

***THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Case No. 648/97

In the matter between:

DANIEL JOSEPH HUGHES

Appellant

and

THE STATE

Respondent

Coram:	HOWIE, PLEWMAN JJA and MELUNSKY AJA
Heard:	4 MAY 1999
Delivered:	26 MAY 1999

JUDGMENT

MELUNSKY AJA/

MELUNSKY AJA:

[1] The deceased died shortly before 6 am on 23 September 1993. On the previous evening he had been to a place of

entertainment known as the Sports Cafe, Village Walk, Sandton. The appellant was one of a number of security officers (colloquially known as "bouncers") on duty at the Sports Cafe on the night of 22 to 23 September. He was employed by Tri-Falcon CC, a close corporation which supplied security personnel to various night clubs including the Sports Cafe. At some time after midnight the deceased was involved in a fight inside the night club. As a result two of the security officers, Shane Cass and Brian Kimmel, asked him to leave and escorted him outside. The appellant followed them. The deceased was a well-built young man in his early twenties. At the time of the incident he was under the influence of liquor. He became aggressive and, possibly egged on by one of his companions, taunted some of the security officers and challenged them to fight him. Eventually he and the appellant became engaged in a fight in the car park area of the night club, in the course of which the deceased fell to the ground. Whether this was due to the appellant punching or kicking him is in dispute. What seems to be certain is that he fell onto the back of his head and lost consciousness. Some twenty minutes later he was taken by ambulance to the Sandton Clinic. Initially he

appeared to respond to treatment but he suffered a relapse and died without regaining consciousness.

[2] The appellant was charged in the Randburg regional court with culpable homicide arising out of the deceased's death. Despite his plea of not guilty he was convicted and sentenced to a fine of R3000 or eighteen months imprisonment. A further three years imprisonment was conditionally suspended. The appellant's appeal to the Witwatersrand Local Division (Joffe and Cassim JJ) was unsuccessful but he was granted leave to appeal to this Court against his conviction.

[3] The State case, in short, is that after the appellant and the deceased had fought, and while the deceased was lying on the ground, the appellant kicked and tramped on him (the word "stomped" was used by some of the witnesses), that the kicks caused internal haemorrhaging which, in turn, led to cardiac arrest and the death of the deceased. All of the above-mentioned facts are in issue and it becomes necessary to analyse the events in more detail. A convenient starting point is the medical evidence.

[4] Paramedic personnel of the Sandton Fire and Emergency

Services, including Ian Rex, commenced resuscitating the deceased at the car park. The deceased was in a serious condition, with a markedly depressed level of consciousness, no recordable blood pressure and very weak peripheral pulses. He was admitted to the Sandton Clinic at 02:41 where he came under the care of Dr Soicher. There was no noticeable improvement in his condition. X-Rays of his chest and cervical spine showed no abnormalities and clinical examination of his chest and abdomen did not reveal blood loss or internal injuries. A computerised brain scan was obtained and this, too, was normal. Dr Zwonnikoff, a neurosurgeon, arrived at the clinic while the deceased was still on the scanning machine. He saw to the deceased's removal to the intensive care unit. By this time the deceased's blood pressure had improved, his peripheral pulses were satisfactory and his level of consciousness showed considerable improvement, so much so that Dr Zwonnikoff was able to return to his home for about 30 minutes. At about 04:30, and while Dr Zwonnikoff was driving into the clinic to commence his early morning ward rounds, the deceased's condition deteriorated. His blood pressure fell and he showed no response to painful stimuli. He was placed on a

ventilator and was given blood intravenously. At about 04:45 he suffered a cardiac arrest. Cardio-respiratory resuscitation was commenced. It was noted that the deceased's abdomen had become slightly distended. Despite all attempts at resuscitation, including intravenous infusions, defibrillation and the administration of intra-cardiac adrenalin, he died at 05:50. Dr Zwonnikoff and Dr Soicher assisted in the resuscitation process and called in a general surgeon when the distension of the deceased's abdomen gave rise to a suspicion that there might be a source of haemorrhage in his abdomen. The surgeon arrived when it was too late to provide any effective treatment for the abdominal injuries.

