

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

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R127/2014**
 DATE HEARD: **27/11/2015**
 DATE DELIVERED: **04/12/2015**

In the matter between:

DAVID DESMOND VAN DER WESTHUIZEN

Appellant

and

THE STATE

Respondent

Coram: Olivier J et Pakati J

JUDGMENT

Olivier J:

- [1.] The appellant, Mr David Desmond van der Westhuizen, was charged in the Regional Court with murder, alternatively culpable homicide. He pleaded not guilty to both counts. He admitted having slapped the deceased once, and having inflicted two blows with his fist, but he denied having caused the death of the deceased. He also denied that the post mortem report which had been made available to him, pertained to the person that he had assaulted.

- [2.] The prosecution presented the evidence of two eyewitnesses, Ms Maria Coleman, the wife or life partner of the deceased, and Ms C A Eland, the niece of the deceased. Their evidence was basically to the effect that an altercation had taken place between the deceased and Mr Deon van der Westhuizen on Sunday 24 April 2011. Ms Coleman intervened and in the process injured Mr Deon van der Westhuizen, who then left. Not long thereafter the appellant arrived in a vehicle, driven by himself and accompanied by one Lappers. The appellant entered the premises of the deceased and Ms Coleman, grabbed the deceased and banged his head against the tree. When the deceased fell and basically lay defenceless on the ground, the appellant trampled on his head and chest. The appellant only stopped when he was attacked by Ms Eland.
- [3.] During that night the deceased started vomiting blood, but refused to be taken to hospital. He was, however, admitted to the Postmasburg Hospital the next morning, in other words on 25 April 2011, and he died there on 3 May 2011.
- [4.] Dr Anizoba later performed an autopsy on the body of the deceased and certified the cause of death to have been *"blunt trauma injuries to the head and neck with lethal consequences"*.
- [5.] The appellant did not testify. From what was put to Ms Coleman and Ms Eland in cross-examination it appeared that his case was that he had gone to the house of the deceased and Ms Coleman to

find out what had happened between them and Mr Deon van der Westhuizen. According to him the deceased then attacked him, whereupon he slapped the deceased once, and hit him twice with clenched fists. The statements were furthermore to the effect that the deceased then walked away. It was put to the witnesses that the appellant denied having smashed the deceased's head into a tree and having trampled him.

[6.] Just before the close of the case for the prosecution the appellant made further admissions in terms of section 220 of the **Criminal Procedure Act**¹. In those admissions he persisted with the version that he had only slapped the deceased once, and hit him twice with fists. He, however, went on to admit the identity of the deceased, and he admitted that the deceased had died as a result of brain haemorrhage sustained in the appellant's assault on him. The appellant, in fact, admitted having negligently caused the death of the deceased.

[7.] The appellant was eventually convicted on the main count, that of murder. It was found that he had indeed banged the head of the deceased against a tree, and thereafter trampled on him. It was found that his assault had caused the death of the deceased, and that the appellant had acted with the intention² to kill. On 30 October 2012 the Regional Magistrate found that there were no substantial and compelling circumstances to justify a deviation from the prescribed sentence, that there were in fact aggravating

¹ 51 of 1977

² Apparently in the form of *dolus eventualis*.

circumstances and that the deceased had not provoked the attack, and sentenced the appellant to 15 years imprisonment.

[8.] The present appeal is against the conviction and the sentence, leave having been granted on petition. The grounds advanced in respect of the conviction concerned contradictions between Ms Coleman and Ms Eland and it was submitted that the Regional Magistrate should have found the version of the appellant to have been reasonably possible. It was furthermore submitted that the trial court had failed to give proper consideration to the question whether the deceased may not have survived the attack had he been transferred to another hospital and that the trial court had erred in finding that the appellant's assault had been the direct cause of the death of the deceased. Lastly it was submitted that the trial court had in any event erred in finding that the appellant had acted intentionally in causing the death of the deceased.

[9.] As regards the sentence it was submitted that the court had failed to give proper consideration to the appellant's favourable personal circumstances, that the seriousness of the offence had been over-emphasised, that the court had failed to consider other sentencing options, and the possible rehabilitation of the appellant outside prison, and that overall the sentence was disturbingly inappropriate.

[10.] Mr Nel, counsel for the appellant, correctly and responsibly conceded that the contradictions between Ms Coleman and Ms Eland were not material and that the Regional Magistrate had been

correct in rejecting the version of the appellant as to the nature of the assault. Mr Nel restricted his argument, as regards the conviction, to the following submissions:

10.1 That the fact that the deceased had not been transferred to a hospital where a so-called CT-scan could be performed to establish whether there was a brain haemorrhage and, if so, where an operation could be performed to drain the blood, had been a *novus actus interveniens* and therefore the effective cause of death; and

10.2 That, in any event, it had not been proved beyond reasonable doubt that the appellant had assaulted the deceased with the intention to kill him.

