

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: A345/2012 ⁵⁴ *The force*

A354/12

17/5/2013

(1)	REPORTABLE: ☒ YES ☐ NO
(2)	OF INTEREST TO OTHER JUDGES: ☒ YES ☐ NO
(3)	REVISED.
<i>2013.05.17</i> <i>Tatn</i>	
DATE	SIGNATURE

In the matter between:

SIBUSISO CHRISTOPHER MASEKO

Appellant

and

THE STATE

Respondent

JUDGMENT OF THE COURT

MAKGOKA J et LAKA AJ:

[1] The appellant was arraigned in the regional Court, Ermelo, on a charge of murder, read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. The deceased died of injuries sustained on 25 December 2003. The cause of death was noted in the post-mortem report as

'skull and brain injury'. The trial culminated in the conviction of the appellant, upon which he was sentenced to 8 (eight) years' imprisonment. Leave to appeal having been refused by the trial court, the appellant appeals against the conviction, with leave of this court.

[2] The State led the evidence of two witnesses, Mr. Sibusiso Kenneth Zulu (Zulu) and Constable Willie Alfred Makwakwa (Makwakwa). The appellant testified and closed his case without calling any further witnesses. Zulu testified that he was walking with the appellant from a tavern. They were approached by the deceased in an aggressive manner. The appellant pushed the deceased away. The deceased hit the appellant with a fist. The appellant retaliated by hitting the deceased with a fist. According to Zulu, this was a hard blow and the deceased fell backwards on the tarred road.

[3] The appellant continued to hit and kick the deceased whilst the latter was lying on the ground. The police arrived at the scene. This did not deter the appellant from assaulting the deceased. The appellant was arrested. Makwakwa, a constable in the South African Police Service (SAPS), was patrolling the area when he observed the deceased lying on the ground and the appellant standing over, and assaulting the deceased. He arrested the appellant.

[4] The appellant testified that on the night of the incident he was at a tavern drinking liquor. Later he left for his girlfriend's place. Zulu joined him on the way, but he was going to another tavern. Along the way, they encountered the

deceased lying in the street. He then noticed a vehicle coming and tried to move the deceased from the middle of the street. The vehicle happened to be a police van. The police accused him of having assaulted the deceased, which he denied.

[5] The appellant attacks the conviction on the basis that the evidence does not sustain a conviction of murder. At worst for the appellant, so is the argument, he should have been convicted of assault with intent to do grievous bodily harm. The State supports the conviction.

[6] Before we consider the submissions in this regard, it is necessary to restate the approach to be adopted by a court of appeal when it deals with the factual findings of a trial court. The proper approach is found in the following principles laid down in *R v Dhlumayo*.¹ A court of appeal will not disturb the factual finding of a trial court unless the latter had committed a misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.

[7] The issues for determination in this appeal are these:

- (a) whether or not the appellant assaulted the deceased, and if so
- (b) whether or not he did so in self-defence;

¹ 1948 (2) SA 677 (A)

- (c) whether or not the appellant's assault on the deceased (if established) caused the fatal injuries to the deceased;
- (d) whether the evidence established murder or only
 - (i) culpable homicide;
 - or
 - (ii) assault with intent to do grievous bodily harm.

[8] We now consider the above, in turn, starting with whether or not the appellant assaulted the deceased. It would be recalled that the appellant's version was that no fight occurred between him and the deceased, and therefore denied assaulting the deceased. In this regard the trial court relied on the evidence of Zulu, who was walking with the appellant. Zulu was a single witness.

[9] In terms of s 208 of the Criminal Procedure Act, 51 of 1977, an accused may be convicted of any offence on the single evidence of any competent witness. The court can base its findings on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect (*R v Mokoena* 1932 OPD 79 at 80) or if there is corroboration (*S v Gentle* 2005 (1) SACR 420 (SCA)). See further, *R v Mokoena* 1956 (3) SA 81 (A) at 85; *S v T* 1958 (2) SA 676 (A) at 678; *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G; and *S v Banana* 2000 (2) SACR 1 (ZSC).

[10] In the present case, there is no suggestion that Zulu's evidence was not satisfactory in all respects. Even before us, the appellant's attorney, quite

correctly, did not argue otherwise. The trial court's finding in this regard (that the appellant assaulted the deceased in response to the deceased's initial aggression towards him) is therefore unassailable.

[11] That brings us to the next enquiry, whether the appellant, in assaulting the deceased in those circumstances, did not exceed the boundaries of private defence. It should be noted that during the trial, the appellant did not raise private defence, given his version that there was no fight between him and the deceased, and therefore, no assault occurred. As stated in para 10 above, in this court, his attorney disavowed any reliance on that version of the appellant, and pinned his argument on private defence.

