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

**JUDGMENT**

**Not Reportable**

Case No: 317/11

In the matter between:

**FRANCOIS STEPHANUS CLOETE** **Appellant**

and

**THE STATE** **Respondent**

**Neutral citation:** *Francois Stephanus Cloete v The State* (317/11) [2011] ZASCA 02(2 March 2012)

**Coram:** MTHIYANE DP, MAYA, MALAN, WALLIS JJA and PETSE AJA

**Heard:** 23 November 2011

**Delivered:** 2 March 2012

**Summary:** Murder – what constitutes – whether appellant under legal duty to prevent death – cause of death and common purpose not proved – Appellant's actions amounting to assault with intent to do grievous bodily harm – sentence – imposition of – factors to be taken into account – appellant dragging the deceased on the road for 50 to 70

metres causing him severe injuries – wanton disregard of the victim's rights to physical integrity and privacy a relevant factor.

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**ORDER**

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**On appeal from:** North Gauteng High Court, Pretoria (Ledwaba, Msimeki and Tlhapi JJ, sitting as a court of appeal):

The appeal is upheld and the order of the court below dismissing the appeal is set aside and replaced with the following:

'1 The appeal is upheld.

2 The appellant's conviction for murder is set aside and replaced by a conviction for assault with intent to commit grievous bodily harm.

3 The appellant's sentence is set aside and replaced by a sentence of four years' imprisonment.'

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**JUDGMENT**

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**PETSE AJA (MTHIYANE DP, MAYA, MALAN, and WALLIS JJA CONCURRING):**

Introduction

[1] On 11 May 2007 the appellant was convicted in the Regional Court sitting in

Schweizer-Reneke on a charge of murder. On 8 November 2007 he was sentenced to ten years' imprisonment.

[2] Disenchanted with his conviction and sentence he appealed against both to the North Gauteng High Court, Pretoria – with leave granted by it on petition. That court subsequently dismissed the appeal in a judgment by Ledwaba J, with Msimeki and Tlhapi JJ concurring. He now appeals to this court with leave granted by the court below on 12 November 2010.

[3] The deceased, Thulasizwe Hlatswayo, died on 13 February 2006 from the consequences of a subdural haemorrhage. Prior to that he had been subjected to various assaults by different people including the appellant. The problem, however, is that the medical evidence is insufficient to establish beyond a reasonable doubt which of these assaults caused his death. The factual circumstances in which this arises are set out below.

[4] In convicting the appellant the trial court found that he was under a legal duty to protect the deceased – whom he had earlier arrested by way of a citizen's arrest – from being harmed by others whilst he (the deceased) was under his care. In other words the conviction was said to be based not on his own conduct in assaulting the deceased, but on his failure to protect him from an assault by others. That conclusion raises a number of difficulties that will be dealt with below, both as to the cause of death and as to the implications of this approach.

[5] It must be mentioned at the outset that the charge sheet contained no allegation that the appellant was being charged on the basis of his alleged failure to discharge the legal duty to protect the deceased from harm by others. Nor did it allege that the appellant had acted with a common purpose with the persons who assaulted the deceased, and probably caused his death. That raises a further technical question whether the charge sheet properly reflected the case that the appellant was being called upon to meet but again it is unnecessary to decide this.

[6] At his trial the appellant pleaded not guilty. He nonetheless admitted that: (a) the

deceased was the person reflected in the charge; (b) the deceased died on 13 February 2006 at or near The Bullet's Pub, Schweizer-Reneke; (c) the deceased died as a result of the injuries sustained at the place of assault; (d) the content of the post-mortem report; and (e) that the blood stain found on his shirt was the blood of the deceased.

Evidence

[7] Mr Tshekoemang Freddy Kit was the first witness to testify on behalf of the State. His evidence is as follows. On the night of the murder, he was at Bullet's Pub restaurant where he was employed. At about 22h00 he stepped out of the building to relieve himself at the outside toilet whereupon he saw a red BMW motor vehicle pulling up near the restaurant. A short while later a red Toyota van left the premises. He also saw two men pushing a dark blue BMW motor vehicle which belonged to one of the patrons. Upon witnessing these two incidents he raised the alarm by telephoning the owner of the restaurant, Mr Genade, and reported what he had seen.