[11.] The argument that the appellant's assault, and the injuries sustained during that assault, had not been the direct cause of death is completely inconsistent with the admissions that the appellant had, as already mentioned, made just before the close of the case for the prosecution. His admission that he had caused the death of the deceased was never withdrawn. That admission was, in fact, made after an adjournment had subsequent to the medical evidence been granted for the appellant and his attorney to consult, presumably about precisely that evidence. On this basis alone, in my view, this argument cannot succeed.

[12.] I will, however, nevertheless deal with the medical evidence presented by the prosecution. Dr M Necibi testified that he had not

been involved in the admission of the deceased to the Postmasburg Hospital. He only examined him on 27 April 2011, when he found that the deceased was confused and was having convulsions. He concluded that the deceased was seriously injured, and that he had probably sustained a head injury. Dr Necibi testified that in such a case it is essential that a scan be performed so that, if it shows that there is a brain haemorrhage, the blood can be drained. The hospital in Postmasburg did not have the facilities for this. According to Dr Necibi the deceased was not transferred to Kimberley, where the facilities would have been available, because the family declined this. Most importantly, however, Dr Necibi testified that he could not say that the deceased would have survived had he been transferred to a hospital in Kimberley.

- [13.] Dr Anizoba testified that, under normal circumstances, a scan should be performed on a person with suspected brain haemorrhage and, if it is confirmed, the blood could then be drained in a surgical procedure, which could result in the survival of such a person. He went on, however, to testify that the deceased had been a frail and sickly person and that he may in any event have died, even if he had undergone surgery to drain the blood. Dr Anizoba was not prepared to say that surgery would have saved the life of the deceased. He testified that the deceased had sustained very serious injuries in the assault.

[14.] The burden of proof was on the prosecution to prove that the appellant's assault had been the direct cause of the death of the deceased³.

[15.] In **S v Thembani**⁴ the approach which should be followed in considering whether the consequences of an attack had been interrupted by a *novus actus interveniens* was explained as follows:

"[25]...The deliberate infliction of an intrinsically dangerous wound, from which the victim is likely to die without medical intervention, must in my view generally lead to liability of an ensuing death, whether or not the wound is readily treatable, and even if the medical treatment later given is substandard or negligent, unless the victim so recovers that at the time of the negligent treatment the original injury no longer poses a danger to life...In the present case, the trial Court rightly found that at the time of the deficient treatment, the original wound was still an operating and substantial cause of death, and that it could not be said that it merely provided the 'setting' within which the negligent conduct of the hospital staff operated.

³ Compare **S v Tembani** 1999 (1) (SACR) 192 (W) at 198b - c

⁴ 2007 (2) SA 291 (SCA), dismissing an appeal against the judgment in the case referred to in footnote 3.

[29] *In view of the allusion to it by some of the authorities, I should add that I do not consider that even gross negligence in the administration of medical treatment should be sufficient to relieve the original perpetrator of criminal liability of an ensuing death."*

The following remarks in **S v Counter**⁵ at 285 are also instructive:

"From the authorities it is clear where there is an intentional or gross negligent intervening cause that changed the course of events so that it could be said that the original act can no longer be regarded as the cause of death then there is a novus actus interveniens.

In my view a true novus actus interveniens can only mean an event that drastically changed the course of events and that the result that followed is, in the ordinary human experience totally unexpected."

[16.] In my view it is clear, on all available evidence, that the injuries caused in the appellant's attack still existed at the time of the deceased's death, and that they had in fact become progressively

⁵ [2000] 2 All SA 276 (W)

worse. They were accordingly, at the time of death, not merely the “*setting*” for any possible negligence on the part of the deceased’s family or the staff of the Postmasburg Hospital. Insofar as it may have been negligent not to transfer the deceased to a hospital where a scan and an operation could be performed, such negligence did not “*drastically change*” the course of events that would on the available evidence have followed upon the infliction of such an injury.

[17.] This brings me to the question whether it had correctly been found that the appellant had acted with the required intent. The Regional Magistrate found that the appellant had not, at the stage when he slammed the head of the deceased into the tree, foreseen the death of the deceased. It was found, however, that when the appellant trampled the deceased “*That must have convinced the Accused that he was killing this person*”.

[18.] Insofar as the Regional Magistrate may have intended to convey that the appellant should, at that stage, have realised that he was killing the deceased, such a finding would of course not have been a proper basis for a finding of *dolus eventualis*. In **S v Campos**⁶ it was in paragraph [33] confirmed that “(the) Court should guard against proceeding too readily from ‘ought to have foreseen’ to ‘must have foreseen’ and thence to ‘by necessary inference in fact foresaw’ the possible consequences of the conduct enquired into. The several thought processes attributed to an accused must be established

⁶ 2002 (1) SACR 233 (SCA)

beyond any reasonable doubt, having due regard to the particular circumstances which attended the conduct being enquired into."

