lib
8.10.

61/85

Case no 30/83
m c

SOLOMON MKHANYISELWA NGUBANE

- and -

THE STATE

JANSEN JA.

Case no 30/83
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

SOLOMON MKHANYISELWA NGUBANE .... Appellant

- and -

THE STATE .... Respondent

Coram: JANSEN, CORBETT, MILLER, TRENGOVE et VILJOEN JJA.

Heard: 24 FEBRUARY 1984.

Reasons filed: 28 MAY 1985.

REASONS FOR JUDGMENT.

JANSEN JA :-

The appellant was convicted in the Natal Provincial Division (per THIRION J and assessors) of murder with extenuating circumstances and sentenced to 10 years imprisonment. He appeals against the conviction on the following "special entry" made, on his application, by the presiding judge :-

> "........ whether the effect of the prose= cutor's willingness to accept a plea of guilty to culpable homicide had the effect of reducing the charge from murder to one of culpable homicide and whether the Court therefore acted irregularly in adjudicating on the charge of murder."

The appellant's case is that it was incompetent for the court to convict him of murder and that the court should have convicted him of culpable homicide, with

a consequential /.......

a consequential reduction of the period of imprison= ment by, it is suggested, 5 years.

It is clear from the record and the presiding judge's reasons for making the special entry that when called upon to plead to the indictment for murder, the appellant pleaded guilty to culpable homicide after counsel for the appellant had told the court that the prosecutor was prepared to accept that plea. The prosecutor did not at any stage inform the court to the contrary and the court consequently assumed that the prosecutor had accepted the plea of guilty to culpable homicide. It is common cause that it was in fact the prosecutor's intention to do so and that the court's assumption was fully justified.

Counsel for the appellant then handed in a statement signed by the appellant. Counsel described it as "a written statement of admissions and a version of events which I have checked with the accused and which my learned friend for the prosecution is prepared to accept as a record of what happened on the occasion in question". The presiding judge understood this to be a statement in terms of sec. 112 (2) of Act 51 of 1977. Paragraph 5 of the statement read as follows :-

> "When he stabbed the deceased, the accused did not act intentionally, but negligently, in that a reasonable man would in the circumstances have realized that he was acting unlawfully, and that his actions would cause the death of the deceased."

The presiding judge says in this regard :-

"I perused the statement .... and came to the conclusion that paragraph 5 of the statement was worded in a manner which, although it might set out the law correctly, would hardly have made sense to the accused. I accordingly decided not to proceed on the strength of the statement but to question the accused. I proceeded to do so without actually having obtained confirmation from the prosecutor that he was prepared to accept the plea. I simply assumed that he was prepared to accept the plea because of what counsel for the accused had said.

The accused told me his version of the killing. In the course of doing so the accused said that he was 'much' under the influence of liquor at the time of the killing and that a quarrel arose between him and the deceased. He said: 'I don't know how I stabbed her but she got injured. I stabbed her.' He was unable to say how many times he stabbed her or how it all came about. On the facts stated by the accused and particularly because of his vagueness about what happened I was not satisfied that the accused was admitting facts which would prove all the elements of

> the crime of culpable homicide and conse= quently I ..... changed the plea to one of not guilty."

The presiding judge considered himself entitled to do so in terms of sec. 113 of the Act. (In his reasons he adds "but I venture to say that quite apart from the provisions of that section I would have had that right", a matter which, however, need not now be considered.) He then directed the prosecutor to call the State's evidence. This was done and the appellant also gave evidence on his own behalf. The conviction of murder with extenuating circumstances then ensued.

Section 106 (1) (a) of the Act clearly entitles an accused on indictment for murder to plead "that he is guilty of the offence charged or of any offence of which he may be convicted on the charge", including culpable homicide (sec. 258(a)), and sec. 112 clearly envisages that the prosecutor may accept such plea, with the result that, subject to certain safeguards, the accused on his plea of guilty, may be convicted "of the offence to which he has pleaded guilty".[1] However, sec. 113 provides that in certain circumstances a plea of not guilty must be recorded :-

> "If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the

accused / .....

> accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation."

It is a matter of some difficulty, in the absence of specific provision in the Act, to determine what the position is where e.g. a plea of culpable homicide is accepted by the prosecutor in respect of an indictment for murder and the court subsequently records a plea of not guilty in terms of sec. 113 and requires the prosecutor "to proceed with the prosecution". Does the plea so entered relate to the charge of murder or does it relate to culpable homicide? Does the

prosecutor / .....

prosecutor proceed with a prosecution for murder or for culpable homicide? Our writers on criminal procedure are not in agreement on this.

Hiemstra e.g. (Suid-Afrikaanse Strafproses, 3rd ed., p. 268; Tweede Kumulatiewe Byvoegsel 1983, p. 16) is of the opinion that a plea recorded in terms of sec. 113 relates to the original charge and that the prosecution proceeds in respect of such charge, whereas writers such as Van der Merwe, Barton and Kemp (Plea Procedures in Summary Trials, pp. 41-43) hold the opposite view.

Many of the apparent difficulties seem to arise from an attempt to categorize acceptance of a plea (as envisaged by sec. 112) as being either a withdrawal under sec. 6 (a) or a stopping of a prosecution under sec. 6 (b). (Cf. Kotzé, 1978 De Jure 211, 1979 THR-HR 44; Joubert, 1982 De Jure 345). Strictly speaking it would seem to be neither. It must be seen as a sui generis act by the prosecutor by which he limits the ambit of the lis between the State and the accused in accordance with the accused's plea. Whether one in a case such as the present speaks of amendment, withdrawal or abandonment of the murder charge does not really seem to matter. That the lis is restricted by acceptance of the plea appears from sections 112 and 113. The proceedings under the former are restricted to the offence "to which he has pleaded guilty" and the latter must be read within that frame.

In my view the question posed in the "special entry" must be answered in the affirmative. As it is plain that "a failure of justice has in fact resulted" from the irregularity, this Court should intervene (cf. sec. 322(1) of the Act).

Counsel for the State and for the appellant are agreed that if this is to be done, the conviction of murder should be altered to a conviction of culpable homicide. The agreement obviously rests on the assumption that the evidence discloses that the appellant negligently killed the deceased. The court *a quo* came to the conclusion that the appellant intentionally killed Maureen Ndlovu, a woman with whom he had some association :-

"I have already said that in our view the accused has grossly exaggerated the state of his insobriety. Even if there was some provo= cation, then in our view the accused did not lose his power of self-control, but was at all times able to foresee and did foresee the conse= quences of his acts, and did form the intention to kill her. He stabbed the deceased not once but five times, and he then fled from the scene where he had killed her. In our view the accused must have foreseen and did foresee that the stab wounds which he was inflicting on the deceased would cause her death, and he nevertheless stabbed her, reckless whether death resulted or not. The one stab wound which proved to be fatal, penetrated to a depth of 8 centimetres. It is in that part of the body which seems to attract Okapi knives, because almost invariably it is the left clavicle where the knife enters."

This appears to reflect a finding that the form of intention was dolus eventualis. The inference of intention appears to be fully justified. But no doubt a reasonable man in the position of the appellant would not only have realized that his use of the knife could lead to death but he would also have refrained from attacking the deceased in the manner he did. On this basis it could be said, as counsel have assumed, that the charge in reality being one of culpable homicide, the evidence establishes the commission of that offence by the appellant.

