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

**JUDGMENT**

REPORTABLE
Case No: 424/2012

In the matter between:

**JACOB HUMPHREYS** **APPELLANT**

**v**

**THE STATE** **RESPONDENT**

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| **Neutral citation:** | *Humphreys v The State* (424/12)[2013] ZASCA 20 (22 March 2013). |
| **Coram:** | Brand, Cachalia, Leach JJA and Erasmus and Van der Merwe AJJA |
| **Heard:** | **11 March 2013** |
| **Delivered:** | **22 March 2013** |

**Summary: Collision between train and minibus – 10 passengers in minibus died and 4 seriously injured – driver of minibus convicted in High Court of murder and attempted murder – on appeal defence of automatism considered but not upheld – held further that negligence had been established but not *dolus eventualis* – convictions of murder consequently replaced with culpable homicide and convictions of attempted murder set aside – effective sentence of 20 years' imprisonment reduced to 8 years.**

# ORDER

**On appeal from:** Western Cape High Court, Cape Town (Henney J sitting as court of first instance):

1. The appeals against the fourteen convictions and the sentences imposed by the trial court are upheld.
2. The ten convictions of murder are set aside and replaced with ten convictions of culpable homicide.
3. The four convictions of attempted murder are set aside.
4. The sentences imposed by the trial court are set aside and replaced with the following:

'Eight years' imprisonment which is ante-dated to 28 February 2012.'

# JUDGMENT

**BRAND JA (CACHALIA, LEACH JJA and ERASMUS and VAN DER MERWE AJJA**):

[1] The appellant, then in his late fifties, was charged in the Western Cape High Court, Cape Town before Henney J with ten counts of murder and four counts of attempted murder. All these charges arose from a single incident which occurred on 25 August 2010 when a minibus, driven by the appellant, was hit by a train on a railway crossing near Blackheath on the outskirts of Cape Town. There were fourteen children in the minibus, ranging in ages between seven and sixteen years. Ten of the children were fatally injured in the collision, which gave rise to the ten charges of murder. Four of them fortunately survived, but were seriously injured. They were cited as the complainants in the four charges of

attempted murder. At the end of the trial the appellant was convicted as charged on all fourteen counts and sentenced to an effective period of 20 years' imprisonment. The appeal against both the convictions and the sentences imposed is with the leave of this court.

[2] At the trial five witnesses were called on behalf of the State. Of these, four were eyewitnesses while the fifth was an engineer in the employ of Metrorail who gave evidence about the technical aspects regarding traffic control at the railway crossing where the accident occurred. Two of the four eyewitnesses were passengers in the minibus driven by the appellant. They were respectively seventeen and sixteen years old and in grades 9 and 10 at school. The third eyewitness was the driver of the train that collided with the appellant's minibus, while the fourth was waiting in his stationary car at the railway crossing immediately before the collision occurred. There were differences in detail between the state witnesses. The court a quo found these differences unsurprising in the circumstances and not so serious as to affect the credibility of any of them. I find no reason to interfere with that finding. The appellant gave evidence in his defence. The differences between his version, on the one hand, and the one presented by the state witnesses, on the other, are on peripheral matters only. This resulted mainly from the appellant's version that he had no recollection of what happened at the crucial time shortly before and at the time of the collision. In consequence, the background facts can mostly be recounted without reference to their evidential source.

[3] At the time of the most tragic incident that gave rise to this case, the appellant was 55 years of age. For most of his adult life he worked as a shunter for Transnet. After his retirement he was requested by parents in Eerste River, where he lived, to start a shuttle service for their children to schools in the Bellville area. He did so from about 2001. At the time of the collision he had therefore used the same route that traverses the railway crossing, where the accident occurred, for nearly ten years. His approach to the crossing took him along Frederick Street which runs parallel to the railway line, that is, roughly from north to south. It also took him along Buttskop Road, which runs from east to west and crosses the railway line. Frederick Street joins Buttskop Road on its

northern side to form a T-junction, not far from the railway crossing. So it happened that shortly before 7 am on 25 August 2010 the appellant was driving his minibus carrying fourteen school children on Frederick Street. As he approached the T-junction there was a line of stationary vehicles waiting to enter Buttskop Road. The two passengers who gave evidence testified that the appellant overtook these vehicles. The appellant, however, denied that he did so. The court a quo accepted the version of the two passengers and I can see no reason to interfere with that credibility finding on an issue which, in any event, appears to be of peripheral relevance only.