[19.] In **S v Lungile and Another**⁷ the following was held at 602h – j:

"The question to be considered in the present matter is whether the State proved beyond a reasonable doubt that the appellant in fact did foresee that her actions could result in the Nicola's death. Moreover, that alone would not be enough. It would also have to be the only reasonable inference that she did not care (i.e. was reckless as to) whether death would in fact result and, as it is sometimes put in the cases, reconciled herself to such a result".

[20.] According to Dr Anizoba the deceased's injuries would not initially have been visible externally⁸. The record contains no description of the shoes which the appellant had worn when trampling on the deceased. In my view the reasonable possibility of the appellant not having in fact foreseen the death of the deceased was not excluded. There is, however, no doubt at all that a reasonable person in his position would have foreseen it, as Mr Nel readily conceded, and in my view the appellant should therefore have been convicted of culpable homicide.

⁷ 1999 (2) SACR 597 (SCA)

⁸ When Dr Necibi examined the deceased on 27 April he noted only an oedema of the jaw and a laceration of the lip.

- [21.] This would mean that this Court would be free to either remit the matter to the Regional Magistrate for sentence on such a conviction or to impose sentence itself. In my view there is sufficient information before this Court to deal with the sentence itself.
- [22.] The appellant's personal circumstances were favourable. He had a stable employment history and for all practical purposes he had no previous convictions. He had three dependent children and a life partner, who was also dependent upon him. It is abundantly clear that a custodial sentence would have a seriously negative impact on those dependents.
- [23.] On the other hand it is aggravating that the appellant, who had known the deceased, had attacked a weak and sickly person to begin with. It was a prolonged attack. When the deceased lay helpless on the ground after his head had been banged into the tree, the appellant went on to trample on his head and chest. There is no indication that the appellant would have stopped his attack had he not been interrupted by Ms Eland.
- [24.] I am prepared to accept that the attack had been provoked to the extent that it had, apparently, been reported to the appellant that the deceased had been responsible for the injury sustained by which Mr Deon van der Westhuizen, who presumably was a relative of the appellant. It can also be assumed that the appellant would not have known that the deceased had not, in fact, inflicted the injury to Mr Deon van der Westhuizen. However, even if it is accepted that such a report would have provoked the appellant, the

fact remains that he clearly had ample time to reflect and to come to his senses. He had, however, clearly been intent on revenging the injury sustained by Mr Deon van der Westhuizen and on punishing the deceased for that.

[25.] In my view the only appropriate sentence would, unfortunately, still be a custodial sentence. Mr Nel in effect conceded this, but suggested that it should be a sentence of imprisonment in terms of section 276(1)(i) of the **Criminal Procedure Act**, which would mean that the appellant could then after having served a relatively short portion of the sentence of imprisonment be released on correctional supervision. In my view, however, such a sentence would not be appropriate, taking into account the seriousness of the offence.

[26.] There is also the problem that there is no indication of any remorse on the part of the appellant. Despite this I am, however, of the view that the appellant should be afforded the opportunity of rehabilitation outside prison for at least part of his sentence. In my view an appropriate sentence would be one of 10 years imprisonment, of which 3 years are conditionally suspended.

[27.] It appears that the appellant had served 43 days of his sentence before being released on bail on 12 December 2012 pending the outcome of this appeal. His sentence will therefore be antedated by an equal number of days, to 22 October 2015⁹.

⁹ Section 280 of the **Criminal Procedure Act**.

[28.] The following orders are therefore made:

1. THE CONVICTION OF MURDER IS SET ASIDE AND SUBSTITUTED WITH THE CONVICTION OF CULPABLE HOMICIDE.
2. THE SENTENCE OF 15 (FIFTEEN) YEARS IMPRISONMENT IS SET ASIDE AND SUBSTITUTED WITH THE FOLLOWING SENTENCE:

"10 (TEN) YEARS IMPRISONMENT, OF WHICH 3 (THREE) YEARS ARE SUSPENDED FOR A PERIOD OF 5 (FIVE) YEARS ON CONDITION THAT THE ACCUSED IS NOT CONVICTED OF AN OFFENCE INVOLVING AN ASSAULT ON ANOTHER, IN RESPECT OF WHICH THE ACCUSED IS SENTENCED TO UNSUSPENDED IMPRISONMENT OF MORE THAN 1 (ONE) YEAR WITHOUT THE OPTION OF A FINE AND WHICH OFFENCE IS COMMITTED DURING THE PERIOD OF SUSPENSION".

3. THE SENTENCE IS ANTEDATED TO 22 OCTOBER 2015.



C J OLIVIER
 JUDGE
 NORTHERN CAPE DIVISION

I agree.



B M PAKATI
 JUDGE
 NORTHERN CAPE DIVISION

For the Appellant: ADV. I J NEL
 Instructed by: Johan Kotzé Attorneys, Postmasburg

For the Respondent: ADV. C G JANSEN
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