[8] The owner responded immediately and upon his arrival at the restaurant fired a warning shot into the air. He (the owner) then enquired from Kit as to the direction which the red Toyota van had taken. The owner, Kit and another man unknown to Kit, boarded the owner's motor vehicle and drove in hot pursuit of the Toyota van. As the owner, Kit and the unknown man were driving along they came upon a Toyota Tazz motor vehicle parked on the side of the road next to which there were a number of people standing. The unknown man who was also a passenger in the owner's vehicle alighted at that spot whereafter Kit and the owner drove away. Further on, they came upon the red Toyota van that was abandoned on the road. The owner then telephoned his wife and asked her to arrange for someone to bring the keys for the van. They eventually returned to the restaurant. On their arrival there they found the police present. Kit also saw the deceased lying on his back with his pair of trousers pulled down to his knees and next to him was his T-shirt. Kit then returned to his workplace where he remained until he knocked off after which he went to bed. He testified that he knew the appellant by sight only, having seen him on various occasions when the appellant visited the restaurant.

[9] Ms Kornelia Petronella Genade was the second witness called by the State. She

testified that she co-owned the Bullet's Pub restaurant with her husband. On the fateful night she was together with her husband who received a telephone call which prompted him to leave, saying that there were people stealing cars. He took his shotgun with him. As her husband left she peeped through the window after which she also went out. When she came outside she saw a group of people milling around and joined them. She then observed two human figures across the road about one hundred metres away kicking something on the ground. She then left that spot where she was and returned to her residence. After seeing a police van present outside she went out again. She enquired from one of the police officers as to what they had come there for. The policeman pointed to a person who was lying on the ground across the road. Next to him were the appellant and his former co-accused. She said that she overheard the appellant telling his former co-accused that he (the appellant) 'will hit the black to death'. This was a translation from a more idiomatic expression in Afrikaans ('ek sal hom dood poes'). The appellant had placed his foot on the person lying on the ground. Under cross-examination she confirmed that it was possible she had heard some discussion between the appellant and his co-accused about his chasing the man on the ground. It was put to her that the accused denied saying that he would kill the deceased and she accepted that he might have said something like 'here lies the poes who steals cars'. The appellant and his former co-accused stood next to a Toyota Tazz motor-vehicle. She could not say whether the appellant had in fact said that the deceased could 'stand up now' as the police were present.

[10] The appellant testified that at approximately 21h30 on the night the deceased died he arrived at Bullet's Pub travelling in a BMW motor vehicle together with his erstwhile co-accused to 'enjoy a few drinks' thereat. As they were about to leave they saw the BMW motor vehicle being pushed in reverse by two persons with a third person seated on the driver's seat. When they shouted at these persons they abandoned the vehicle and fled the scene in different directions. They gave chase, with him pursuing one of the culprits for approximately seventy to one hundred metres. He gave up the chase when the culprit he was pursuing disappeared into the darkness. He was then making his way back to Bullet's Pub when someone unexpectedly emerged in front of him. He wrestled with this person and eventually subdued him and dispossessed him of an object that he was

carrying in his hand which turned out to be a cellular telephone.

[11] The appellant stated that he thereafter pulled the man through a barbed wire fence taking him back to the restaurant. As he was tired he paused to take a breather whilst the person he apprehended lay on the ground. At this juncture a Toyota Tazz motor vehicle with four occupants pulled up next to him. The four occupants then assaulted the deceased by kicking, stamping on him and striking him with some object whilst the appellant was busy trying to telephone his erstwhile co-accused to arrange a bakkie to convey the deceased to the police. But he was unsuccessful in his endeavours. He then returned to the spot where he had left the deceased and found him seated on the ground with his head leaning against his raised knees. At that stage the four men who assaulted the deceased had left with three of them returning to the pub. As no vehicle was available to convey the deceased the appellant, assisted by one of the four assailants, held the deceased by his shoulders and pulled him, taking him to the pub. The deceased, however, was wrestling and kicking in an attempt to free himself. Because the deceased was resisting they decided to pull him by his feet – whilst he lay on his back – across the tarred road back to the pub.