[5] The post-mortem examination on the deceased's body was conducted by the district surgeon of Randburg, Dr Wilken, on 27 September. This disclosed a 3,5cm horizontal tear of the abdominal aorta, extensive bleeding into the peritoneal cavity, into the liver and duodenal region and around the pancreas and anterior pericardial sac. The aorta was not ruptured but the tear is indicative of the amount of force that was applied. The cause of death was described as catastrophic abdominal bleeding. In evidence Dr Wilken explained

that the bleeding was due to the rupture of the mesenteric vessels. The abdominal injuries were consistent with the application of considerable blunt force to the abdomen. The post-mortem examination also disclosed a small subarachnoid haematoma to the left temporal region of the skull which was too small to be picked up by the scan. Although the head injury probably caused the deceased to lose consciousness it did not cause his death. Dr Zwonnikoff agreed with Dr Wilken's view that the most likely cause of death was the abdominal bleeding which resulted in inadequate cardiac output to perfuse the body and, more importantly, inadequate blood pressure and blood volume to perfuse the heart itself, thus leading to cardiac arrest.

[6] Dr Milroy, a pathologist, and Dr Moyes, a specialist anaesthetist, who gave evidence for the defence, doubted whether the deceased's abdominal haemorrhage had caused the cardiac arrest. They suggested that a 2.5 milligram dosage of a drug known as Dormicum, which was administered intravenously to the deceased in order to sedate him before undergoing the brain scan, could have resulted in the cardiac arrest particularly because it was given to a

patient who had consumed a considerable quantity of alcohol. It may be observed that the deceased's blood alcohol content at the time was estimated to be in excess of 0.20 grams per 100 millilitres and that, according to Dr Moyes, the combination of Dormicum and alcohol created a high risk of cardiac arrest. He added, however, that the risk would be greatly diminished "if you have an anaesthetist or experienced person to pump oxygen into his lungs".

[7] Dr Moyes was under the impression that the improvement in the deceased's condition, which was commented on by Dr Zwonnikoff, had occurred before he underwent the brain scan. This was not so. It is quite clear that Dr Soicher telephoned Dr Zwonnikoff immediately after he examined the deceased for the first time, that Dr Zwonnikoff recommended a scan and that Dr Soicher made the necessary arrangements for the scan to be taken. When Dr Zwonnikoff arrived at the clinic, at about 03:00 or 03:15, the deceased was already on the scanning machine, under the care of a radiologist, Dr Papert, who had been called in by Dr Soicher. It was after the scan that the deceased's condition improved and he was admitted to the intensive care unit in an improved condition. He maintained his

improvement, according to Dr Zwonnikoff, for about 45 minutes to an hour. Any adverse side-effects of Dormicum would have become apparent within fifteen minutes of the administration of the drug. It seems to be inconceivable that Dormicum could have played any part in the deceased's death, for not only did no ill-effects manifest themselves immediately after its administration but the indications were that the deceased might have been on the road to recovery after the scan. It is probable that Dr Moyes' supposition that Dormicum was administered to the deceased after the improvement in his condition might have led him to believe that the drug had caused the relapse.

[8] Dr Moyes, moreover, was under the impression that the deceased was first admitted to the intensive care unit at 04:15 and that he was then in an "unsalvageable" condition. He reached this conclusion on the strength of notes apparently made by members of the clinic's nursing staff. At the trial the notes were admitted provisionally, at the instance of the defence, and subject to later proof. However, Dr Zwonnikoff testified that he saw to the deceased's admission to the intensive care unit and it is clear that, at that stage,

the deceased's condition was still improving. Moreover the deceased must have been admitted to the unit well before 04:15. Dr

Zwonnikoff must have left the clinic at about 04:00, some time after he had taken the deceased to the intensive care section. (Dr Soicher's statement that he first saw the deceased at 03:15 was clearly wrong.

The deceased arrived at the clinic at 02:41 and Dr Soicher saw him almost immediately thereafter. He then telephoned Dr Zwonnikoff and arranged for the scan and Dr Zwonnikoff arrived at the clinic at about 03:00 or 03:15.) It is necessary to add that the nursing notes were not proved and, consequently, no weight can be attached to their contents, where they were in conflict with the evidence of Dr

Zwonnikoff. What is more it was never suggested to Dr Zwonnikoff that Dormicum could have been responsible for the deceased's death.

