

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : 107/2005

In the appeal between:

TAMANE ISAAC MOHAPI

Appellant

and

THE STATE

Respondent

CORAM:

EBRAHIM J *et* VAN DER MERWE J

HEARD ON:

8 MAY 2006

JUDGMENT BY:

VAN DER MERWE J

DELIVERED ON:

5 JUNE 2006

- [1] The appellant was convicted in the regional court of murder and on 2 June 2004 sentenced to 12 (twelve) years imprisonment. The appellant applied for and obtained leave to appeal from the court *a quo* against sentence only. At the hearing of the appeal, however, leave to appeal against the

conviction was applied for on behalf of the appellant. This was not opposed by counsel for the respondent who, in fact, in his heads of argument dealt with the merits of the conviction. In the particular circumstances of this case leave to appeal against the conviction as well, was granted. The appellant's application for condonation for the late filing of heads of argument was also not opposed and was granted.

[2] It is common cause that the appellant stabbed the deceased with a knife in the back. The incident took place on 19 January 2003 at Marquard. The court *a quo* accepted the evidence of the witnesses on behalf of the respondent to the effect that the appellant did not act in self-defence and that the appellant stabbed the deceased in the back whilst the deceased was running away from him. This finding was not challenged on appeal, correctly so in my judgment.

[3] It was, however, argued on behalf of the appellant, that the respondent did not prove the element of causation. It is trite that on a charge of murder the State has to prove beyond

reasonable doubt that the act in question caused the death of the deceased. The test in this regard constitutes two enquiries. First, it must be established whether there is a factual nexus between the act and the result, in other words, whether the act is a *conditio sine qua non* of the death of the deceased. This is referred to as factual causation. Only if factual causation is established, the second enquiry arises, namely in respect of legal causation. The test in respect of legal causation is a flexible one and the question in essence is whether on the basis of considerations of policy the act is linked sufficiently closely or directly to the death in order to recognise the act as the legal cause of the death. See **S v MOKGETHI AND OTHERS** 1990 (1) SA 32 (AD) at 39 D to 41 A.

- [4] As a result of the stabbing, the deceased was admitted to the Senekal Hospital on 19 January 2003, where an intercostal drain was inserted in order to drain air and free blood from the chest cavity. Approximately 600 millilitres of blood was so drained. However, during the night of 19 and 20 January

2003 approximately a further 1 000 millilitres of blood was drained. It was consequently thought that a thoracotomy was called for. For this purpose the deceased was transferred to the Bethlehem Hospital where on 20 January 2003 the thoracotomy was performed. Thereafter the deceased was treated in the intensive care unit of Bethlehem Hospital for approximately a week. Thereafter the deceased was transferred to a ward in the Bethlehem Hospital. In the ward his condition steadily deteriorated until his death on 16 February 2003.

- [5] Several medical practitioners testified on behalf of the respondent. Dr. F. Hayden testified in respect of the condition and treatment of the deceased at Senekal Hospital. Dr. K.W. van der Merwe testified about the condition and treatment of the deceased during the period that the deceased was in the Bethlehem Hospital. Dr H.M. Loppstadt and Dr. P.J. Pretorius gave evidence in respect of the stay of the deceased in the ward in the Bethlehem Hospital after he was transferred there from the intensive care unit. The court

a quo also heard the evidence of Dr. H.E. van Schalkwyk, the pathologist that performed an autopsy on the body of the deceased on 19 February 2003. In some respects these medical practitioners gave conflicting evidence and some also revealed a rather disturbing phenomenon, namely the presence in intensive care units of organisms that are resistant to all available antibiotics. However, there can in my judgment be no doubt that the evidence referred to below should form the basis of the determination of the issue in question.