[12] When the police arrived the appellant informed them that 'hier lê die bliksem … hier lê die bliksem wat die karre gesteel het en weggehardloop' ('here lies the bliksem who stole cars and [then] ran away') referring to the deceased. The appellant accepted that the peeling of the skin on the deceased's back, skull and buttocks was directly attributable to his dragging the deceased across the road to the pub. In cross-examination he conceded that the superficial injuries that he sustained on the fateful night were not caused by the deceased. He also said that he struck the deceased on his chest with his elbow and kicked him on his legs as he lay on the ground subdued. The four persons who assaulted the deceased whilst he lay on his stomach kicked him on his face and body and also hit him on the head with an object he subsequently learnt was a plank. The assault of the deceased lasted about fifteen minutes. Although he could have remonstrated with the perpetrators of this assault he did not do so for he believed that they would not have listened to him. Nor could he have intervened as he was tired. When the four persons stopped assaulting the deceased he found him bleeding from his head and face with his

clothes drenched in blood. As he dragged the deceased from that spot over a distance of fifty to seventy metres the deceased's buttocks, back and head were rubbing against the surface of the ground. He confirmed, that when he dragged the deceased it was with full appreciation that his conduct might cause the deceased bodily injuries.

[13] Two witnesses were called by the trial court in terms of s 186 of the Criminal Procedure Act 51 of 1977 (the Act). They were Constable Jan Segopotso Peo and Dr Moorad who were, respectively, the police officer who attended at the crime scene and the pathologist who performed the post-mortem examination of the deceased.

[14] Peo testified that he met the appellant's erstwhile accused outside the pub. The latter reported to him that there had been an attempt to steal his car. The appellant called out to him to 'Come and see. Here lies the person who wanted to steal the car. I chased him and caught him in the veld'.[1] He then approached the appellant and observed that the latter had his one foot on the head of the deceased who lay on the ground. He asked the appellant if he knew the deceased and the appellant answered in the negative. The appellant then spilt the contents of the glass he had in his hand on the deceased. He then asked his colleague Constable Galai to call an ambulance and request Inspector Nthele to come to the scene. He left the scene upon Inspector Nthele's arrival.

[15] In cross-examination it was put to Peo that the appellant told the deceased to get up now that the police were there and said to him that there had been nothing wrong with him when the police came. Peo did not accept this proposition and said that the appellant had said to the deceased – in his presence – that 'he must get up and try to run away as he did before the police came'.

[16] Dr Moorad testified that he conducted the post-mortem examination of the deceased and compiled the post-mortem report. He confirmed his finding that the deceased suffered a left side subdural haemorrhage and swelling of the brain due to a blunt force head injury. Although he confirmed that the death of the deceased was not

[1] The evidence was given in Afrikaans and this is a translation.

instantaneous he could not say with any degree of certainty what the length of the period of survival after the initial head injury would have been. But he stated that once the brain started to swell it could no longer control pressure with the result that all systems within the brain would fail following the initial haemorrhage, the swelling and the contusions that the deceased had on the brain. Under examination by the court the doctor accepted the proposition put to him that it is quite possible that the deceased was already fatally injured, when he was dragged by the appellant, after the intervening assault by the four occupants of the Tazz motor vehicle. His evidence requires repetition:

'Court: Now would you say that, being dragged on a tarred road for that distance, which we estimate between 70 and 100 metres, could also fall within that blunt force head injury?

Witness: It could fall within the blunt force injury, but what is difficult for me to offer an opinion based on the pathological findings is that, a subdural haemorrhage which is the haemorrhage on the left side which I was talking about, occurs often in assaults, but it can also occur in falls. So if one is given a scenario of the deceased being dragged by his feet, presumably it is a gravel road, with the head bumping.

