THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case number : 197/07

In the matter between :

ALEXANDER GEORGE WHITEHEAD	**FIRST APPELLANT**
AREND CHRISTIAAN DE WAAL	**SECOND APPELLANT**
GEHARDUS JOHANNES TALJAARD	**THIRD APPELLANT**
WILLEM JACOBUS PETRUS JACOBS	**FOURTH APPELLANT**
HANS JACOB WESSELS	**FIFTH APPELLANT**
RYNO ADRIAAN ROSSOUW	**SIXTH APPELLANT**
RYAN ALBUTT	**SEVENTH APPELLANT**

and

THE STATE	**RESPONDENT**

CORAM : FARLAM, NAVSA, VAN HEERDEN, MLAMBO et COMBRINCK JJA
DATE : 1 NOVEMBER 2007
DELIVERED : 30 NOVEMBER 2007

Summary: Criminal Law and Procedure – common purpose in the context of culpable homicide and public violence – whether duplication of convictions – sentence of 8 years confirmed – order contained in para 49.

Neutral citation: This judgment may be referred to as *Whitehead v The State* [2007] SCA 171 (RSA)

COMBRINCK JA/

COMBRINCK JA:

[1] On 15 August 1995, the Municipal and Regional Services Council workers of Kuruman went on strike and on 30 and 31 of that month they decided to demonstrate to highlight their grievances. To this end they marched through the streets of Kuruman, chanting and waving placards. In the course of the march they emptied rubbish bins and threw the trash in the streets. The following day they again staged a march through the town. Their numbers were estimated variously to be between 60 and 200. They again started trashing the streets but after the arrest of five of their numbers they desisted and the demonstration continued peacefully. They halted at the taxi rank which is in the middle of the town and sat down on a grassy area where they were addressed by their leader. The next moment a posse of white men armed with pickhandles and sjamboks came running down the street and without warning set upon the seated workers and beat them indiscriminately with their weapons. The workers fled in all directions pursued by their attackers. They, (the attackers), then proceeded to smash cars belonging to blacks and attack other black people who had nothing to do with the striking workers. After the attack at least nine people remained lying on the grass with various injuries. Mr Gaoretelwe Adam Brown, ('the deceased'), a municipal worker, was found next to a fence close to the grass area unconscious with a wound to his head. He was taken to hospital where he subsequently died. The cause of death was an injury to the head caused by a blunt instrument.

[2] The seven appellants and one other, Louis George Rademeyer, were as a consequence of these events charged in the regional court with public violence (count 1), culpable homicide (count 2), assault with intent to do grievous bodily harm (count 3) and malicious damage to property (count 4). They were convicted on counts 1 and 2 and the seventh appellant was in addition convicted of assault with intent to do grievous bodily harm. The other appellants were acquitted on count 3 and all the appellants on count 4 on the basis that these offences formed part of the offence of public violence and it would lead to a multiplicity of convictions (previously known as splitting of charges) if they were to be found guilty on these charges. The assault of which the seventh appellant was

convicted related to events which took place later in the day and were unconnected with the main assault on the striking workers. The appellants were sentenced on counts 1 and 2 to five years on each, of which two years of the total was suspended. Thus an effective eight years imprisonment. The seventh appellant was sentenced to an additional two years for the separate assault.

[3] The appellants appealed unsuccessfully to the High Court, Kimberley, against the convictions and sentences. Rademeyer absconded and is a fugitive from justice. Leave to appeal to this court was refused by the High Court but on application this court granted the appellants:

'2. Leave to appeal against their convictions and sentences on the count of culpable homicide; and against their sentences on the count of public violence. The seventh applicant was granted leave to appeal against the sentence imposed on the count of assault with intent to do grievous bodily harm.'

Leave to appeal against the conviction of public violence was not sought. In issue before us is therefore (i) the propriety of the conviction of culpable homicide; (ii) the sentence in respect of that count; (iii) the correctness of the sentence on the count of public violence and (iv) the sentence imposed on the seventh appellant in respect of the count of assault with intent to do grievous bodily harm.

[4] I deal first with the question whether culpable homicide was proved. There was only one eyewitness to the actual assault on the deceased and that was Mr Westley Mabilo. He was not one of the demonstrators but was in the vicinity when they came marching down the street. He, out of curiosity, joined them on the grassy area to hear what the speaker had to say. He witnessed the group of white men clad in khaki arriving with pickhandles and sjamboks approaching the seated workers and indiscriminately assaulting them. He and others fled in the direction of the station. He ran up against a wire fence where he fell and was trampled underfoot by the fleeing demonstrators. People fell on top of him and when he managed to extricate himself, he noticed a person lying nearby. This person had previously been lying on top of him. It is common cause that this was the deceased. He then witnessed a man with what he described as a 'kierie' with a snake painted on it striking the deceased on the head causing an open wound. This man he said was part of the group of white men who had launched the

attack at the grassy area. He also observed a uniformed policeman striking the deceased on the back with a rifle. Subsequently he assisted others in placing the deceased, who was unconscious, in a private vehicle which then conveyed him to hospital. The evidence of this witness was uncontroverted, the appellants having chosen not to testify. The defence did not seek to impugn his testimony.

