



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Criminal Appeal: Case A364/2023

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
.....	21/10/2025
SIGNATURE	DATE

JOHANNES MARTIN ABRAHAM BARNARD

Appellant

and

THE STATE

Respondent

JUDGMENT

HASSIM J and LABUSCHAGNE J

- [1] The appellant was convicted of murder in the Springs Regional Court and was sentenced on 21 September 2021 to 10 years imprisonment, of which 3 years were suspended for 5 years on various conditions.
- [2] The appellant brought an application for leave to appeal and he was granted leave to appeal against his conviction by petition in terms of section 309C of the Criminal Procedure Act, 51 of 1977, by means of an order granted by Potterill J and Mogale AJ dated 10 November 2023.

THE STATE's CASE

- [3] It was common cause at the commencement of the trial that the deceased's identity was admitted as well as the date on which he died, namely 7 March 2019.
- [4] The State called three Police officers and a pathologist as their witnesses. The first was Sergeant Sam Malao who was in a patrol vehicle together with his colleague, Constable Ketse Ntshebo, who was the second witness. It was around about approaching 01:00 in the morning on 7 March 2019 when Sergeant Malao responded to a complaint regarding a suspicious person at Struisbult. He drove to Rietbok Street and found a group of CPF members who pointed to a man who they referred to as the suspect. He was standing next to house number 14. There were more than 10 CPF members. Sergeant Malao contends that he was trying to speak to the deceased (the suspicious person) when the accused from the Flying Squad arrived in his vehicle. He went straight to the victim and assaulted him with a fist, giving him blows to the face, tripping him, but he hit his head as he fell. Sergeant Malao contends

that he tried to pull Barnard away from the victim, but he merely said, “fuck you” and continued assaulting and kicking him on his upper body while he was lying down.

[5] When Sergeant Malao pulled him off the victim, he went to his car and Sergeant Malao then telephoned his commander. He contends that the victim was unconscious. Ekurhuleni Paramedics then arrived, and he was taken to hospital. He opened an assault docket against the accused, and the accused was arrested the next day.

[6] In his official statement, Sergeant Malao made no mention of the fact that the accused was kicked while on the floor. In his statement he said that the victim was pushed onto the ground and that he fell and hit his head and sustained head injuries.

[7] Constable Ketse Ntshebo was the second State witness. She contends that as they arrived, the CPF members drove off. There were still community members on the scene. The accused arrived in a Flying Squad vehicle. He went straight for the accused and assaulted him. He tripped the victim, and he fell. He kicked the victim on his head. He also hit his body with his fists. This witness’s recollection is not good, and she admits this (page 83, line 9 – 14). She denies the appellant’s version that there was a bag next to the victim.

[8] The evidence of this witness contradicts her statement in that she mentioned in her statement that there was a discussion with the CPF, while she contends that they had driven off when they arrived, in her evidence in chief.

- [9] The third witness was Jan Thabo Maake, the Commander who was telephoned by Sergeant Malao. When he arrived on the scene he found the victim with a cut on the side of his head. There were no CPF members on the scene. There was an ambulance. The only contradiction in his statement is that he contended in his statement that he had asked Sergeant Malao to call an ambulance, while it was already there according to his evidence in chief.
- [10] Dr Dladla was the State Pathologist who confirmed that the plaintiff's face had a 15 cm linear scratch from the left forehead to the cheek. There was a skull fracture of the right middle cranial fossa to the temporal bone. There was also a subdural haemorrhage over the right frontal, temporal and parietal lobes with a midline shift to the left. Dr Dladla, in cross-examination, conceded that the injury was consistent with the deceased having tripped and fallen onto the pavement. The Pathologist did however not distinguish between the assault giving rise to these events and the fall.

THE DEFENCE CASE

- [11] The appellant's evidence was that he was on duty that night when he received a late-night call from his sister who was hysterical, telling him that there was an intruder in his parental home. She had tried to get hold of the SAPS but with no success.
- [12] The appellant contends that he asked his partner to try to get hold of the Police and he drove off at high speed to the scene. On his arrival he found members of the CPF wearing their customary jackets and his family was also present. He walked over to see whether his mother and sister were okay. He spoke to

his sister and parents. The suspect was pointed out to him (there is some lack of clarity on whether it was his sister or a member of the CPF who pointed out the deceased). The accused then approached the suspect and engaged him on what his intentions were. The deceased did not answer him and merely grinned at him and when pushed for an answer said: “Ek het kom kyk of jou sussie lekker is”. This remark caused the appellant to slap him across the left of his face with his right hand, and this was followed up with fists. He contends that the appellant then turned, tripped over his own feet and fell down onto the edge of the pavement.

- [13] He bent down and grabbed the deceased’s left arm and lifted it up and pinned him down with his knee on his deceased’s left hip, with the intention of flipping him over onto his stomach. He contends that he was in the process of effecting an arrest when he was pulled by Sergeant Malao. He testified that he uttered “fuck off” in general terms and not necessarily at Sergeant Malao. He denies having the intention of killing the deceased, who later died of blunt force trauma to the head, according to the post-mortem report.