However, it is a moot point whether proof that a killing was intentional does not negative it being negligent and whether an intentional killing can ever constitute culpable homicide, particularly as the instances of "partial excuse" have fallen by the wayside (S v Bailey 1982(3) SA 772(A)). The preponderance of judicial opinion is that on a charge of culpable homicide the accused may be convicted of that offence despite the killing being found to have been intentional (S v September 1972(3) SA 389(C); S v Smith 1981(4) SA 140(C); S v Zoko 1983(1) SA 871(N); S v Breakfast 1984(3) SA 302 (E C); contra S v Alexander 1982(4) SA 701 (T)). Some of our writers (e g Rossouw 1973 THR-HR 161 and Du Plessis 1984 SALJ 50) are of the same view, but the majority maintain the contrary. (Cf De Wet en Swanepoel, Strafreg, 3d 155; Hunt, Criminal Law Vol II, 2d 417-419; Van der Merwe & Olivier, Onregmatige Daad, 4th 131; Van der Merwe 1972 THR-HR 299, 1983 THR-HR 82; Middleton & Rabie 1972 THR-HR 383; Hugo 1973 SALJ 334; St Q Skeen 1983 SALJ 177; Van Oosten 1981 De Jure 343, 345; Snyman, LAWSA Vol 6 par 259, Strafreg 199). These writers in effect agree that dolus excludes culpa (negligence).

The two main bases for the view that a killing cannot be both intentional and negligent appear to be the following: (i) "the logical impossibility of con= cluding that a man may at one and the same time foresee certain consequences and also fail to foresee those very consequences" (Hugo, supra, at p 337; and cf Hunt, supra, at 417-418; St Q Skeen 180-81); (ii) the premiss that dolus and culpa are incompatible concepts. These two propositions must now be considered.

The "logical impossibility" seems to be the ratio in S v Alexander (supra) for accepting that proof of intention (dolus) excludes culpa, as appears from the following passage (p 705 G-H) :-

> "Ek kan met respek nie saamstem met die beslissings in die September en Smith sake supra nie.

Moord is die wederregtelike opsetlike veroorsaking van die dood van 'n medemens. Strafbare manslag is die wederregtelike nalatige veroorsaking van die dood van 'n medemens.

Hoewel die skeidslyn tussen dolus eventualis en culpa soms eng is, kan daar geen twyfel bestaan dat dit twee selfstandige en onder= skeibare skuldvorms is nie. S v Ntuli 1975(1) SA 429 (A) te 436-7; S v Burger 1975(4) SA 877 (A).

In die geval van dolus word die dader verwyt dat hy die gevolg voorsien het en hom daarmee versoen het of dat dit sy oogmerk was. In die geval van culpa word dit die dader juis verwyt dat hy die gevolg nie voorsien het en voorsorg teen die intrede daarvan getref het nie." (My underlining.)

The last paragraph raises the impossibility of foreseeing and not foreseeing at the same time.

The "logical impossibility" cannot, however, legitimately be used to justify the conclusion that proof of dolus necessarily excludes culpa. It is true that dolus postulates foreseeing, but culpa does not necessarily postulate not foreseeing. A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, e g by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility. In such a case the paradox of foreseeing and not foreseeing does not arise at all. The concept of conscious (advertent) negligence (luxuria) is well known on the Continent and has in recent times often been discussed by our writers. (Cf Burchell and Hunt Criminal Law Vol 1, 2d 148-50, 194; Snyman, Strafreg 170, 199; Bertelsman 1974 Acta Juridica 38, 1975 SALJ 67, 1980 SACC 33; Morkel 1981 SACC 162, 1982 THR-HR 321, 1983 THR-HR 87; Middleton 1973 THR-HR 181; Van

Oosten / ....

Oosten 1982 THR-HR 183, 423).

Conscious negligence is not to be equated with dolus eventualis. The distinguishing feature of dolus eventualis is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain". (Cf the Dutch authors cited in S v Dladla en Andere 1980(1) SA 1(A) 4 B-G). Our cases often speak of the agent being "reckless" of that consequence, but in this context it means consenting, reconciling or taking into the bargain (cf Snyman Strafreg 168, cited in S v Swanepoel 1983(1) SA 434 (A) 456 H) and not the "recklessness" of the Anglo American systems nor an aggravated degree of negligence. It is the particular, subjective, volitional mental state in regard to the foreseen possibility which characterizes dolus eventualis and which is absent in luxuria.