Court: It is a tar road.

Witness: Is it a tar road? Then, still I am assuming the head would be subjected to a fair amount of bouncing. A subdural haemorrhage is basically caused, it is velocity injury, which causes the brain, or the head being moved in an anti-postural direction. And what happens is the veins which insert into the surface of the brain, because of the velocity injury therefore get ruptured and that leads to the haemorrhage. But, as I said, it could also happen by being punched against a hard surface so that, the head is moving forward and backward as well.

. . .

Cross-examination: . . . Doctor, a blunt force head injury is a type of injury which one normally gets when a person is hit several times with an object? Is that correct? – It is one of the findings you could get, yes.

It often occurs when a person has been hit with a stick or a knobkierie several times or even with a fist or kicked on the face or on the head? – Yes.

And after several of these blows have been administered, to put it that way, death does not occur instantaneously, because sometimes people die two days after the application of such force. Is that correct? – That is correct.

Even longer sometimes? – That is correct.

Now you do agree, the scenario as put to you by the Court, this man was hit several times, kicked in the face, hit with some or other object as well. He was basically hit into submission after some time he was dragged. You would agree with me that, it is quite possible and likely that, at that stage, he

had been fatally injured already? You cannot *say* (inaudible)? – No, I cannot, and certainly after *an assault that* (inaudible) severe, judging by the external injuries and the photographs, it is quite likely, yes.' (Counsel were agreed that the words I have inserted and italicised accurately convey the gist of what the typist found inaudible.)

[17] Having summarised the evidence adduced at the trial, the trial court stated that as the appellant was charged with murder it was incumbent upon the State, which bore the onus, to prove that the deceased died as a result of the injuries unlawfully and intentionally

inflicted on him by the appellant. Accepting that the deceased had earlier been assaulted by four men before the appellant dragged him on the ground for fifty to seventy metres it proceeded to ask itself whether the death of the deceased was brought about by the dragging to which the appellant had admitted or the earlier beating to which the appellant was not a party.

[18] In the event the trial court found that if regard was had to the fact that the appellant: (a) had earlier apprehended the deceased to bring him to justice; and (b) that the deceased was – having been apprehended – in the control and custody of the appellant, the appellant was under a legal duty to protect the deceased from attacks by others which the appellant failed to do. Consequently the trial court found that the death of the deceased was caused by the appellant's omission.

[19] I should, however, say that the concluding statement in the judgment of the trial court is ambivalent as to the actual basis for the appellant's conviction. It said:

'In the result I hold that the accused person is because of the death of the deceased by his omission he also conceded that during this dragging he foresaw also that the deceased could suffer the injuries he sustained and that as I have submitted, the injuries which he has sustained, they were fatal.'

I shall return to this aspect later.

[20] The court below, as I have already stated, dismissed the appeal against both the conviction and sentence. In dismissing the appeal against conviction, it found support in

the decision of this court in *S v Musingadi & others* 2005 (1) SACR 395 (SCA) in which the decision in *S v Chimbamba & another* 1977 (4) SA 803 (RA) was relied upon. In *Musingadi* this court in dismissing the appellants' appeal against their conviction for murder had regard to the fact that: (a) the appellants were responsible for the deceased's captive state as part of the joint enterprise to rob; (b) when they departed, they left the deceased trussed up and helpless; (c) the appellants knew, when they departed, that no 2 [accused] was intent on killing the deceased; and (d) the appellants must have known, and therefore knew, that the deceased was powerless to resist or withstand no 2's [accused] murderous intent.