And although Dr Soicher was asked whether any negative effect was observed after the administration of the drug, his response, that no negative effect was noted, was not challenged by the cross-examiner.

[9] Another issue relating to the medical aspect raised in this Court concerned the assumption made by Dr Moyes to the effect that the deceased was not properly monitored and that ventilation was not

properly applied after the administration of Dormicum. Once it is accepted, as I do, that the drug was not causally connected to the deceased's cardiac arrest, the failure to monitor or to provide ventilation would appear to be irrelevant in relation to the issues to be decided. In any event there was no evidence to support the inferences raised by Dr Moyes. On the contrary Dr Soicher stated that the deceased was monitored by Dr Papert and members of the Sandton Fire and Emergency Services during the scan and it is quite clear that he suffered no ill-effect while undergoing the scan. Nor was it ever put to either Dr Soicher or Dr Zwannikoff that the deceased was not ventilated. Dr Moyes' assumption in this regard was based solely on the unproved and untested nursing notes and no regard should be had to them.

[10] In the trial court it was suggested by the defence witnesses that the abdominal bleeding could have been caused by forceful external cardiac massage which was employed during the attempt to revive the deceased. This submission was not argued in this Court and it is therefore not necessary to deal with it in any detail. It is sufficient to say that the abdominal haemorrhage was the cause, and

not the effect, of the cardiac arrest. This is obvious from the evidence of Dr Zwonnikoff. Indeed no other reason for the cardiac arrest was advanced on the appellant's behalf - apart from the question of Dormicum. Moreover Dr Zwonnikoff made it perfectly clear that the nature and severity of the internal injuries could not reasonably have been incurred during the application of external cardiac massage.

[11] In the result it has, in my view, been established beyond reasonable doubt that it was the abdominal bleeding which resulted in the cardiac arrest.

[12] The only other matter raised in this Court in relation to the medical evidence was whether the failure of the doctors at the Sandton Clinic to detect the abdominal bleeding before it was too late to save the deceased's life was a *novus actus interveniens*. Counsel for the appellant argued that it was. He submitted that while Rex detected tenderness in the area of the deceased's liver when he examined him in the parking area of the Sports Cafe, the doctors who attended the deceased at the clinic failed to notice this on palpation of the patient's abdomen. He also submitted that internal investigations of the deceased's abdomen would probably have revealed the presence of

blood but the doctors concentrated on the deceased's head and chest and failed to carry out any abdominal procedures. In the circumstances, according to the argument, the doctors were grossly negligent.

[13] Assuming, without deciding, that negligence of the medical practitioners would, if established, amount to a *novus actus* as contended for on the appellant's behalf, it is clear that the evidence falls far short of showing that the doctors were negligent. What is more, it was not suggested to either Dr Zwonnikoff or Dr Soicher in cross-examination that they were negligent in the respects relied upon by the appellant's counsel. In the circumstances the arguments raised by counsel must fail.

[14] The evidence relating to the events at the Sports Cafe do not have to be recounted in detail in this judgment. It may be noted that there were almost as many versions as there were observers, possibly because the view of some of the witnesses was partially obscured by parked cars. In essence, however, there are only two issues that need to be decided - to what extent and under what circumstances did the appellant kick the deceased and whether

Kimmel kicked the deceased after he was lying on the ground.

[15] The second matter can be disposed of with relative ease.

One of the witnesses - Robert Anderson - testified that after the deceased fell it appeared to him that the appellant kicked him as he lay on the ground. Anderson did not see the kicks landing as a parked car obscured his view but he added that Kimmel then "came in and kicked the deceased as well." The appellant's counsel submitted that if it was reasonably possible that Kimmel had kicked the deceased, the State had not excluded the possibility that the deceased's death was caused by Kimmel and not the appellant. The magistrate held that while Anderson was a "good" and honest witness, there were shortcomings in his evidence which might have been due to the fact that he had drunk a considerable amount of liquor during the evening. Kimmel, perhaps not unexpectedly, denied that he had kicked the deceased. He was, however, an unsatisfactory witness. What is important is that no other witness supported Anderson's version concerning Kimmel's alleged assault on the deceased. In particular neither Romy Nomis nor her brother, Gary, both of whom witnessed the incident, saw Kimmel kick the deceased. They were regarded as satisfactory and reliable

witnesses and it is clear that they would have seen Kimmel kick the deceased had this occurred. In the circumstances Anderson's evidence on this point is not acceptable. It is therefore unnecessary to consider the possibility that even on Anderson's version the appellant and Kimmel may have acted with the common purpose of injuring the deceased.