In principle it should not matter in respect of dolus eventualis whether the agent foresees (subjectively) the possibility as strong or faint, as probable or improbable (cf S v De Bruyn 1968(4) SA 498(A) 510), provided his state of mind in regard to that possibility is "consenting", "reconciling" or "taking into the bargain". However, the likelihood in the eyes of the agent of the possibility eventuating must obviously have a bearing on the question whether he did "consent" to that possibility. No doubt this is what Snyman (Strafreg 169) has in mind when he states that "as die dader die gevolg slegs voorsien as 'n verwyderde of vergesogte moontlikheid, is daar na my mening nie dolus eventualis nie". Some writers, however, approach the matter somewhat differently. Burchell and Hunt Vol 1 (p 152-4) states that the "recklessness" required for dolus eventualis :-

> "means the taking of a conscious risk. The accused foresees the consequence in question as a real possibility and yet persists in his conduct irrespective of whether it does result or not .... It seems in every situation where the accused does foresee the consequence as at least a real possibility and nevertheless persists in his conduct irrespective of whether it results or not, he does consciously take the risk of it happening."

Morkel (1981 SACC 162, at 173) says that :-

> "the distinction between dolus eventualis and conscious negligence is however not to be found in a voluntative element. In the case of dolus eventualis the perpetrator is blamed for having acted despite having foreseen as a concrete

possibility / ......

> possibility that his conduct may
> be criminal."

Apparently the "perpetrator" sees it as a concrete possibility if he realizes that "on a preponderance of probability" it may well happen. It must, however, be remarked that if the agent persists in his conduct despite foreseeing a consequence as a real or concrete possibility, the inference could well be drawn that he "reconciled" himself to that consequence, that he was "reckless" of that consequence.

The concept of conscious negligence clearly establishes that foresight *per se* does not exclude negligence. The "logical impossibility" of at the same time foreseeing and not foreseeing does therefore not assist in the solution of the present problem.

This disposes of the first ground for holding that dolus excludes culpa. It is now necessary to turn to the question whether dolus does not exclude culpa because they are incompatible concepts.

It may be accepted that dolus and culpa are conceptually different: that culpa as opposed to dolus, is an aliud and not a minus (Hazewinkel-Suringa, Inleiding tot de Studie van het Nederlandse Strafrecht, 8th ed 172; Snyman, Strafreg, 199 n 20). This difference is so funda= mental that it may be conceded that the two concepts never overlap. It may also be conceded that, at least theoretically, proof of dolus does not necessarily amount to proof of culpa. But this is not the end of the enquiry. The question remains whether proof of dolus

necessarily / ......

necessarily excludes _culpa_.

Dolus connotes a volitional state of mind. _Culpa_, it would seem, may entail no state of mind at all. The mere labelling of _culpa_ as a form of _mens rea_ does not necessarily and decisively point to the contrary. The view generally held by our courts is that _culpa_ is constituted by _conduct_ falling short of a particular standard, viz that of the reasonable man (cf _Snyman Strafreg_ 196-8, 199-200; _Van der Merwe_ & _Olivier_ Onregmatige Daad 4th ed 131-152; _Van der Walt_ Delict 8 par 36, 39, 41; _Burchell_ & _Hunt_ Vol 1 196-200). Although the reasonable man standard may to some extent be individualized in certain circumstances, it remains an objective standard. If failing to meet such a standard of conduct is the essence of *culpa*, then it seems unrealistic to equate it to a state of mind at all. Some of our writers, however, propound a "subjective test" for negligence. A few may be mentioned. *Milton* (*Hunt* Vol 11 2d 413-4) and E M *Burchell* (*Burchell* and *Hunt* Vol 1 2d 194-6) are of the view that *culpa* does relate to a state of mind, viz inadvertence: "a state of mind in the sense that the actor has failed to exercise such mental and physical capacities as he possesses and which, if exercised would have caused him to take measures to avoid the risk of harm to others". *De Wet* (Strafreg 3rd ed 155-6) appears to be to the same effect :-

> "Die vraag of 'n persoon nalatig gehandel het is .... 'n vraag na sy gesindheid [a state of mind] .... by nalatigheid [stel mens] die vraag of hy onagsaam was