- [6] Dr. H.E. van Schalkwyk is a very experienced pathologist. He testified that the stab wound caused by the appellant was three centimetres in length and situated just above the shoulder blade. It penetrated approximately 10 centimetres into the chest cavity and a lung. He testified that the stab wound caused a lot of bleeding but that that in itself was not fatal. Dr. van Schalkwyk testified that at the time of the death of the deceased, the stab wound had already healed completely. He said that the cause of the death of the

deceased was multiple organ failure brought about by infection that spread to these organs, especially the lungs and kidneys. He described the stab wound as a “minor incident” and specifically testified that the deceased should not have died of the stab wound, in the following terms:

“You said in evidence doctor that this type of stab wound in your experience is a relatively minor incident because you see it regularly every day every weekend at Bethlehem hospital, is that correct? -- Correct.

So from what you have said the inference can be drawn that this type of relatively minor stab wound which you see regularly does not usually lead to the death of the stabbed person, is that correct? -- No, in fact, they never lead to the death. I do all the post mortems and I can tell you that stab wounds to the chest that come to die are very-very few and far between.

In other words the germs, the infection, the septicaemia, that was the cause of death to put it in a nutshell? -- No, the infection, the septicaemia, was a vehicle. This is how the infection was transported to all the vulnerable important organs but the failure of the organs was the eventual cause of death, as a result of the septicaemia.”

- [7] From the above it is clear that it is of crucial importance to analyse the evidence in respect of what the origin of the serious infection was or could be. Dr. van Schalkwyk said that he thought that the organism that caused the infection was introduced into the body of the deceased by the knife or the stab wound. This must, however, be seen in the light of the totality of the evidence. In this regard it is important to note that Dr. van Schalkwyk found severe congestion of both lungs, multiple adhesions of the lungs and severe right lower lobe pneumonia. He said that an adhesion of the lung is formed when the lung virtually becomes anchored to the chest wall and that the numerous adhesions of the lungs of the deceased constituted clear evidence of previous lung infections. As Dr. van Schalkwyk testified that no tests were done to establish whether the deceased had an underlying illness at the time when the stab wound was inflicted, it follows that there is at least a reasonable possibility that at the time of the stabbing, the deceased suffered from considerable lung infection.

- [8] The evidence of Dr. van der Merwe is in the same vein. Dr. van der Merwe is a medical practitioner with 29 years experience and was at the time head of clinical services at Bethlehem Hospital. He testified that in his experience about 90% of patients with injuries similar to the stab wound inflicted upon the deceased, would survive and that in fact the deceased was only the second person with such wound that he was aware of that died after admission in hospital. Dr. van der Merwe also said that three days after the admission of the deceased to the intensive care unit, there was already evidence of quite severe infection of the airways of the deceased. He said that that was too soon for the infection to have developed after admission of the deceased in hospital and that therefore the deceased must have had respiratory tract or chest infection at the time of the stabbing.
- [9] In my judgment, on the evidence referred to above, there is a very real and reasonable possibility that existing lung infection of the deceased caused the multiple organ failure

and death of the deceased, in other words, that the stab wound did not cause the infection and resultant death of the deceased nor materially contributed thereto. On this basis there is a reasonable possibility that the stab wound was not a *conditio sine qua non* and therefore not a factual cause of the death of the deceased. The appellant should therefore not have been convicted of murder or culpable homicide and consequently the appeal must succeed.

[10] It was conceded on behalf of the appellant that he should have been convicted of assault with intent to do grievous bodily harm. This concession was properly made. I believe that it is in the interest of justice that the matter be finalised and not referred to the trial court for the purpose of sentence. In my view, a sentence of 2 (two) years imprisonment is appropriate in all the circumstances of this case.

[11] In the result the conviction and sentence are set aside and replaced with a conviction of assault with intent to do grievous bodily harm and a sentence of 2 (two) years imprisonment which must be deemed to have been imposed

on 2 June 2004.

C.H.G. VAN DER MERWE, J

I concur.

S. EBRAHIM, J

On behalf of the appellant: N.W. Phalatsi and Partners
BLOEMFONTEIN

On behalf of the respondent: Adv. M. Strauss
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

/sp