

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A19/2011

In the appeal between:

BRENDAN JOPSON

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* LEKALE, AJ

JUDGEMENT:

LEKALE, AJ

HEARD ON:

6 JUNE 2011

DELIVERED ON:

30 JUNE 2011

[1] The appellant was convicted of culpable homicide by the regional court sitting at Sasolburg and was, eventually, sentenced on the 1st July 2010 to 7 years imprisonment of which two years imprisonment was conditionally suspended.

[2] The appellant now approaches this court on appeal against both the conviction and the sentence, having successfully petitioned this court for leave to appeal in terms of section

309C of the Criminal Procedure Act, no. 51 of 1977 as amended (the “CPA”).

[3] On the date of the incident which gave cause to the trial, the appellant visited an automatic teller machine (ATM) located inside the shop at the filling station in Deneysville to draw cash. He was in a hurry as he needed to settle his bill with the restaurant where he had had dinner. The deceased was ahead of him at the ATM. The deceased delayed for some considerable time in finalizing his transaction on the ATM. An argument eventually broke out between the appellant and the deceased which deteriorated into a physical altercation. The appellant, eventually, knocked the deceased down with fists. The deceased fell on his back and fractured his skull. He later died in his bed that night and the post mortem report attributed his death to brain or subdural hemorrhage due to head injury.

[4] The trial court based its findings of fact mainly on the video footage depicting the altercation between the appellant and the deceased. The said footage was also made available to us for assistance in determining the appeal.

[5] In returning a verdict of guilty the court below found, on the basis of the video footage, that the appellant was the one who was aggressive and that the deceased did not hit or attempt to hit him. The trial court, further, found that the deceased died as a result of the punches directed at his body by the appellant and that there was nothing to indicate that the deceased was aggressive or that he directed any punches at the appellant.

[6] In the Heads of Argument and verbal submissions made before us, Mr Van Wyk, appearing for the appellant, takes issue with the observations made by the trial court. He submits that it is clear from the footage that the deceased directed a blow at the appellant and that the appellant actually struck the deceased once in the chest and the nose.

[7] A look at the video footage reveals that the deceased was talkative and playful to the extent of being obnoxious when he transacted at the ATM. The deceased is further depicted gesticulating in the direction of the appellant and extending his

hand towards him as if pushing him. He is also shown throwing blows, which do not reach the target, at the appellant while being agile on his feet contrary to the findings of the court *a quo*. The video footage shows that the deceased taunted the appellant to the extent of being provocative by, *inter alia*, talking into his face.

- [8] The video footage furthermore shows the appellant reacting to the deceased's moves with kicks to the deceased's feet and three fast and stinging punches with his left hand. The deceased, on his part, tries to hit the appellant without success as the latter appears to be faster and more accurate in his deliveries. The interaction between the two resembles a kickboxing match with the parties exchanging blows. The footage is not audio-visual and, as such, the only evidence pertaining to verbal exchanges between the deceased and the appellant emanates from the appellant.

- [9] Mr Van Wyk further contends that the deceased's death was not reasonably foreseeable and that the appellant is, at the very most, guilty of common assault because he exceeded the

bounds of self-defence.

[10] The question, on a charge of culpable homicide based on unlawful assault, is whether or not the accused, in the position of the appellant, reasonably ought to have foreseen death ensuing as a result of the assault. (See **S v VAN AS** 1976 (2) SA 921 at 92H).

[11] In *casu* the question is whether or not a reasonable man in the position of the appellant would have foreseen that the deceased would fall on his back and hit his head against the hard ceramic floor, thereby, injuring his head with the result that he would sustain fatal brain hemorrhage.

[12] The evidence of the pathologist who performed the post mortem is apposite on this question as correctly submitted by Mr Van Wyk. Dr Humphries, an experienced district surgeon of more than 30 years, conceded under cross examination that, although the punch which the appellant delivered to the deceased's nose was heavy enough to fracture the bone, it was most probably not reasonably foreseeable that the

deceased would die. He further volunteered that a closer look at the video footage gives the impression that **“the fall was more on the shoulders but there was a whiplash on the ground”**.

[13] The cashier who testified before the trial court and witnessed the encounter between the deceased and the appellant, as correctly pointed out by Mr Van Wyk, also did not see the urgency of intervening immediately after the deceased fell to be ground. If the assault was vicious and brutal one would reasonably have expected her to have intervened sooner rather than later.

[14] In the present matter the possibility of death ensuing appears, in our view, to have been so remote that it could not have reasonably possibly been foreseeable to a reasonable man in the appellant's position regard being had to human experience. Fist fights similar to the one depicted on the video footage do not normally result in death.

[15] Mr Mohlala, for the state, contends that assault with intent to

do grievous bodily harm, not common assault, would be a competent verdict in the event of the court finding cause to interfere with the conviction. Mr Van Wyk does not quarrel with this contention and concedes that fists may be used and are, actually, known to cause serious bodily harm.

[16] The court is satisfied from the video footage that the appellant, most probably, intended to injure the deceased “**really seriously**” regard being had to the kicks executed and the successive punches to the deceased’s upper body inclusive of the head. In our view the appellant probably wanted to neutralize the deceased so as to ensure that he left the shop safely without fear of further attacks from the deceased. In this regard it should be noted that the appellant testified that the deceased threatened him with violence by saying that he should wait until they got outside. (Compare **S v DIPHOLO** 1983 (4) SA 757 (T) at 760.)

[17] On sentence the parties are in agreement that a prison sentence without an option of a fine is not appropriate in the circumstances of the present matter. Mr Van Wyk, further,

submits that the 70 days that the appellant served in prison before he was released on bail pending appeal should be taken into consideration by antedating the sentence to run from the 1st July 2010.

[18] We are in respectful agreement with the parties regard being had to the appellant's personal circumstances and the circumstances surrounding the commission of the crime herein inclusive of the measure of provocation evident from the video footage.

ORDER:

[19] In the result the appeal succeeds and the judgment and sentence of the court below are set aside and replaced with the following:

- “1. The accused is found guilty of assault with intent to cause grievous bodily harm in terms of section 259(a) of Act no. 51 of 1977 as amended;**
- 2. The accused is sentenced to R6 000,00 fine or 9 months imprisonment of which R4 000,00 or 7**

months imprisonment is suspended for 5 years on condition that the accused is not found guilty of assault with intent to do grievous bodily harm committed during the period of suspension.”

[20] The above sentence is antedated to run with effect from the 1st July 2010.

L. J. LEKALE, AJ

I concur.

C. VAN ZYL, J

On behalf of the appellant:

Mr. R van Wyk
Instructed by:

SASOLBURG

On behalf of the respondent:

Adv. M A Mohlala
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

/eb