THE COURT A QUO

- [14] The Court *a quo* summarised the facts. The Court then rejected the version of the appellant and his mother outright.
- [15] Part of the summary of evidence was a summary of what was put to the state witnesses in cross-examination. Sgt Malao had not seen the appellant talking to his family. He had also not seen the interaction where the appellant asked

the deceased what he was doing on the scene. The rejection of the appellant's version in these circumstances is therefore all the more puzzling.

[16] The version of the defence was rejected for the following reasons:

16.1 In cross-examination the version put to the State witness was that the appellant on arrival did not see the other Police officers, but as he was cross-examined, he stated that Sergeant Malao was there and said to him: "This is my suspect, I arrived here first." The version that Sergeant Malao and the appellant argued over the suspect was never put to the State witnesses by the defence.

16.2 The accused testified that his sister phoned him about an intruder inside the house. His mother's evidence however established that there was no intruder inside the house. She saw the deceased outside the gate. Her evidence was rejected in that the Court found that she was not an honest witness because she chose what she wanted to remember and what she did not want to remember. The latter comment relates to what the appellant had said about him assaulting the deceased and what his mother knew about it. She contended that she didn't know anything about an assault.

[17] The Court *a quo* found that while there wasn't direct evidence of an intention to kill, the appellant was guilty of murder and that his intention was in the form of *dolus eventualis*. The Court was satisfied that the accused subjectively foresaw the possibility of his conduct causing the death of the deceased and he was plainly reckless.

DISCUSSION

[18] In my view, the Court *a quo* did not look at the facts holistically to assess the versions based on their inherent probabilities. Such a failure was recently deprecated by the SCA, as appears from **S v Magasela** 2025 JDR 1467 at par [18]:

“In **S v Chabalala** 2003 (1) SACR 134 (SC) (“Chabalala”), this Court amplified the *holistic* approach required by a trial court in examining the evidence on the question of the guilt or innocence of an accused. It stated:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt. The result may prove that one scrap of evidence or one defect in the case for either party ... was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.”

[19] The Court *a quo* also did not distinguish between the two components of *dolus eventualis* in the context of murder, namely the subjective foreseeing of death

and secondly, conduct or evidence that establishes resignation or acceptance or indifference to the eventuation of the risk of death.

[20] In **S v Magasela** 2025 JDR 0567 the SCA dealt with the approach to the type of inferential reasoning applied by the court *a quo*. From para 32 the following is stated:

“[32] The appellant was carrying a loaded, unsafe, cocked pistol, which he removed from its holster amid a physical altercation with the deceased. The conduct of the appellant, thus described by himself, fell short of what is required of the reasonable man. The appellant’s conduct was accordingly negligent and his negligence was the direct cause of the deceased’s death. The further legal question that then arises is whether, given these circumstances, it can be found that the appellant was guilty of culpable homicide or dolus eventualis i.e. did he subjectively foresee the possibility of his firearm being discharged thus causing the deceased’s death. Further, whether notwithstanding that foresight, he proceeded to act in the manner he did. The correct legal approach to this question was enunciated as follows in S v Sigwahla 1967 (4) SA 566 (A) at 570B-D.

‘The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as dolus eventualis as distinct from

dolus directus. The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The factum probandum is dolus, not culpa. These two different concepts never coincide.'

[33] *The two legs of the enquiry are not considered in isolation. This approach was refined by this Court in **Humphreys v S** [2013] ZASCA 20; 2013 (2) SACR 1 (SCA); 2015 (1) SA 491 (SCA) paras 12-18 (Humphreys). I quote extensively from Brand JA's judgment, as the test set out so comprehensively by him is worth repeating. Humphreys concerned a bus driver, who transported scholars. He was accustomed to taking a short cut by driving over a railway line. He had done this successfully until the day of the fatal crash when a train collided with the bus. Ten children died and four were critically wounded. Humphreys was found guilty of culpable homicide as opposed to murder dolus directus or dolus eventualis. Brand JA's reasoned as follows:*

'... the fact remains that a voluntary act and dolus are two discrete requirements for a conviction of murder. It follows that the presence of the one does not presuppose the existence of the other. Despite the establishment of voluntary conduct, the question therefore

remains: did the court a quo correctly find that the appellant had the requisite intent to cause the death of ten of his passengers and attempt to take away the life of four others ...'.

For the first component of dolus eventualis it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not dolus in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for dolus and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference ...

Adopting what essentially amounted to this line of inferential reasoning, the court a quo concluded that in the prevailing circumstances, the appellant subjectively foresaw the death of his passengers as a possible consequence of his conduct. I do not believe this conclusion can be faulted. I think it can confidently be accepted that no person in their right mind can avoid recognition of the possibility that a collision between a motor vehicle and an oncoming train may have fatal consequences for the passenger of the vehicle... To deny this foresight would in my view be comparable to a denial of foreseeing the possibility that a stab wound in the chest may be fatal. Since there is nothing on the evidence to suggest a subjective

foresight on the part of the appellant so radically different from the norm, I agree with the conclusion by the court a quo that the element of subjective foresight had been established.