[21] The court said:

'The appellant's conduct of leaving the deceased who was helpless with the four men and did nothing to stop them from assaulting the deceased was unlawful. He clearly saw and has described how the deceased was beaten. Even if his main aim was not to kill the deceased there is no doubt that in exacerbating the deceased's injuries by dragging him he subjectively foresaw that death may possibly ensue and reconciled himself with the possibility. Appellant under cross-examination said he foresaw that the dragging would cause bodily injuries to the deceased. In dragging him for a distance of about fifty to seventy metres on tarred road he definitely foresaw that the unlawful result may ensue. Furthermore, the appellant's conduct and vile utterances at the pub in the presence of the police clearly show that he did not care about the wellbeing of the deceased. The appellant was correctly convicted of murder.'

[22] With respect, I find myself unable to subscribe to the approach of the court below for reasons that will become apparent later in this judgment.

Argument

[23] In this court counsel for the appellant mounted a three-pronged attack against the conviction. He submitted that: (a) the appellant was not under a legal duty to prevent the assault on the deceased by the four persons travelling in the Toyota Tazz and even if it were found that he was under such legal duty there was not even a shred of evidence – let alone proof beyond reasonable doubt – to controvert the appellant's assertion that he could not have prevented the assault; (b) there was no evidence beyond reasonable

doubt to prove that the assault attributed to the appellant causally contributed to the death of the deceased; and (c) the state failed to allege, let alone prove beyond reasonable doubt, that the appellant acted in pursuance of a common purpose with the four assailants whom he saw stamping on and kicking the deceased. I hasten to deal with each of these contentions in turn.

Legal duty

[24] The point relating to the question whether the appellant was under a legal duty to prevent the assault on the deceased by the four occupants of the Toyota Tazz can be disposed of on the basis of what the appellant said at the trial when he testified in his defence. His evidence was that at that stage he was tired and realised that his intervention would not have had any effect as the four assailants would not have listened to him. There was no evidence adduced by the State to controvert this and it was not challenged in cross-examination by the prosecutor. This conclusion renders it unnecessary, in my view, to consider the allied question whether the fact that the appellant was not alerted in the charge sheet or otherwise that this was the case that he was called upon to meet should have, in itself, led to the acquittal of the appellant on the charge of murder.

Causal link

[25] The best that can be said in favour of the State with regard to this point is that the doctor who was called at the behest of the trial court testified that: (a) the assault on the deceased by the four persons did not result in an instantaneous death; (b) that the deceased would have survived for a while after suffering a subdural haemorrhage. The doctor was asked specifically in cross-examination if the fatal injury could have been caused by the prior assault by the men in the Toyota Tazz and he said that he thought that that was ‘quite likely’. It therefore goes without saying that this shortcoming in the State’s case must redound to the benefit of the appellant. On a proper reading of the doctor’s evidence it is impossible to say with the requisite degree of certainty that the appellant’s conduct contributed causally to the death of the deceased. The evidence is at least consistent with the possibility that the fatal injury was sustained by the deceased as a result of the blows inflicted by the four assailants from the Toyota Tazz motor vehicle.

Common purpose

[26] With respect to common purpose it was argued, with reference to an abundance of judgments of this and other courts, that the appellant could not have been convicted of murder on two bases. First, it was submitted that he was not charged on the basis that he had acted in the furtherance of a common purpose with the four assailants. Second, there was no evidence adduced by the State to prove the prerequisites for a successful invocation of the doctrine of common purpose.

[27] I do not consider it necessary to deal with this part of the appellant's argument in any great detail. Suffice it to mention that it was, in any event, never part of the State's case that the appellant in doing whatever he was alleged to have done acted in the furtherance of a common purpose with anyone. On the contrary the charge sheet explicitly stated that he was charged with murder in that 'upon or about 13 February 2006 and at or near Schweizer-Reneke . . . the accused did unlawfully and intentionally kill Thulasizwe Hlatswayo' and no less or more. The witnesses who testified on behalf of the State sought to support the case that the appellant was called to meet and no more.

[28] Moreover the evidence adduced by the State, such as it was, came nowhere close to establishing any of the pre-requisites of common purpose.[2] The problems of the State were also compounded by the absence of any countervailing evidence to that of the appellant which militates against the notion that the appellant acted with a common purpose with the four assailants who assaulted the deceased. Accordingly the reliance by the court below on *Musingadi* must, with respect, be taken to be erroneous. To sum up, there was no proof of any prior agreement between the appellant and the four assailants who assaulted the deceased. Nor was there any proof that in dragging the deceased – after the four assailants had left – the appellant manifested an association with or a sharing of a common purpose with those four assailants.

