the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused and (b) he reconciles himself with that possibility. See CR Snyman, Criminal Law, fifth edition, at 184. As was observed in *S v Burger* 1975 (4) SA 877 (A) having regard to the requirements of foresight and persistence the dividing line between murder with culpability being in the form of *dolus eventualis* and culpable homicide, is sometimes rather thin. The elements of culpable homicide were outlined as follows at 878H-879E in that case:
 - “(i) Culpable homicide is the unlawful, negligent causing of the death of a human being; see *S. v Ntuli* 1975 (1) SA 429 (AD) at p. 436A, and cases there cited.
 - (ii) Basically there must be some conduct on the part of the accused involving *dolus* (such as an assault), or *culpa* (such as an operation by a surgeon without due care, or the driving of a motor vehicle without keeping a proper look-out).
 - (iii) Such conduct must cause the death of the deceased.

- (iv) In addition there must be *culpa* in the sense that the accused ought reasonably to have foreseen the possibility of death resulting from such conduct; see *S. v Bernardus* 1965 (3) SA 287 (AD). This is because culpable homicide is the unlawful, negligent causing of the death of a human being.
- (v) It follows from the foregoing that causation of death, even as the result of an unlawful act which is criminally punishable, is not of itself sufficient to constitute the crime of culpable homicide. To disregard the additional requisite of the reasonably foreseeable possibility of resultant death, would be to reinstate the doctrine of *versari in re illicita*, which was outmoded by *S. v Bernardus*, supra.
- (vi) If an accused does foresee - as distinct from ought to have foreseen - the possibility of such resultant death and persists in his conduct with indifference to fatal consequence (or if he actually intends to kill) the crime would be that of murder; see *S. v Sigwahla* 1967 (4) SA 566 (AD) at p. 570B - E. Having regard to the requirements of foresight and persistence, the dividing line between (a), murder with *dolus eventualis* and (b), culpable homicide, is sometimes rather thin.
- (vii) *Culpa* and foreseeability are tested by reference to the standard of a *diligens paterfamilias* ("that notional epitome of reasonable prudence" - *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (AD) at p. 373F) in the position of the person whose conduct is in question. One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense."

32. In *S v Ndlanzi* 2014 (2) SACR 256 (SCA) at 265 paras 31-33 the Court reaffirmed the requirements for *mens rea* in the form of *dolus eventualis* as follows:

"[31].....Recently this approach was refined by this court in *S v Humphreys* 2013 (2) SACR 1 (SCA) by Brand JA at 8a – b as follows:

'In accordance with trite principles, the test for *dolus eventualis* is twofold:

- (a) Did the appellant subjectively foresee the possibility of the death.... ensuing from his conduct; and
- (b) did he reconcile himself with that possibility (see eg *S v De Oliveira* 1993 (2) SACR 59 (A) at 65i – j)?

Sometimes the element in (b) is described as "recklessness" as to whether or not the subjectively foreseen possibility ensues (see eg *S v Sigwahla* 1967 (4) SA 566 (A) at 570).'

[32] It is clear that the requisite subjective foresight may be proved by inferential reasoning based on the premise that 'in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence'. (See *Humphreys* supra at 8e.)

[33] Thereafter, 'the next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population'. (See *Humphreys* supra at 8f.)"

33. The appellant testified that he was agitated as opposed to being angry, due to *inter alia*, the deceased's conduct in having failed to load the crates and feed the animals. However, what can be discerned from the evidence is that he was enraged. There is nothing in the evidence to suggest that his anger beclouded his judgment or that he failed to appreciate unlawfulness of his action. Subjectively viewed, he possessed the actual intention (*animus*) to kill. As already alluded to, disappointingly, the hay hook was not described on record but on inspection of photo 4, appearing in para 7 of this judgment, there can be no doubt that it is a dangerous weapon the hook of which penetrated 10 cm into the body of the deceased. In my view, by striking the deceased with this weapon, targeting the left side of his chest, the appellant foresaw the possibility of the resultant death.
34. The Court expatiated on the second leg of the test for *dolus eventualis* as follows in *S v Humphreys* 2013 (2) SACR 1 (SCA) at 9i-j para 17:

“[17]...The true enquiry under this rubric is whether 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 collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.”
35. Regard being had to the nature of the weapon used the possibility of the consequences that ensued would have been apparent to any person of normal intelligence. On the facts, the only reasonable and inexorable inference to be drawn is that when he gave vent to his ire it was immaterial to the appellant whether the consequences would flow from his action; put differently, he proceeded nevertheless or persisted with his conduct indifferent to the fatal consequence of his action.
36. Regrettably for the Acting Regional Court Magistrate, he concluded as follows:

“By striking the deceased with the hook on the left side of the chest the accused ought to have foreseen that death may occur. The accused reconciled himself with the eventuality”

In my view, having lengthily analysed the facts, the Magistrate correctly found that the murder was perpetrated intentionally. It is clear that he made a mistake insofar as he states that the “accused ought to have foreseen that death may occur” because this is not the correct test. Be that as it may, on the conclusion I have reached the Magistrate’s mistake is inconsequential. I am therefore satisfied that no demonstrable or material misdirection exist in his reasons that the murder was perpetrated with the intention in the form of *dolus eventualis*. It follows that this appeal should fail.

Order:

1. The appeal is dismissed.

PHATSHOANE J

I concur:

TLALETSI AJP

On behalf of the Appellant	Adv WJ Edeling
Instructed by	Elliott, Maris, Wilmans & Hay
On behalf of the State/Respondent	Adv JJD Rosenberg
Instructed by	Director of Public Prosecutions