


**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case Number: **A77/2024**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<b>28 MAY 2026</b> DATE	 SIGNATURE

In the matter between:

**GIDEON FOURIE**

First Appellant

**JACQUES DE LANGE**

Second Appellant

**SAMPIE HEARN**

Third Appellant

And

**THE STATE**

Respondent

Heard on: 19 March 2026

Delivered: 28 May 2026

***Delivered:*** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **28 May 2026**.

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## JUDGMENT

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**KEKANA AJ, (NYATHI J CONCURRING)**

### ***Introduction***

[1] This is an appeal against the conviction (23 February 2023) and sentence handed down by the trial Court on 09 May 2023. The Appellants were arraigned in the regional court, Benoni, on a count of murder read with section 51(1) and Part I of Schedule 2 of Act 105 of 1997.

[2] The trial Court convicted the first Appellant on murder on the basis of *dolus eventualis* and the second and third Appellants on assault with the intent to do grievous bodily harm. The trial Court sentenced the first Appellant to 15 years' imprisonment and the second and third Appellants each to 5 years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977.

### ***Background***

[3] The allegations were that the three Appellants acted with a common purpose to kill Daniel Botha (the deceased) by strangling or choking him, hitting him with clenched fists and kicking him with booted feet, as a consequence of which the deceased died.

### ***Submissions by parties***

[4] The first Appellant submits that:

- 4.1 the trial court misdirected itself in finding that strangulation was the cause of death, and that the Appellant was guilty of murder *dolus eventualis*.

[5] The second Appellant submits that:

- 5.1 the trial court erred in finding the second Appellant acted in common purpose with the first Appellant and finding him guilty of murder. That with contradictions from state witnesses there was no evidence to prove beyond reasonable doubt that the second Appellant assaulted the deceased.

[6] The third Appellant submits that:

- 6.1 the state did not prove beyond a reasonable doubt that the third Appellant had in any way assaulted the deceased. He denies that he had assaulted the deceased at all.
- 6.2 he in fact deposed to an affidavit as a state witness in which he clearly indicated that the deceased was assaulted by the First Appellant. He was all along regarded as a state witness as per the initial statement of Mare and as per the consultation notes of the prosecutor Mrs van Jaarsveld whilst consulting with Badibanga regarding the identity of the alleged third assailant.

### ***Issues***

[7] The issue before this Court is whether the trial court erred in its finding that strangulation was the cause of death. Again, whether the trial court erred in convicting the first Appellant of murder and the second and third Appellants on common purpose.

## ***The Evidence***

[8] The first Appellant admitted that he had hit the deceased once with his elbow and once with his fist in the face. He denied that he strangled and kicked the deceased.

[9] Marais, for the state testified that the first Appellant grabbed the deceased with his hand around the neck pushing him down, ultimately causing the deceased to fall on the ground. Badibanga, for the state also testified that the first Appellant grabbed the deceased with his hand around the neck.

[10] Mr Badibanga, another state witness testified that the first Appellant grabbed the deceased around the neck, but this happened for a short period as he managed to separate them. The deceased was still standing.

[11] It is not clear even from the evidence of Dr Shahzad what could have caused the death. There were blue marks around the neck of the deceased. From the records it is not clear whether the blue marks were zonal or not but at least it is recorded that they were 'around' the neck and for that reason the conclusion is strong that they were not zonal. From the evidence of Dr Shahzad, the strangulation was not long enough to cause brain injury. Dr Shahzad testified if strangulation caused the massive bleeding the deceased would have been incapacitated by the bleeding within a very short time and would not have been able to protect himself very shortly after the strangulation. He also testified that if bleeding occurs that can result in death instantly.

[12] Dr Sarang who had conducted the postmortem on the body of the deceased was also silent about any injuries on the body of the deceased except for the injuries on the head. Consequently, there is no medical evidence corroborating the version of the state that the deceased was brutally kicked by three big men.

[13] As regards the second Appellant, it is clear from the evidence that Badibanga was the only witness to place him on the scene. Badibanga as a single witness whose testimony has being adumbrated with contradictions, the trial court should have

considered it with the circumspection required when dealing with the evidence of single witness.

[14] The third Appellant was charged with one count of murder in that he in the furtherance of a common purpose with his co Appellants killed the deceased by strangling/ choking, hitting and kicking him.

### ***Ad Convictions***

[15] The trial court found that the first Appellant had strangled the deceased and that caused the diffused axonal injury. Again, that the strangulation caused the diffused axonal injury while the facts did not support strangulation as the action which caused the diffused axonal injury.

[16] As regards conviction, the Appellants' main ground of appeal is that the trial court erred in finding that the state proved its case beyond reasonable doubt. The contention was that in considering the peculiar set of facts involved in this matter, the trial court misdirected itself in finding on the evidence presented that the state had proved its case beyond reasonable doubt.

