REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case Number : 254 / 03

In the matter between

STEVEN GOVENDER	**First Appellant**
JUDE MICHAEL RYAN	**Second Appellant**
YOGANATHAN PILLAY	**Third Appellant**
MARK VALOO	**Fourth Appellant**

and

THE STATE	**Respondent**

Coram **MARAIS, MITHYANE JJA and PONNAN AJA**

Date of hearing **24 FEBRUARY 2004**

Date of delivery **31 MARCH 2004**

SUMMARY

Evaluation of evidence - one must guard against a tendency to focus too intently upon separate and individual parts of what is after all a mosaic of proof.

Culpable homicide - suspect fatally assaulted whilst in police custody - in law a duty on those policemen who witnessed the attack but did not participate in it to put a stop to it - Each could be convicted on one of three bases - (a) as an actual participant in the assault; (b) on the basis of common purpose; and (c) by failing to prevent the assault when there was a duty to do so.

J U D G M E N T

PONNAN AJA

PONNAN AJA

[1] On 21 April 1998 a report was received at the Mountain Rise Police Station of a robbery and rape allegedly perpetrated in the Panorama Gardens area of Pietermaritzburg. Shortly after midday and in consequence of certain information having been received by them, six policemen in three vehicles descended on the home of one Nhlanhla David Nyembe ("*the deceased*") in Sobantu.

[2] Whilst still at his home, according to the arresting officer Sergeant Marian, the initial feigned ignorance on the part of the deceased and denial of any wrongdoing by him, quickly gave way once his rights had been explained to him to be replaced by a co-operative attitude. Aside from perspiring and appearing somewhat nervous the deceased evidenced no visible injuries or signs of ill-health. Certain items found at the deceased's home pursuant to a search conducted with his consent,

as well as the deceased's vehicle and his licensed firearm, all believed to be linked to the commission of the offences in Panorama Gardens, were seized. The deceased was arrested and taken into custody.

[3] Entrusting the deceased to the care of his relief commander, Sergeant Marian proceeded to Captain Gafoor, the head of the CID, and communicated to him news of the deceased's arrest. Returning to the charge office, Sergeant Marian processed the deceased by causing appropriate entries to be made in the SAP Register's 13 and 14. An occurrence book entry at 13:25 records that the deceased had no visible injuries. That much, was confirmed during their evidence, by both Sergeant Marian and Inspector Ravindra Maharaj the charge office commander.

[4] Some five minutes later and prior to the deceased being lodged in the cells Sergeant Marian handed the deceased to the third appellant. Confirmation of that appears in an entry in the occurrence book at 13:30,

which reads: 'Suspect out: B/M David Nyembe 14/299/04/98. No injuries. Taken by: Signed: Y Pillay.'

[5] At 14:30, the occurrence book records: 'Report: Sergeant Y Pillay reports that the suspect B/M David Nyembe SAP 14/299/04/98 was booked out on further investigation by Sergeant Y Pillay. The suspect was taken to Sergeant Ryan's office. En route to the office the suspect complained of dizziness and short breath. The ambulance was summoned to attend to the suspect. Ambulance attendant Johan Prinsloo of MRI attended and certified that the suspect was deceased. Cause of death is unknown at this stage, the suspect did however bring up a lot of food through his nose and mouth. At no stage was the suspect assaulted whilst in my custody. Entry for station commissioner's attention. Signed Y Pillay.'

[6] Those undisputed facts formed the basis of the charge levelled by the state against each of the appellants in the trial court. The appellants pleaded not guilty but were each convicted as charged by the Regional Court, Pietermaritzburg on one count of culpable homicide and sentenced to imprisonment for a term of 12 years. An appeal to the

Natal Provincial Division (Jappie et Moleko JJ) met with partial success inasmuch as the sentence in each instance was reduced to a term of imprisonment for a period of 7 years. The appellants sought and were granted leave, by the court *a quo*, to appeal to this Court against in each instance the conviction as well as the sentence imposed pursuant thereto.