[16] There is some dispute on whether the deceased or the appellant issued the challenge that resulted in the fight that ensued. Everything points to the likelihood that it was the deceased, and not the appellant, who was the aggressor in this respect. However, the appellant's version went further. He claimed that the deceased attacked him when he requested the deceased to leave the parking lot and that the appellant, in fighting back, acted in self-defence. This version was correctly rejected by the trial magistrate and by the court *a quo*. There is no need to set out the reasons for the rejection of the appellant's version as nothing was said to persuade us that his evidence could reasonably possibly be true in this respect.

[17] Romy Nomis testified that the appellant "stomped" the deceased on his stomach after he fell to the ground. Her brother Gary

agreed that the deceased was "stomped" by the appellant but he did not see what part of the deceased's body was tramped on because of the presence of parked cars which interfered with his view. Anderson and André Barnard, another witness, also confirmed that the appellant had kicked the deceased after he had fallen to the ground. Anderson's evidence should, in my view, be treated with care and although Barnard was found to be an honest witness his evidence was regarded as unreliable because of his state of intoxication. Anderson and Barnard do, however, provide some support for the evidence of Romy and Gary Nomis and in my judgment it was clearly established on the evidence as a whole that the appellant had kicked the deceased after he had been knocked down. The appellant, Kimmel and Cass denied that the appellant had kicked the deceased while he was lying down. Their evidence was unsatisfactory and was rightly rejected by the magistrate. What is more, the nature and severity of the deceased's abdominal injuries provide powerful confirmation for the fact that he was kick or tramped on while he was on the ground. There was some evidence that the appellant might have kicked the deceased during the course of the fight. In fact the appellant said that he had kicked the

deceased twice as they fought. I assume that it is possible, but unlikely, that kicks during the course of the fight could have caused some of the abdominal injuries which Dr Wilken described in his evidence. But as it was established that the appellant did not kick the deceased in self-defence, he cannot escape legal responsibility for inflicting any of the injuries during the course of the fight as there was absolutely no reason for him to accept the deceased's challenge. There can be little doubt, moreover, that the kicking and/or "stomping" while the deceased was lying on the ground at least contributed to the abdominal injuries if it was not the sole cause thereof.

[18] The state has therefore established that the deceased died as a result of an abdominal haemorrhage which was due to the appellant unlawfully kicking or tramping on the deceased's abdomen.

[19] The only other matter that has to be dealt with arises out of the fact that after the appellant's conviction but before sentence in the regional court, the magistrate disclosed, after a query raised by the appellant's attorney, that Dr Wilken had become the magistrate's house doctor "long after" he had testified in the trial. The magistrate explained that he had lost confidence in his previous doctor's approach

to medicine and emphasized that the doctor/patient relationship with Dr Wilken had not affected his assessment and evaluation of his evidence. After receiving this information, the appellant's attorney stated that he accepted the magistrate's explanation and added that he would not take matters any further.

[20] The appellant's counsel suggested that the attorney's acceptance of the magistrate's explanation did not bind the appellant. It is difficult to see why this should be the case. The matter was dealt with in open court in the presence of the appellant and the attorney, according to the record, informed the court that he raised the matter at the request of his client and that he would accept whatever answer was given by the court. It is obvious that the appellant was satisfied with his attorney's approach to the matter and it is not open to him to now contend that he is not bound by the way in which his attorney dealt with it.

[21] The appeal is therefore dismissed.

APPEAL

L S MELUNSKY
ACTING JUDGE OF

CONCUR:

HOWIE JA
PLEWMAN JA