*This brings me to the second element of dolus eventualis, namely that of reconciliation with the foreseen possibility. The import of this element was explained by Jansen JA in **S v Ngubane** 1985 (3) SA 677 (A) at 685A-H in the following way:*

‘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 ... The concept of conscious (advertent) negligence (luxuria) is well known on the Continent and has in recent times often been discussed by our writers ...

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" ..."

- [21] There was no consideration by the court a quo that there had to be evidence from which the acceptance of the risk of death can be inferred. This failure to engage the issue is a misdirection. The postulate that death was foreseeable and that the appellant therefore was reckless as to the risk of death

demonstrates the inferential reasoning in question. It conflates the first leg of the enquiry into *dolus eventualis* with the second leg.

[22] The Court a quo further erred in rejecting the appellant's version outright. The deficits in the evidence of the state witnesses have been pointed out.

[23] The appellant's version ought to have been assessed with reference to its internal coherence and probabilities. The deceased's comment provoking the assault "Ek het kom kyk of jou sussie lekker is" reveals the following: That the deceased observed an interaction between the appellant and his family when the appellant arrived, from which he gleaned that one of the onlookers was his sister and that she lived at the house where he was apprehended. The appellant's evidence on the deceased's comment is not contradicted by Sgt Malao. This indicates that the version of the appellant had internal cohesion or inherent credibility. This is at variance with the sequence of events attested to by the state witnesses. The court a quo ought to have been assessed whether the appellant's version in this regard was reasonably possibly true. I am of the view that the appellant's version was reasonably possibly true. That is why the appellant snapped and first slapped and then assaulted the deceased with his fists, causing him to trip and fall. He was incensed to start with but was provoked into an assault by the slur on his sister.

[24] This attack on the deceased, who was not defending himself, constitutes at least assault with the intention to do grievous bodily harm. Once the deceased had tripped and struck his head on the pavement, leaving a 15 cm laceration on the side of his head, the appellant pounced on him such that it caused a

fellow police officer to intervene to pull him off. He cursed, because he was still engaged with the deceased and did not want to be interrupted.

[25] There is however no evidence that the appellant saw the injury which the deceased sustained in hitting the kerb with his head, understood its seriousness and was indifferent to whether the deceased died or not. He says he was trying to first pin the deceased down in order to flip him onto his stomach to effect an arrest. He was probably still assaulting the deceased but testified that he was doing this in trying to effect an arrest. The test is not whether the Court believes his version but whether it is reasonably possibly true. In my view his version does pass muster in this regard.

[26] The evidence required to establish the reckless acceptance of the risk of death is not present on the version of the accused. The State witnesses testified about the appellant continuing to kick the deceased in the head as he lay on the floor, and this, if accepted, could point to such reckless acceptance. However, that evidence comes from state witnesses who have deviated on these material respects from their written statements. The appellant should have received the benefit of the doubt, as his version is reasonably possibly true.

[27] The conviction on the charge of murder can therefore not stand. However, on his own version the appellant is guilty of assault with the intent to do grievous bodily harm. However, the question is whether the appellant is not guilty of culpable homicide.

- [28] The foreseeability of death when an enraged policeman repeatedly assaults another is self-evident. When the assault continues once the deceased has fallen, he has failed to take reasonable steps to avoid further harm. The nature of the head injury is such that death was inevitable once his head had struck the kerb stone. It cannot be seen as a *novus actus interveniens* as the fall was the direct result of the assault. The fact that the assault continued once the deceased was down appeared to the state witnesses as intent to kill. The appellant did not see it that way and was in my view clearly negligent in his assessment of the risk of death. This appears to be an instance of conscious negligence (*luxuria*) which dispels murderous intent.
- [29] In these circumstances culpable homicide has been established. The facts justify a suspended custodial sentence. The offence is serious even though the assault on the deceased was a response to the appellant's family being the target of the deceased's home invasion, The appellant should have exercised restraint, particularly in the presence of the CPF, onlookers and other police officers. As the offence was aggravated by provocation, this points to a risk of it being repeated in future if provoked under similar circumstances.
- [30] In the circumstances, an appropriate sentence would be six years imprisonment, wholly suspended for three years, on condition that the appellant is not convicted of an offence involving violence during the period of suspension.

[31] In the result I propose the following order:

1. The appeal against the conviction of murder is upheld.
2. The order of the court a quo is set aside and replaced with the following:
 - “1. The accused is guilty of culpable homicide.
 2. The appellant is sentenced to six years imprisonment wholly suspended for three years, on condition that the accused is not convicted of an offence involving violence during the period of suspension.
 3. The sentence is antedated to 21 September 2021.

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LABUSCHAGNE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED



SK HASSIM J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

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