[4] When the appellant reached Buttskop Road, vehicles were again queuing to cross the railway line. Although the railway line was on the appellant's right side when he reached the T-junction, he therefore had to turn left and make a U-turn in Buttskop Road to join the queue. By all accounts, that is what the appellant did. According to the appellant's version he can remember stopping behind the last vehicle in the queue, but not what he did after that. What then happened, according to the eyewitnesses was that the appellant overtook the line of vehicles on their right-hand side and approached the crossing in the lane destined for oncoming traffic. The crossing is controlled by two booms in Buttskop Road, one for traffic from the east – as the appellant was approaching – and the other for traffic from the west. Because the booms are positioned on different sides of the railway line, they can be avoided, even when they are down, by going onto the lane intended for oncoming traffic and by then returning to the correct lane to pass the boom on the other side. On both sides of the railway line there are also large stop signs as well as other traffic signs indicating a railway crossing. In addition there are large red warning lights directed at traffic in Buttskop Road that start flashing when a train approaches the crossing and just before the booms come down.

[5] At the time when the appellant overtook the line of vehicles in Buttskop Road, Mr Stewart Pekeur was the driver of the car waiting in front of that queue. He testified that he had stopped because the red lights were flashing. At that stage, Pekeur said, the booms had not yet come down. According to Pekeur they did, however, come down before the minibus came past him. Because the

appellant was already in the lane intended for oncoming traffic, he could enter the crossing without any hindrance from the boom on the eastern side, which is what he then did. In sum, Pekeur's version that the minibus entered the crossing in the face of flashing warning lights and by dodging the barrier created by the boom, was confirmed by the two passengers and the train driver. It is common cause that, upon entering the crossing the minibus was hit on its left side by the train which, according to the train driver, had no chance to avoid the collision. From an inspection in loco the court a quo determined that, from the time that the red warning lights start flashing, it takes a few seconds for the boom to come down. Thereafter, it takes about one minute for the train to reach the crossing.

[6] According to the appellant he was also seriously injured in the accident and was admitted to hospital for five days. He further maintained that he remembered absolutely nothing, from the time that he stopped behind the last vehicle in the queue in Buttskop Road, until he regained consciousness after the accident. Both passengers testified that the appellant had successfully executed the same manoeuvre that led to the accident on the fateful day on two previous occasions. According to the one witness, he had entered the railway crossing on those occasions after the booms had already come down while the other witness recalled that on those occasions the red lights were already flashing, but the booms had not yet come down. The appellant emphatically denied that this ever had happened. The court a quo, however, preferred the version of the state witnesses and, in my view, rightly so.

[7] On these facts the appellant's contention, in the main, was that the State had failed to prove the element of murder described as *dolus* or intent. His submissions in support of this contention were encapsulated in his heads of argument:

'When the appellant made the U-turn [in Buttskop Road] he must have realised that the level crossing danger lights were activated and that the booms were closing. If the actions of the appellant were conscious and deliberate he would have realised the dangers involved, as he was a railway worker. Therefore it is submitted that it is highly improbable that his actions were conscious and deliberate. It was a suicidal movement

which, it is submitted, no reasonable person would have made if he was conscious of his actions.'

[8] This submission, I think, demonstrates confused reasoning. If the appellant was indeed not conscious of his actions, the defence available to him would be that he did not act voluntarily. Since it is a trite principle of our law that a voluntary act is an essential element of criminal responsibility, the appellant would indeed be entitled to an acquittal if his actions were attributable to mechanical behaviour or muscular movements of which he was unaware and over which he had no control. Since this type of involuntary behaviour is more reminiscent of the activities of an automaton rather than a human being, the defence has become known as one of 'automatism' (see eg C R Snyman *Criminal Law* 5 ed (2008) at 55 and the cases there cited).