[2] *S v Thebus & another* 2003 (2) SACR 319 (CC)*; S v Mgedezi & others* 1989 (1) SA 687 (A) at 705–706C; *S v Musingadi & others* 2005 (1) SACR 395 (SCA); *S v Jiya & others* 1991 (2) SA 52 (E); *S v Mzwempi* 2011 (2) SACR 237 (ECM).

[29] I revert now to the concluding paragraph of the judgment of the trial court quoted earlier in this judgment. The comment I wish to make in regard thereto is that it is susceptible to the interpretation that the appellant was convicted of murder on the basis that he was either under a legal duty to prevent the assault by the four assailants or that in any event the injuries attributed to the dragging of the deceased by the appellant – which he admitted to have foreseen – caused the death of the deceased. In other words the cause of death was irrelevant as on either basis the appellant was criminally responsible therefor. It must be said that on either basis the conviction of the appellant for murder is, for the reasons already stated, unsustainable. That renders it unnecessary to consider whether it can ever be permissible to seek a conviction on this basis.

[30] Counsel for the State initially sought to persuade us that the murder conviction of the appellant was supportable. But she soon realised that apart from all else there was no evidence, which met the requisite threshold in a criminal trial, to sustain the verdict of the trial court.

[31] The question that now arises for determination is what offence, if any, is the appellant guilty of. Counsel for the appellant at the outset candidly accepted that the appellant could not escape a conviction of assault. Nevertheless he initially argued that the State failed to prove beyond a reasonable doubt that the appellant had the requisite intent to cause the deceased grievous bodily harm. In elaboration he submitted with reference to sound judicial authority that the nature of the injuries suffered by the deceased as a consequence of the dragging is not the decisive factor in determining whether the appellant had the requisite intent to do grievous bodily harm.[3]

[32] When it was pointed out to counsel by this court that the appellant had admitted under cross-examination that when he dragged the deceased on a hard surface (in this case being a tarred road and gravel) with his back, head and buttocks rubbing on the hard surface he foresaw that the friction between the body and the ground would cause the deceased grievous bodily harm, he was constrained to concede that the evidence

[3] *S v R* 1998 (1) SACR 166 (W) at 169f–170b.

established that the appellant had the requisite intent to cause the deceased grievous bodily harm.[4] In any event it is apparent from the record that all the constituent elements of the substantive crime of assault with intent to do grievous bodily harm were present.[5] With respect to the form of intent that the appellant had it bears mention that *dolus eventualis* suffices.[6] Although the appellant was charged with murder a verdict of assault

[4] *S v Erasmus* 2005 (2) SACR 658 (SCA) para 10.
[5] C R Snyman *Criminal Law* 5th ed 461-462.
[6] *R v Basson* 1961 (3) SA 279 (T) AT 282C–283C.

with intent to do grievous bodily harm was, in terms of s 258*(b)* of the Act, competent.[7]

[33] Following this concession the question arose as to whether the matter should then be remitted to the trial court for it to consider sentence afresh in the light of this judgment. Given the long passage of time and with a view to avoiding further delay in the disposal of the matter both counsel were agreed that the interests of justice dictated that the matter be dealt with to finality in this court. In my view that approach commends itself.

[34] As to an appropriate sentence counsel for the appellant submitted that the appellant has already served a period of about nine months in jail. Thus it was urged upon this court to consider a sentence of four years imprisonment under correctional supervision in terms of s 276(1)(*i*) of the Act. Counsel for the State argued for a sentence of four years' direct imprisonment or if this court were against her on that score she aligned herself with the argument advanced on behalf of the appellant.