[5] Counsel for appellants argued that the trial court and the court *a quo* had ignored this evidence. The evidence demonstrates, so it was submitted, that the policeman may have caused the death of the deceased, that he had acted independently, alternatively, he and the man with the stick with the snake on had acted independently of the appellants. There was therefore no causal connection between the deeds of the appellants and the death of the deceased. The State, so it was argued, had failed to prove any negligence on the part of the appellants in that a reasonable man in their position would not have foreseen that an unknown person and a policeman would assault and kill the deceased. With reliance on *S v Thenkwa* 1970 (3) SA 529 (A) counsel submitted that the doctrine of common purpose cannot be applied in cases of culpable homicide. In the alternative, in so far as the doctrine has been found to be applicable in cases involving culpable homicide, it was argued that if one had regard to the evidence relating to the part each appellant played in the general assault, it cannot be found that the requirement for culpability on the basis of common purpose as laid down in *S v Mgedezi* 1989 (1) SA 687 (A) had been proved by the State.

[6] The fundamental difficulty which the appellants face is that they chose not to appeal against the conviction of public violence. The basis of the conviction of that crime was that the appellants had acted in concert and in furtherance of a common purpose when they set upon the workers, assaulted them and inflicted damage to the motor vehicles. The appellants have in effect accepted this finding. They now strive to persuade us that, on the facts, the assault upon the deceased was an isolated incident, unconnected to the general assault, and committed by persons outside the group for whose actions they cannot be held responsible. This argument is not supported by the evidence. The witness, Mabilo, made it clear that the man with the stick was part of the attacking group. It was he who struck the deceased on the head more than once. He only saw the

policeman strike the deceased once on his back. It is furthermore clear from his evidence that the attack on the deceased was not separated in time from the general attack. It was on the evidence part and parcel of the attack and pursuit of the workers, carried out by a member of the attacking group.

[7] The reliance on *S v Thenkwa (supra)* for the proposition that the doctrine of common purpose is not applicable to culpable homicide is misplaced. In that case the very basis for finding that the two accused were guilty of culpable homicide was that they had acted in concert. What the court said must be guarded against, is convicting a person of murder or culpable homicide merely because he took part in, or associated himself with an assault on the victim. It must be proved that each participant in the assault had the required *mens rea*. Botha JA at p 534G spelt it out thus:

'Die skuld van elkeen moet volgens sy eie handeling en sy eie gesindheid bepaal word. Waar meerdere persone van strafbare manslag aangekla word, is blote deelname aan die onwettige daad wat die dood veroorsaak het, dus onvoldoende om al die deelnemers vir die doodslag strafregtelik aanspreeklik te hou. Dit kan alleen voldoende wees indien daar by die deelnemers ook skuld was met betrekking tot die doodslag self. Aan die skuldvereiste vir strafbare manslag word voldoen indien 'n redelike persoon in die plek van die deelnemer aan die onwettige daad, wat die dood veroorsaak het, sou besef het dat 'n ernstige besering in die uitvoering van die daad veroorsaak sou kon word, en dat hy sou voorsien het dat die besering moontlik lewensgevaarlik sou kon wees.'

This is precisely what the trial court found when determining fault on the part of each appellant. The magistrate said the following:

'Gesien in die lig van die gevaarlike aard van die wapens wat gebruik was, moes ieder en elke een die redelike moontlikheid voorsien het dat die strekking van hulle gesamentlike opset die dood van die oorledene tot gevolg kan hê.'

This court has confirmed that the doctrine of common purpose is applicable to culpable homicide. See *S v Nkwenja* 1985 (2) SA 560 (A) at 573B; *Magmoed v Janse van Rensburg* 1993 (1) SACR 67 (A) at 78b-d. The following passage from the former judgment (at 573B-D) also disposes of the argument that no causal connection between the individual acts of the appellants and the death of the deceased was proved:

‘Strafbare manslag is die wederregtelike, nalatige doodslag van 'n ander en behels in die algemeen die vereiste van 'n kousale verband tussen 'n handeling van die beskuldigde en die dood. In die onderhawige geval is dit onseker watter appellant die dodelike geweld toegepas het en sou dit moeilik wees om spesifiek aan die een of die ander van die appellante 'n handeling toe te skryf wat *conditio sine qua non* van die dood was. Maar in ons praktyk word in gevalle soos die onderhawige, waar daar voorafbeplanning was en dan deelneming aan verwesenliking van die gesamentlike oogmerk, nie altyd streng aan die vereiste van kousaliteit (*sine qua non*) gekleef ten einde die een deelnemer strafregtelik aanspreeklik te stel vir 'n gevolg van die handeling van 'n ander deelnemer nie. Sonder om die juiste grondslag van hierdie aanspreeklikheid uit te stip wil dit my voorkom dat albei appellante wel aan strafbare manslag skuldig is (vgl die benadering in *S v Ngobozi* 1972 (3) SA 476 (A) op 478C - F).’