[9] When the defence of automatism is raised, the onus is on the State to establish the element of voluntariness beyond reasonable doubt (see eg *S v Potgieter* 1994 (1) SACR 61 (A) at 72j-73g; *S v Cunningham* 1996 (1) SACR 631 (A) at 635i). However, as was pointed out in *Cunningham*, the State is assisted (in discharging this onus) by the inference dictated by common experience that a sane person who becomes involved in conduct which attracts the attention of the criminal law ordinarily does so consciously and voluntarily. In order to disturb this natural inference, an accused person who seeks to rely on the defence of automatism is thus required to establish a factual foundation, sufficient at least to raise reasonable doubt as to the voluntary nature of the alleged criminal conduct.

[10] By its very nature, only the accused person can give direct evidence as to his or her level of consciousness at the relevant time. However, if the mere say-so of the accused person that the act was unconsciously committed were to be accepted without circumspection, it would tend to bring the criminal justice system into disrepute. After all, an accused person who has no other defence is likely to resort to this one in a last attempt to escape the consequences of his or her criminal behaviour. Hence it has been emphasized in earlier cases that the defence of automatism must be carefully scrutinised (see eg *S v Potgieter supra* at 73c). Generally speaking, expert medical evidence will be required (see eg *S v Cunningham supra* at 636A-B). But absent such evidence, the court will require

some indication of an emotional stimulus that could serve as a trigger mechanism for the unusual condition of sudden absence of cognitive control. Such trigger has been found in circumstances giving rise to stress, provocation, frustration, fatigue and so forth (see eg *S v Potgieter supra* at 74a; *S v Henry* 1999 (1) SACR 13 (SCA) at 21b-g; *S v Eadie* 2002 (1) SACR 663 (SCA) para 16). Another consideration that comes into play is that subconscious repression of an unacceptable memory, described as amnesia, does not mean that the accused person acted involuntarily and the defence of automatism is thus not available in these circumstances (see eg *S v Henry supra* at 20g-i).

[11] Appraised against these criteria, I think the court a quo was right in finding that the appellant did not even come close to establishing a factual basis for any doubt about the voluntariness of his conduct. No expert medical evidence was tendered on his behalf. On the appellant's own evidence there is a glaring absence of any suggestion as to what could have triggered the rare condition of sudden unconsciousness. On the contrary, the appellant disavowed any intimation that he was under stress, or that he was fatigued, angry or emotionally upset in any way. Moreover, there is evidence that the appellant had executed the same movement of entering the railway crossing despite clear warning of an approaching train in the past. In view of this evidence, I believe it can be inferred safely that the appellant knew exactly what he was doing when he tried to perform the same exercise on the fateful occasion. The only difference is that on this occasion he was unsuccessful in doing so. At best for the appellant it could be inferred that he was suffering from retrograde amnesia, which is no defence in itself. Consequently, it is not necessary to decide whether or not the appellant was truthful in pleading total inability to recall the most crucial details of the tragic event. Suffice it to say that his defence of automatism cannot be sustained.

[12] Nonetheless and despite the confused reasoning demonstrated by the appellant's argument, the fact remains that a voluntary act and *dolus* are two discreet 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? In arriving at the conclusion that he did, the court accepted, rightly in my view, that the appellant had no desire to bring about the death of his passengers. Consequently it found that the appellant did not have *dolus directus* or direct intent. What the court did find was that he had intent in the form of *dolus eventualis* or legal intent. In accordance with trite principles, the test for *dolus eventualis* form is twofold: (a) did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and (b) did he reconcile himself with that possibility (see eg *S v De Oliveira* 1993 (2) SACR 59 (A) at 65i-j). Sometimes the element in (b) is described as 'recklessness' as to whether or not the subjectively foreseen possibility ensues (see eg *S v Sigwahla* 1967 (4) SA 566 (A) at 570). I shall return to this alternative terminology, which sometimes gives rise to confusion.

[13] 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. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.

[14] 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. Equally obvious, I think, would be the recognition on the part of every person that the heedless disregard of clear warning signals of an approaching train, together with the deliberate avoidance of a boom specifically aimed at preventing traffic to enter a railway crossing by reason of the approaching train, may result in a collision with that train. After all, every such person would appreciate that the very purpose of all these preventative measures was aimed at avoiding the possibility of a collision between a motor vehicle and a train, precisely because the consequences of the collision may be so horrific. What follows as a matter of course, I think, is the foresight on the part of every right minded person that disregarding these preventative measures creates the possibility that the foreseeable consequences may actually occur. 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.