[17] I find that there were some contradictions in the state's case. These contradictions were so material that they cannot be ignored. The two state witnesses did contradict themselves in their testimony during hearing with what was contained in their statements. Despite the contradictions, what is evident before us is that the first Appellant did hit the deceased and did strangle the deceased, what is not clear is whether the strangulation was long enough to cause bleeding in the brain.

[18] It is trite that appellate courts are reluctant to interfere with the factual and credibility findings made by trial courts unless they are shown to be clearly wrong or based on material misdirection.<sup>1</sup> Bearing in mind the advantage that a trial court has

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<sup>1</sup> *S v Monyane* 2008(1) SACR 543 (SCA) para 15.

of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial court's evaluation of oral testimony.<sup>2</sup>

[19] I agree with the first Appellant that *dolus eventualis* must not become a tool to convict an accused on murder where the State is unable to prove an intent to murder. While I agree that intention was not proven, the question which then arises is, but for the conduct of the first Appellant, the consequence (death of the deceased) would not have occurred at all or when it did. If the answer to this question is in affirmative, then the first Appellant's conduct is a factual cause of the consequence. Same is found even if the Court embarks on a notional elimination of the first Appellant's conduct to assess whether the result would have been different if he had not acted. The death would not have happened at all or when it did.

[20] I am of the view that the first Appellant was negligent, and his negligence has caused the death of the deceased. Having found that the first Appellant was negligent, and that his negligence has caused the death of the deceased, the first Appellant should not have been found guilty of murder but guilty of the competent verdict of culpable homicide as only negligence was established.

[21] The only instance where the second and third Appellants are placed on the scene is that they are alleged to have kicked the deceased on the body. Dr Shahzad who had also examined the body of the deceased did not notice any injuries which could have been as a result of the fact that the deceased was kicked by the three Appellants. He also testified further that the organs of the deceased were harvested and that it would not have been done if there were any injuries to the organs of the deceased.

[22] There is no medical evidence corroborating the version of the state that the deceased was brutally kicked by three big men. The state did not prove beyond a reasonable doubt that the deceased was indeed kicked. With both medical experts having confirmed that there were no injuries on the body to confirm any kicking on the

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<sup>2</sup> *S v Francis* 1991 (1) SACR 198 (A) at 204e.

deceased's body, both the second and third Appellants, are found not guilty of any offence.

[23] The statement of Mare which she had deposed to shortly after the incident did not implicate the third Appellant as being part and parcel of any assault on the deceased. Also, in the recording which she made shortly after the incident, the contents of which she admitted, she did not implicate the third Appellant as being part and parcel of any attack on the deceased. During cross examination Ms Mare was uncertain as to the identification of the third Appellant as being one of the attackers of the deceased.

[24] The initial statement by Badibanga, which he deposed to shortly after the incident did not implicate the Appellant as being one of the assailants. He testified that he was well aware of the name and identity of the third Appellant before the incident. He further indicated that he was furnished with a photograph of the third Appellant by the investigating officer before he deposed to his affidavit. Being that as it may he did not finger the appellant as being one of the assailants.

### ***Ad Sentence***

[25] Having found the first Appellant guilty of a competent verdict, this Court has the discretion and is in a good position as to pass a proper sentence<sup>3</sup>. In the exercising its discretion, the Court took into account that the first Appellant was 21 years of age at the time, with no previous convictions. He also took the deceased to hospital to ensure medical care, which is inconsistent with someone wanting to kill someone and then assist to ensure medical intervention.

[26] In ***S v Jonas and Others***<sup>4</sup>, the court ruled that being a first-time offender or having dependents did not automatically constitute exceptional circumstances. It is trite that the individual circumstances of the offender must be considered, but they are subordinate to, and must be balanced against, the seriousness of the offence and the

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<sup>3</sup> *S v M* 1988 (2) SA 779 (A) at 785.

<sup>4</sup> 1998 (2) SACR 677 (SE).

need for proportional punishment. Personal circumstances cannot override the seriousness of the crime. The life of a young person who evidence shows that he did nothing wrong has been cut short.

### ***Conclusion***

[27] The first Appellant is found guilty of culpable homicide and the second and third Appellants are found not guilty of any offence. Consequently, the appeal on sentence was upheld and the imposed sentence by the trial Court on the first Appellant is set aside and replaced with a sentence of 10 years imprisonment.

### ***Order***

[28] In the premises, the following order is made:

1. The appeal against the conviction and sentence of first Appellant is upheld and to be replaced as follows:
  - 1.1 the first Appellant is convicted of culpable homicide.
  - 1.2 the first Appellant is sentenced to ten years imprisonment.
2. The appeal against the second and third Appellants is upheld.
3. The conviction and sentence against the second and third Appellants is set aside.
4. The sentence against the first Appellant is antedated to 9 May 2023.


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**N D KEKANA**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

I concur,



**J S NYATHI**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**