[7] Logically, the only evidence as to what transpired in the office of the second appellant emanated from the appellants. The appellants, all of whom testified in their defence told a similar story. After having left the charge office with the deceased the third appellant proceeded to the office of the second appellant, which was then occupied by the second and fourth appellants. Although not a member of the Murder and Robbery Unit like the other three, the assistance of the first appellant was also enlisted to interrogate the deceased. During the course of the questioning the deceased appeared to move somewhat uneasily in his

chair. He began perspiring heavily and coughed intermittently. As the coughing became more frequent and the perspiring more profuse concern for his well-being grew. The third appellant enquired whether the deceased was unwell or under medication. The deceased requested some water which was brought to him in a discarded Coke can by the second appellant. The third appellant removed the deceased's handcuffs to enable him to drink the water. When he complained that he was feeling hot and stood up and unbuttoned his shirt, the fourth appellant moved a fan closer to him. The deceased kicked off his takkies. His quickly deteriorating condition prompted the third appellant to contact the Provincial Ambulance Services. As the coughing worsened the deceased appeared to be choking and had difficulty swallowing. Food particles emitted from his mouth as he struggled to breathe. The deceased then slid off the chair and fell to the ground knocking his head on the floor in the process. Whilst the third appellant contacted a

second ambulance service, the first appellant employed CPR and mouth-to-mouth resuscitation in an endeavour to revive the deceased. When the paramedics from the second ambulance service eventually arrived the deceased was pronounced dead.

[8] Three forensic pathologists testified during the trial. All three appeared to be in agreement that the cause of death was blunt force trauma to the head, with resultant intra-cranial pathology resulting in suppressed levels of consciousness. A bout of vomiting followed and in his concussed state the deceased inhaled his own vomitus and asphyxiated. Support for that conclusion is to be found in the histology report of Prof Dada (exhibit “L”) whose examination of sections of the deceased’s lungs revealed congestion as well as large quantities of foreign organic (mainly vegetable) matter in the bronchi and alveolar spaces.

[9] Drs Maney and Perumal who jointly conducted the post-mortem examination on the deceased observed that the deceased had suffered '...extensive bruising of the skin and subcutaneous tissue over the whole body.' Those injuries were consistent, in the opinion of Dr Maney, with a sustained beating.

[10] By a process of inferential reasoning, direct evidence being absent, the trial court concluded that each of the appellants '... whose evidence was so improbable as not to be a reasonable possibility' were indeed guilty. Both the conclusion reached as well as the reasoning by the trial court are under attack in this Court.

[11] The thrust of the appellants' case in this court is that the deceased must have sustained his injuries in consequence of an assault which had been perpetrated upon him by members of the Police Service at some stage prior to him being entrusted into the third appellant's custody.

Support for such a hypothesis, which it was submitted is a tenable one, is to be found in the evidence of the state witness Sipho Mhlongo.

[12] The evidence of Mhlongo, or rather such of it as can properly be discerned, in a nutshell, is, that he was in the company of others including John Mchunu, when he chanced upon an assault being perpetrated by between two and four policemen on a male person, who it must immediately be said could only have been the deceased. He then made a report to one Sgt. Ngubane, who, according to him, was prepared to come to the assistance of civilians who were ill-treated at the police station.

[13] The magistrate found Mhlongo to be an unreliable witness and without more disregarded his evidence in toto. The conclusion by the magistrate that Mhlongo was an unreliable witness is undoubtedly correct. That much is supported by the evidence on the record. What was impermissible, so it was argued on behalf of the appellants, was for

the magistrate to have simply disregarded his evidence in its entirety as if he had never testified. Counsel's stricture is sound. For, the factual hypothesis that the deceased may have been assaulted earlier raises starkly the question as to whether the appellants could properly have been convicted.

[14] It seems clear that the trial court did not fully appreciate the factual problems that Mhlongo's evidence presents, nor the complex legal difficulties that it raises. The cardinal issue on appeal therefore is whether Mhlongo's evidence that he witnessed an assault in the passage has sufficient cogency to give rise to a reasonable possibility that it could be true. If so, the appellants are entitled to the benefit thereof.

[15] In order to determine what I have described as the cardinal issue it is necessary to consider the evidence of Mhlongo in some detail and to weigh his claim that he witnessed an assault in the passage against the

evidence of Mchunu and Ngubane, as also against the remainder of the factual matrix and the inherent probabilities in the case.

[16] Mhlongo's tale grew in the telling. As his evidence unfolded, the nature and severity of the assaults became more exaggerated and the number of assailants increased. Not only did his evidence suffer a myriad of internal contradictions, but it conflicted in material respects with that of Mchunu and Ngubane. Mhlongo's evidence that he was in the company of Mchunu when the assaults were witnessed finds no support in the evidence of the latter. Mchunu testified that he was seated on a bench outside the building in conversation with an insurance consultant when he heard screams emanate from the first floor. After the screaming had died down and there was silence, according to Mchunu, Mhlongo came to him and informed him that a person was being assaulted in the charge office. Interestingly, in his statement to the

police, which I must at once record he deviated from during his evidence, Mchunu stated:

'. . .[Sipho Mhlongo] came to me outside the charge office and informed me that there was a black male that was assaulted by the SAPS members on the first floor. I asked him whether he heard or saw when and who was assaulting that person or when that person was assaulted, he replied that he only heard when that person was screaming / crying on the first floor.'