[15] 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, eg 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". . . . Our cases often speak of the agent being "reckless" of that

consequence, but in this context it means consenting, reconciling or taking into the bargain . . . and not the "recklessness" of the Anglo American systems nor an aggravated degree of negligence. It is the particular, subjective, volitional mental state in regard to the foreseen possibility which characterises *dolus eventualis* and which is absent in *luxuria*.'

[16] The question is, therefore, whether it had been established that the appellant reconciled himself with the consequences of his conduct which he subjectively foresaw. The court a quo held that he did. But I have difficulty with this finding. It seems to me that the court a quo had been influenced by the confusion in terminology against which Jansen JA sounded a note of caution in *Ngubane*. That much appears from the way in which the court formulated its finding on this aspect, namely – freely translated from Afrikaans – that the appellant, 'appreciating the possibility of the consequences nonetheless proceeded with his conduct, reckless as to these consequences'.

[17] Once the second element of *dolus eventualis* is misunderstood as the equivalent of recklessness in the sense of aggravated negligence, a finding that this element had been established on the facts of this case, seems inevitable. By all accounts the appellant was clearly reckless in the extreme. But, as Jansen JA explained, this is not what the second element entails. The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.

[18] On the facts of this case I believe that the latter inference is not only a reasonable one, but indeed the most probable one. I say this for two reasons: First, I believe common sense dictates that if the appellant foresaw the possibility of fatal injury to one or more of his passengers – as I found he did – he must by the same token have foreseen fatal injury to himself. An inference that the appellant took the death of his passengers into the bargain when he proceeded

with his action would unavoidably require the further necessary inference that the appellant also took his own death into the bargain. Put differently, the appellant must have been indifferent as to whether he would live or die. But there is no indication on the evidence that the appellant valued his own life any less than the average person or that it was immaterial to him whether or not he would lose his life. In consequence I do not think it can be said that the appellant had reconciled himself with the possibility of his own death. What must follow from this is that he had not reconciled himself with the occurrence of the collision or the death of his passengers either. In short, he foresaw the possibility of the collision, but he thought it would not happen; he took a risk which he thought would not materialise.

[19] My second reason for concluding that the appellant did not reconcile himself with the consequences rests on the evidence that the appellant had successfully performed the same manoeuvre in virtually the same circumstances previously. Moreover, as a matter of pure mathematical calculation, a collision with the train could plainly be avoided even if the crossing was entered after the boom came down. It will be remembered that from the inspection *in loco* the court a quo established that the boom came down about one minute before the arrival of the train. It would therefore obviously take substantially less than a minute to cross the railway lines. So, the fact that the manoeuvre which the appellant tried to execute was practically possible and that it had in fact been successfully executed by him previously, leads me to the inference that, as a matter of probability, the appellant thought he could do so again. Differently stated, the fact that the appellant had previously been successful in performing this manoeuvre probably led him to the misplaced sense of confidence that he could safely repeat the same exercise. Self-evidently the fact that his confidence was misplaced does not detract from the absence of reconciliation with the consequences he subjectively foresaw. It follows that in my view the court a quo's finding of *dolus eventualis* was not justified.

[20] I think it goes without saying that the appellant was negligent. It simply cannot be suggested that any reasonable driver would behave as the appellant did on that fateful day. In short, the appellant was negligent and flagrantly so.

This means, however, that absent a finding of intent in any form, the convictions of murder must be set aside and replaced with convictions on the alternative charges of culpable homicide that were brought against the appellant. What is more, because (a) intent or *dolus* is required for conviction on a charge of an attempt to commit a crime and (b) as a matter of logic no-one can intend to be negligent, our law knows no such crime as attempted culpable homicide (see eg *S v Ntanzi* 1981 (4) SA 477 (N) at 481G-482F; Snyman op cit 453). The four convictions of attempted murder therefore also fall to be set aside.

[21] The appellant's final argument in support of his appeal against the convictions was that, because the deaths of the ten deceased persons resulted from one act or sequence of actions, he cannot be convicted on ten counts of culpable homicide, but on one count only. The proposition thus raised had been considered and found wanting by this court in *S v Naidoo* 2003 (1) SACR 347 (SCA). As I see it, the crux of that decision is encapsulated by the following statement (para 36):

'Just as in the case of murder it is immaterial whether multiple killings were the result of one act (such as throwing a grenade) and as many counts of murder as the number of people who have been killed may be preferred, so too in the case of culpable homicide where multiple deaths have been caused is it immaterial that they were caused by a single negligent act or omission, provided only that multiple deaths were a reasonably foreseeable consequence.'