[35] The appellant's counsel drew our attention to the following mitigating factors in the appellant's favour: (a) he is gainfully employed; (b) he has three minor children one of whom has physical and mental disabilities; (c) he was remorseful; and (d) the occurrence has caused him grave emotional upheavals to a point where his life nearly fell apart. In addition, it was submitted that the appellant acted in the heat of a threatening car theft and without premeditation while he was to some extent under the influence of intoxicating liquor. However, no matter how important these factors may be we do not have the advantage that a trial court would have of a current detailed pre-sentencing report in which the advantages as well as the disadvantages of a sentence of correctional supervision would be canvassed and the capacity of the relevant authorities to supervise such a sentence.

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[7] Section 258 reads: If the evidence on a charge of murder or attempted murder does not prove the offence of murder or as the case may be, attempted murder, but –

. . .

(b) the offences of assault with intent to do grievous bodily harm;

. . .

the accused may be found guilty of the offence so proved.

[36] Nevertheless, as it behoves this court, these mitigating factors must be weighed against the aggravating features of this case. At the time of conviction the appellant had a recent previous conviction for assault in respect of which he paid a fine of R800. The assault of the deceased both at the time of his arrest and when he was dragged on the ground, virtually naked, was gratuitous. The appellant accepted that after he had subdued the deceased he struck him with an elbow on his chest and kicked him on his legs. Again when the deceased could barely walk on his own – after an assault by the four assailants – the appellant dragged him over a hard surface for fifty to seventy metres. He dragged a helpless person who, on his own account, was severely injured and bleeding from the head and face thus manifesting callousness and utter insensitivity to the plight of the deceased. He gratuitously violated the deceased's rights to privacy and physical integrity. The skin on the deceased's back was virtually removed and he must have suffered agonising pain. When the deceased was found by the police he was virtually in a naked state, severely battered and bruised. Unfazed by the presence of the police the appellant used derogatory terms in referring to the deceased. He showed utter contempt for the dignity of the deceased by deliberately spilling liquor on him and placing his foot on his head. Thus there can be no doubt that the deceased's rights were gratuitously violated in many respects in a most callous, demeaning and dehumanising manner.

[37] Accordingly such conduct warrants recognition in the determination of an appropriate sentence to reflect the natural indignation that the community would feel at conduct of that kind. This is all the more so if one has regard to the fact that there are also utterances attributed to the appellant of and concerning the deceased which, on the face thereof, had racial overtones. Given our painful past such utterances are inimical to the ethos of our Constitution and the attitude evinced against the deceased aggravated the assault. It also bears mention that our Constitution firmly sets its face against all forms of violence and seeks to create a society in which a culture of respect for human rights is inculcated.

[38] Having regard to all the aforegoing factors and the submissions of counsel, to which I have given anxious consideration, I have no doubt that a sentence of imprisonment is called for. That leaves the question whether the appellant is a suitable

candidate for correctional supervision. Rather than pre-empt that issue by exercising our powers under s 276(1)(*i*) of the Act I think it preferable to leave it in the hands of the officials of the Department of Correctional Services who will be better situated to determine the relevant facts and assess the suitability of the appellant for such a sentence. If appropriate an application can then be made in terms of s 276A(3) of the Act for the conversion of his sentence into one of correctional supervision.

Order

[39] In the result the following order is made:

The appeal is upheld and the order of the court below dismissing the appeal is set aside and replaced with the following:

'1 The appeal is upheld.

2 The appellant's conviction for murder is set aside and replaced by a conviction for assault with intent to commit grievous bodily harm.

3 The appellant's sentence is set aside and replaced by a sentence of four years' imprisonment.'

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X M Petse

Acting Judge of Appeal

APPEARANCES

| | |
|---|---|
| For the Appellant: | B Roux SC |
| Instructed by: | Couzyn Hertzog & Horak, Pretoria |
| | Spangenberg, Zietsman & Bloem, Bloemfontein |
| For the Respondent: | P du Plessis (Ms) |
| Instructed by: | Director of Public Prosecutions, Pretoria |
| | Director of Public Prosecutions, Bloemfontein |