[17] Sgt. Ngubane testified that although he did not hear the screaming himself he was approached by Mhlongo whilst he was busy washing his vehicle, who reported to him that somebody was screaming upstairs in the detective's office. That somebody was allegedly screaming upstairs, impacts in a direct and substantial way on Mhlongo's evidence that an assault had been perpetrated in the passage downstairs.

[18] Mhlongo testified that during the assault witnessed by him the victim was inter alia kicked in the face and was bleeding from his ears and nose. Such obvious signs of apparent ill–treatment could not have

passed unnoticed. And yet, the arresting officer, the charge office commander, as well as all of the appellants observed nothing untoward. Indeed, each of the appellants testified that they would not have commenced with the interrogation of the deceased if it appeared to them that he was injured or unwell.

[19] Both Drs Maney and Perumal recorded in their medico-legal post-mortem reports (exhibits “B” and “C” respectively) as one of their chief post-mortem findings: 'Bruising of the anterior abdominal wall with perforation of the intestine and bruising of the mesentery.' On the strength of the photographs of the deceased’s body, he not having been present during the post-mortem examination, Dr Naidoo opined that the perforation of the intestine had occurred post-mortem during the dissection of the deceased’s body.

[20] Dr Perumal referred to various aspects, in particular the surrounding bruising in the abdominal area and the fact that the

intestinal injury was a 15 mm diameter tear and not a clean linear cut, which fortified his view that the injury was in consequence of blunt abdominal trauma inflicted ante-mortem. On this aspect, the trial court preferred, quite correctly in my view, the evidence of Dr Perumal. Dr Perumal described the abdominal injury as a severe injury caused by the application of significant force. The clinical symptoms of such an injury, according to Dr Perumal, is that the deceased would have been ' ... bending over and keeling over and he probably would have vomited'.

[21] If the underlying hypothesis of the appellants' version, relying as it does upon the evidence of Mhlongo, is to be accepted, then the charge office commander or the appellants themselves ought to have noticed the evident physical distress of the deceased. None of them did. Sgt Marian testified that when he handed the deceased over to the third appellant in the charge office the deceased was free of any injuries.

Indeed, the occurrence book entry to which the third appellant appended his signature affords corroboration of that fact.

[22] Not only did the deceased walk unaided, which would have been improbable on Dr Perumal's evidence, but he on the appellants' own version, was alert and furnished a coherent account during the interrogation. No motive suggests itself on the evidence as to why others who were not involved in the investigation, would want to assault the deceased. Much less, for them to immediately thereafter, turn him over to the appellants for interrogation.

[23] Mhlongo puts the assault in the passage in close proximity to the charge office. The notion that the deceased could have been subjected to a sustained beating in one of those highly visible public areas prior to his being removed to the office of the second appellant, is, in my view, far-fetched. The risk to a police officer who chooses to conduct

himself/herself in such a fashion is obvious. A member of the public or a disapproving colleague could easily chance upon such unlawful conduct.

[24] The deceased evidently made no complaint to the charge office commander or the appellants, who according to them, were treating him humanely, of any assaults having been perpetrated upon him from the time of his arrest until he came into contact with them. Acceptance of Mhlongo's evidence, entails by implication acceptance of a wholly untenable proposition, namely that various members of the Mountain Rise Police Station conspired to shield the real perpetrators at the expense of the appellants.

[25] In S *v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426 e-h, this court citing with approval from *Moshephi and Others v R* (1980-1984) LAC 57 at 59F-H held:

'The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part

of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

[26] The mosaic as a whole lends little to the factual foundation upon which the logical deduction must rest for the proposition that the deceased had in fact been assaulted in the passage downstairs. When viewed against the tapestry of all of the evidence, the claim by Mhlongo that he witnessed an assault is untenable, and accordingly must be rejected as false.