[22] This brings me to the question of an appropriate sentence, which I must confess I find the most difficult. Since we have set aside the convictions of murder and attempted murder by the trial court and substituted convictions of culpable homicide in their place we are bound to consider the sentence anew. The general approach to sentence in matters of this kind was formulated with admirable clarity by Corbett JA in *S v Nxumalo* 1982 (3) SA 856 (A) at 861G when he said:

'It seems to me that in determining an appropriate sentence in such cases [ie cases of culpable homicide arising from traffic accidents] the basic criterion to which the Court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness

would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded. . . .'.

[23] Adopting this approach, it appears to me that the appellant's behaviour represented the most reprehensible degree of negligence. It amounted to a blatant deviation from what could be expected from the reasonable driver and a flagrant disregard for the safety of others. To overtake a queue of other vehicles waiting at large flashing red warning lights and then to ignore the final safety measures by entering a railway crossing after the boom came down, as the appellant did, constituted irresponsible conduct of the worst kind. I believe this description of the appellant's conduct would be fair even if there had been no passengers in his vehicle.

[24] But the position is made infinitely worse by the fact that there were fourteen children in his vehicle. The parents of these children entrusted their safety and their very lives to the appellant. The court a quo inferred that these parents were obviously not in a financial position to take their children to school every day. I have no reason to doubt the correctness of this inference. They were therefore compelled to place the safety and the lives of their children in the hands of the appellant, without the ability to retain any residual control over his conduct. The sentence we impose must reflect this Court's condemnation of the appellant's abuse of that trust. Moreover, the sentence should reflect our recognition of the acute loss of these invaluable young lives and our identification with the mental anguish and pain endured by their parents and loved ones as a result of that loss.

[25] At the same time, a balanced sentence requires insight into the personal circumstances of the appellant. What emerges when the focus of the spotlight shifts in that direction is that the appellant grew up as one of nine children in a very poor community. After he finished standard six (now grade eight) his parents did not have the financial means to send him to secondary school. Through adult education and by attending night school he managed to complete standard eight (grade ten). He then started working on the railways where he spent nearly 26

years of his life and eventually retired as a shunter foreman. After retirement he supplemented his pension by transporting school children and by conducting a tuck-shop from his home. The appellant has no previous convictions. He and his wife have been married for more than 30 years. During their marriage they have raised six children – five of their own and one adopted. The members of his community show him a great deal of respect and he is described by members of that community as a person supportive of others, both morally and spiritually. The appellant appears to have spent most of his life savings on legal fees arising from this case, and to have sacrificed the well-earned rewards of a responsible lifetime through one moment of extreme irresponsibility.

[26] When it comes to the interest of society it appears that there has been an understandable public outcry about the appellant's highly irresponsible conduct and its horrific consequences. With regard to this, I do not disagree with the view that the determination of an appropriate sentence should be guided by the public interest and not by public poll. Yet, a court that entirely ignores the public outrage that occurred in this case, does so at the peril of losing public confidence in the whole judicial system, which confidence ultimately constitutes the basis of the rule of law.

[27] Since the ten counts of culpable homicide all flow from the same sequence of actions I regard it as appropriate that they should be taken together for purpose of sentencing. Having considered all relevant factors, I believe that a proper sentence would be eight years' imprisonment. Moreover, it appears that the appellant has been in custody since the trial court imposed sentence on him on 28 February 2012. Hence I propose to order, in terms of s 282 of the Criminal Procedure Act 51 of 1977, that the sentence of eight years' imprisonment be ante-dated to that date.

[28] In the result it is ordered:

1. The appeals against the fourteen convictions and the sentences imposed by the trial court are upheld.
2. The ten convictions of murder are set aside and replaced with ten convictions of culpable homicide.

3. The four convictions of attempted murder are set aside.

4. The sentences imposed by the trial court are set aside and replaced with the following:

‘Eight years’ imprisonment which is ante-dated to 28 February 2012.’

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F D J BRAND
JUDGE OF APPEAL

**APPEARANCES:**

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