[12] The evidence is that the appellant struck a blow to the deceased, as a result of which the latter fell. Once that happened, the deceased no longer posed any danger to the appellant. Despite that, the appellant continued to assault the deceased while the latter was lying on the ground. In our view, the appellant exceeded the boundaries of private defence. It was contended on behalf of the appellant that the first blow, which was in private defence and therefore lawful, was probably the fatal one. We find no merit in this submission. The probabilities are that the appellant died from the subsequent repeated assaults to the head.

[13] Besides, there is no suggestion that the deceased's initial aggression towards the appellant posed any serious danger to warrant the blow described by Zulu as 'heavy'. We therefore conclude that the appellant's

reaction to the deceased's attack on him was, in any event, disproportionate and overboard. With this conclusion, we are satisfied that the deceased died as a result of the injuries sustained during the assault by the appellant.

[14] Next must be considered whether the appellant was correctly convicted of murder, which is the intentional killing of a human being. The attorney for the appellant argued that, at the very least, the appellant should have been convicted of assault with intent to do grievous bodily harm. We do not agree. The repeated assault of the deceased while lying on the ground, even after the arrival of the police, points away from the intention suggested.

[15] We now consider the other competent verdict, culpable homicide, which is the unlawful, negligent causing of the death of a human being. It follows that the causing 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. There is the additional requisite of the reasonably foreseeable possibility of resultant death. See *S v Burger*². There is always a very thin line between murder based on *dolus eventualis* and culpable homicide. In *S v Bernadus*³ the following was said in this regard:

'(S) erious injury and death are sombrely familiar as cause and effect in the marks of human experience, for the vulnerabilities of human body are legion, and death may come to mortals through a variety of corporeal hurts and derangements.' See also *S v Thenkwa en 'n Ander*⁴.

² 1975 (4) SA 886 (A) 879 B.

³ 1965 (3) SA 287 (A) at 307 A-C.

⁴ 1970 (3) SA 529 (A).

[16] Here an accused's state of mind at the time of the incident is important, as the element of subjectivity is important in distinguishing between murder and culpable homicide, where the infliction of physical violence is involved. Subjective foresight must be determined, as 'a determination must be made as to what actually went on in the mind of the appellant for the trial court to justifiably infer that the appellant ought reasonably to have foreseen, and in fact did foresee the possibility of causing the deceased's death'. See *S v Campos*⁵; and *S v Mtshiza*⁶.

[17] In the present case, we doubt whether it can be said beyond reasonable doubt that the appellant had the intention to kill the deceased. From a consideration of all the evidence, we do not think that intention, either in the form of *dolus directus* or *dolus eventualis*, was established. Once intention is excluded, the question is narrowed to a choice between culpable homicide and assault with intent to do grievous bodily harm.

[18] In this regard, we consider the nature of the injuries set out in the post-mortem report, from which it is clear that the deceased was severely assaulted. The injuries are such that a reasonable man in the position of the appellant would have foreseen that death could result from the assault. The appellant should have appreciated the possibility that assaulting the deceased with the intensity he did, might well cause serious injuries; and that such

⁵ 2002 (1) SACR 233 (SCA) paras 24,25,26,33 and 38.

⁶ 1970 (3) SA 747 (A) at 751 D -752 E; 735 A-C, 754 A-B,

injuries could result in death. By saying this, we do not lose sight of the fact that the appellant was under the influence of liquor. We therefore conclude that the appellant should have been convicted of culpable homicide. The appeal should therefore succeed to the extent that the conviction of murder should be set aside and replaced with one of culpable homicide.

[19] Ordinarily, but not necessarily, this conclusion would affect the sentence, even though leave was not granted to appeal against the sentence. The appellant was sentenced to 8 years imprisonment. In my view, that sentence is in the range of sentences normally imposed for culpable homicide. Although the trial court misdirected itself in the conviction, it did not do so with regard to the sentence. There is therefore no basis to interfere with the sentence imposed by the trial court. In the end, the appellant's success in overturning the murder conviction has turned out to be academic.

[20] In the result the following order is made:

1. The appeal is upheld to the extent that the conviction on the count of murder is set aside and replaced with the following:

'The accused is convicted of culpable homicide'

2. The sentence of 8 years' imprisonment imposed by the regional court is confirmed.



TM MAKGOKA
JUDGE OF THE HIGH COURT

and


pp

AP LAKA
ACTING JUDGE OF THE HIGH COURT

DATE HEARD : 5 DECEMBER 2012

JUDGMENT DELIVERED : 17 MAY 2013

FOR THE APPELLANT : MR. M. JUNGBLUTH

INSTRUCTED BY : BOTHA & VAN DYK INC

FOR THE STATE : ADV PW COETZER

**INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTIONS,
PRETORIA**