> ten aansien van die gevolg of die onge= oorloofdheid van sy doen of late ...... In al hierdie gevalle kom die vraag of daar _culpa_ was, maar eenvoudig hierop neer of hierdie beskuldigde sy geestes= kragte na die beste van sy vermoë ingespan het, om die pleging van onreg te vermy ...." Die vraag is dus of hierdie besondere beskuldigde, in hierdie gegewe omstandighede, tekort geskiet het in die inspanning van sy geesteskragte om die feit, wat hom ten laste gelê word, te vermy. Die toets is suiwer subjektief. Mens moet dus rekening hou met die beskuldigde se persoonlike en liggaamlike eienskappe."

(_De Wet_ apparently discards the reasonable man test completely whereas _Milton_ and E M _Burchell_ retain it, but merely as a criterion for determining unlawfulness - cf _Botha_ 1977 SALJ 29, _Bertelsmann_ 1974 _Acta Juridica_ 37 n 17. So applied the test is not in all respects the same as that used by _Snyman_ Strafreg 79-80, 195-6 and _Van der Merwe_

Onregmatige / ....

Onregmatige Daad 134-5 for this purpose). It is also said that recent cases disclose a swing to the subjective approach (cf Burchell and Hunt Vol 1.2d 201-3; Bertelsmann 1975 SALJ 62,67; Schäfer 1978 SALJ 201) and that the case of S v Van As 1976 (2) SA 921 (A) confirms this. It is, however, unnecessary for present purposes to express any opinion on this view, save for mentioning that there may be some doubt as to whether the phrase "redelikerwyse kon en moes voorsien het", used in Van As, connotes anything more than the conventional objective standard, albeit somewhat individualized.

If the objective test for culpa is applied, the question is whether the conduct of the agent measured up to the standard of the reasonable man in the circumstances;

if the subjective test were to be applied, the question appears to be whether the *conduct* of the agent measured up to the standard of his own capabilities. In a criminal trial the *factum probandum* would then be the failure of the accused to have complied with that standard (whichever it may be). This appears to be a far cry from requiring proof of an actual mental state such as "inadvertence".

As has been pointed out above the concepts of *dolus* and *culpa* are totally different. *Dolus* connotes a volitional state of mind; *culpa* connotes a failure to measure up to a standard of conduct. Seen in this light it is difficult to accept that proof of *dolus* excludes *culpa*. The facts of the present case illustrate this. The appellant, somewhat under the influence of liquor, without premeditation and as a result of some provocation stabbed the deceased five times, the fatal injury penetrating the heart. The inference drawn by the court _a quo_ that he foresaw the possibility of death ensuing and that he killed intentionally (_dolus eventualis_) is clear. This, however, does not preclude the matter being viewed from a different angle: did not the appellant, foreseeing the possibility of death ensuing by failing to curb his emotions and failing to desist from attacking the deceased, fall short of the standard of the reasonable man (or, if the subjective approach were to be applied, to measure up to the standard of his own capabilities)? The existence of _dolus_ does not preclude the answering of this question in the affirmative.

On this approach dolus does not exclude culpa and it is unnecessary to alter the accepted definition of culpable homicide (viz the unlawful, negligent killing of another person), as was done in S v Zoko (supra). What must, however, be emphasized is that definitions of culpa specifically requiring the absence of dolus (e g Van der Merwe Onregmatige Daad 131) are not in conformity with the views here expressed.

In the present case the facts disclose that the appellant was negligent in causing the death of the deceased. The charge being one of culpable homicide (as found above) the conviction of murder should be altered accordingly. This, in addition, would require some adjustment of the sentence. A reduction by 5 years (as suggested by counsel for the appellant) would, however, be too lenient in the circumstances. In my view the sentence should be altered to 7 years imprisonment.

For these reasons the following order was made :-

"(a) The conviction of murder is altered to 'guilty of culpable homicide';

(b) The sentence of 10 years imprisonment is reduced to 7 years imprisonment."

E.L. JANSEN JA.

CORBETT JA)
MILLER JA)
TRENGOVE JA) Concur.
VILJOEN JA)