[27] The rejection by the trial court of the defence version as false, cannot be faulted. The trial court concluded, quite correctly, that the deceased had sustained his injuries in the office of the second appellant whilst in the custody of all four of the appellants. The only explanation

tendered by the appellants as to how the deceased could possibly have sustained those injuries is that he slid off his chair and fell to the ground striking his head in that process. That single occurrence, however, cannot explain, in addition to the other injuries already alluded to, the:

> '(i) "five areas on the scalp that indicate bruising and therefore a point of impact";
> (ii) "four parts of the rib cage showed that there was blunt force";
> (iii) "focal bruising of the right and left lungs anteriorly and posteriorly";
> (iv) "bruising relating to the left psoas muscle and bruising relating to the rectum"; and
> (v) "bruising of the subcutaneous tissue of the left and right thigh posteriorly."'

as testified to by Dr Perumal. Dr Naidoo, the expert witness called on behalf of the appellants conceded that all of the injuries suffered by the deceased could not be explained by a single occurrence.

[28] It was submitted on behalf of the appellants that the evidence does not exclude the possibility that one or more of the appellants may not have participated in the attack on the deceased. That matters not in my

view. There was in law a duty, in the circumstances of this case, on those policemen who were present and who witnessed (as indeed each must have) but did not participate in the attack on the deceased to put a stop to it. Each of the appellants could have been convicted on any one of three bases. Firstly, that he participated in the fatal assault in circumstances where he ought reasonably to have foreseen the resultant death. Secondly, that he had associated himself with the fatal attack although not himself participating therein (that is, on the basis of common purpose). And, thirdly, he omitted to prevent the assault and consequent death in circumstances where there was a duty on him to do so (see *S v Barnes and another* 1990 (2) SACR 485 (N) at 490 i-j).

[29] Finally, it was submitted, although somewhat obliquely, that the conviction was ill - founded inasmuch as the requisite mens rea had not been proved. That attack on the conviction is misconceived as it

misconstrues the true nature of the enquiry in regard to an essential element of the offence. In *S v Naidoo and Others* 2003 (1) SACR 347 (SCA) at 357, Marais JA stated, if I may say so, with characteristic lucidity:

'The crime of culpable homicide, on the other hand (certainly as regards the consequence (death) of the impugned act or omission) postulates an absence of *dolus* and the presence of *culpa*. The fact that the crime of culpable homicide may be committed even where the act which causes death is an intentional act of assault should not be allowed to obscure that essential truth. In such a case the perpetrator is not convicted of culpable homicide simply because he or she deliberately assaulted a person as a consequence of which it so happened that the person died. If the perpetrator could not reasonably have foreseen that death might ensue, a conviction of culpable homicide cannot be justified. *Aliter* if death should have been foreseen as a possible consequence. What this shows is that it is the perpetrator's culpable failure to foresee the possibility of death in cases where an assault has resulted in death and, in cases not involving an assault, that failure coupled with a further culpable failure, namely a failure to do what could and should have been done to prevent the occurrence of death, that is the rationale for the conviction of culpable homicide. *Culpa* is therefore always present in the crime of culpable homicide. Sometimes it is also associated with *dolus* (as in intentional assaults resulting in reasonably foreseeable but actually unforeseen death). Sometimes it is not (as in negligent conduct resulting in reasonably foreseeable death). For a

penetrating and instructive analysis of these matters see Professor Roger Whiting's article "Negligence, Fault and Criminal Liability" in (1991) 108 *SALJ* 431.'

On a simple application of those principles to the facts here present, it is patent that each of the appellants was correctly convicted. Given the sustained nature of the attack, each of them ought reasonably to have foreseen the death of the deceased.

[30] As to sentence. It is trite that this court will not interfere with the sentence imposed by the court a quo unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate. No misdirection has been alluded to, nor can it be said that the sentence induces a sense of shock.

[31] It has been submitted on behalf of the appellants that the sentence is out of proportion to the gravity of the offence and that having regard to the personal circumstances of each of the appellants a portion of the sentence imposed by the court a quo should have been suspended. It is true that each of the appellants has an unblemished record and that

each was a useful member of society in gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding the clear mitigating factors present, the seriousness of the offence makes it necessary to send out a clear message that the resort by policemen to violence of the kind encountered in this case cannot be countenanced.

[32] The natural indignation that the community would feel at conduct of this kind warrants recognition in the determination of an appropriate sentence. It bears noting that the version of the appellants was not only false but plainly contrived. In advancing a contrived version each placed fealty to his colleagues above his duties as a police officer (see S v Phallo and Others 1999 (2) SACR 558 (SCA) at 570 a-b). There appears to me to be no warrant for interfering with the sentence imposed by the

court *a quo*. It follows, in my view, that the appeal in respect of sentence must also fail.

[33] In the result the appeal is dismissed.

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PONNAN AJA

CONCURRING:

MARAIS JA

MTHIYANE JA