

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A165/2013

In the matter between:

THEMBINKOSI RICHARD DONDA

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* LEKALE, J

HEARD ON:

17 FEBRUARY 2014

JUDGMENT BY:

LEKALE, J

DELIVERED ON:

20 FEBRUARY 2014

- [1] The appellant, who was legally represented, appeared before the regional court at Zastron on the 25th October 2011 on the charge of murder and was convicted, on his plea, of culpable homicide and, thereupon, sentenced to eight years imprisonment. He feels aggrieved by the sentence and now approaches us on appeal against the same with leave granted by the trial court.

- [2] The assertions against him were that on or about the 6th September 2010 and at or near Zastron he unlawfully and intentionally killed one Francinah Lisebo Manele, who happened to be his common law wife. He tendered a plea of guilty to culpable homicide, which was duly accepted by the State. In a statement signed by the appellant and submitted for and on his behalf to the trial court in terms of section 112(2) of the Criminal Procedure Act No 51 of 1977, as amended (the CPA) he admitted that he caused the death of the deceased unlawfully by punching her several times in the face with fists and, further, declared *inter alia* that

“I admit that a reasonable person in the circumstances would not have acted the way I did.”

- [3] On perusing the record we were left in doubt as to whether or not the appellant, in fact, admitted the element of culpability to render himself guilty of the crime of culpable homicide insofar as it is not apparent *ex facie* the section 112(2) statement that he could and should have foreseen the possibility of death resulting from his actions and taken steps to guard against such a possibility, but failed to do so.
- (See Minister of Safety and Security v Mohofe 2007 (2) SACR 92 (SCA) at par [5].)

- [4] We, thereupon, invoked our inherent powers so as to ensure that justice prevailed and directed counsel on both sides to

address the issue notwithstanding the limited nature of the appeal before us. The parties are correctly *ad idem* that the section 112(2) statement does not disclose an admission of any negligence on the part of the appellant and that the court *a quo* would, as such, not have been satisfied that the appellant was guilty of culpable homicide. The court below should, therefore, have drawn the attention of the appellant and his legal representative to that deficiency and directed questions to the appellant to obtain elucidation on the relevant aspect.

(See **Stefaans Toso v S** - Case No A136/2013 – an unreported decision of the Free State Division delivered on 24 December 2013, section 112(2) of Criminal Procedure Act and **S v B** 1991 (1) SACR 405 (N).)

- [5] The conviction and sentence are, thus, not in compliance with the provisions of section 112(2) of the CPA and fall to be set aside on that ground. In order to afford the court below an opportunity to comply with the provisions of section 112(2) of CPA by asking elucidating questions with regard to negligence, the case falls to be remitted to the trial court in terms of section 312(1) of CPA. In the event of the court *a quo* not being satisfied as to the guilt of the appellant after directing clarifying questions to him with regard to negligence, the trial court would have to invoke the provisions of section 113 of the CPA and proceed with the matter as a defended trial.

- [6] We are, further, mindful of the fact that the appellant has been in prison since the 25th October 2011 and that it is in the interests of justice that the matter be finalised expeditiously. I am, further, alive to the appellant's contentions against the sentence imposed in the instant matter. It is possible from his tilt against the sentence that, in the event of a conviction and a similar sentence being imposed, he would feel aggrieved and be inclined to take the same on appeal with attendant costs and time consuming efforts. In an attempt to obviate possible delay, inconvenience and costs on his part in that eventuality, I can only urge the trial court to consider an appropriate sentence in the light of, *inter alia*, the circumstances under which the crime was committed such as the fact that it is not in dispute that both the appellant and the deceased were under the influence of alcohol at the relevant time and that the deceased was also belligerent, probably because of her state of inebriation, insofar as it was not disputed that she wanted to fight with the appellant.

ORDER

- [7] In the result the conviction and sentence are set aside.
- [8] The matter is remitted to the trial court which is directed to proceed to enquire, by way of verbal questions addressed to the appellant, into whether or not he admits that a reasonable man in his position would have foreseen the possibility of death

resulting from his actions *vis-a-vis* the deceased and would have taken steps, which the appellant failed to take, to guard against such an eventuality.

- [9] In the event of the appellant not satisfying the trial court as to negligence, the court *a quo* is directed to enter a plea of not guilty in terms of section 113 of Act 51 of 1977 and to proceed to hear the matter on a defended basis.
- [10] In the event of the court below returning a verdict of guilty against the appellant, it is directed to deduct the period which the appellant shall have already spent in jail since the 25th October 2011 until the date of his release therefrom from any sentence which the court *a quo* may consider appropriate in the circumstances of the matter.
- [11] The appellant shall immediately be taken to the court below where the said court shall determine whether he shall remain in custody as awaiting trial inmate, or whether he shall be released on bail or warning pending finalisation of the matter by the trial court.

L. J. LEKALE, J

I concur.

C. VAN ZYL, J

On behalf of appellant:

Mr P Nel
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv R. Hoffman
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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