[8] Apart from the fact as mentioned earlier, that the appellants have in effect conceded that they acted in concert by not attacking the conviction of public violence, the submission that the acts of each appellant must be measured against the criteria laid down in *Mgedezi*’s case is without merit. As argued by counsel for the State, this is not a ‘joining in’ type of case. Here the evidence makes it abundantly clear that the group of which appellants were part had planned the attack in advance and their participation in the attack was the execution of the prior conspiracy. The group, according to the undisputed evidence, assembled at an obviously predetermined spot near the town library. They were addressed by a person who in all probability was the leader. A bakkie arrived carrying pickhandles which were handed out to the group. They then set off followed by an ambulance which must have been arranged in advance. They attacked their target immediately without the slightest provocation or warning. They were not deterred by a considerable police presence. Tear-gas was used and at least one of the group had a two-way radio over which an order later came to the effect that the group had to withdraw. All conclusive proof of a pre-planned attack. The State proved that each appellant was present as part of the group and some were seen assaulting the demonstrators and others performing acts consistent with an association with and furtherance of a common purpose. Both the trial court and the court *a quo* meticulously analysed the evidence relating to each appellant. The findings were not attacked by the appellants. Appellants’ counsel contended that on the evidence none of the appellants struck the demonstrators on the head. All blows were aimed at the body. From this he said

can be inferred that the members of the group consciously avoided any life-threatening blows. A reasonable man in their position, so the submission continued, would not have foreseen that one of their members would strike a worker on the head. There is no substance in this argument. A number of witnesses testified to either receiving blows to the head or seeing others being struck on the head. One, Mr Joseph Kipoledi, was rendered unconscious by a blow to the head and had to be treated at hospital. Major Scholtz, the senior policeman on the scene, testified to the fact that nine people were left lying on the grass after the attack and he saw blood on their heads and faces. The magistrate in his judgment on sentence recorded that 22 people were injured.

[9] In summary, therefore, I conclude that the regional magistrate correctly found that the appellants were guilty of culpable homicide and that the attack on the judgment is without merit.

[10] During the course of argument counsel were requested to address us on the question of a possible duplication of convictions. On the suggestion of the presiding judge counsel filed additional heads of argument. Defence counsel contends that, because of the manner in which the appellants were charged, there has indeed been a duplication of convictions. Counsel for the State argued to the contrary. As stated at the commencement of the judgment, count 1 was that the appellants were guilty of public violence, count 2, that they were guilty of culpable homicide. Count 1, (freely translated from the Afrikaans), reads in summary as follows:

'That the accused are guilty of public violence in that they on 31 August 1995 at Kuruman . . . unlawfully and with common intent to disturb the public peace by violent means and to infringe the rights of other persons, committed acts which assumed serious dimensions in that they:

(a) armed with pickhandles, sticks and sjamboks instilled fear in another group that they would be subject to violence in order to disperse;

(b) assaulted the said other group with intent to cause grievous bodily harm;

(c) unlawfully and negligently killed Garoetelwe Adam Brown by hitting him with pickhandles, sticks, sjamboks and other objects;

(d) maliciously damaged motor vehicles, the property of . . . (three named persons).'

Count 2 reads:

'The accused are guilty of culpable homicide in that on 31 August 1995 at Kuruman . . . they wrongfully and negligently killed Garoetelwe Adam Brown.'

The only difference in the wording of that part of count 1 relating to culpable homicide with that in count 2 is the description of how death was caused. In essence the allegations are identical. Counsel for the appellants contends that this is a textbook case of duplication of charges which has led to a duplication of convictions. I consider that there is merit in this argument. No doubt, in order to emphasise that this was an aggravated case of public violence, the State included as part of what it intended proving against the appellants, the fact that a human life had been taken. In proving that part of count 1 (as it successfully did) the State on the same facts proved count 2. Put differently, proof of culpable homicide as part of the offence of public violence of necessity proved the allegations in count 2. Nowhere in his judgment does the magistrate indicate that in convicting the appellants on the main count he did not take into account or have regard to the evidence relating to the wrongful killing of the deceased. One passage in his judgment, when dealing with count 1, demonstrates that he did have regard to the fact that the deceased had been killed. He said:

'Die getuienis toon aan dat slegs die swart mense beseer en een selfs gedood is en geeneen van die wit groep is beseer nie, derhalwe is dit duidelik dat die swart groep hulle nie verweer het, selfs met die wapens tot hulle beskikking nie.'

He concluded his judgment with a finding of guilty on counts 1 and 2, thereby indicating that they were convicted as charged. It is relevant to note that in terms of s 259 of the Criminal Procedure Act, 51 of 1977, public violence is a competent verdict on a charge of culpable homicide. Notionally, if in the present case the State was unable on count 2 to prove the cause of death, appellants could have been convicted of public violence. But then they would have been found guilty of public violence on count 1 too. It can never be suggested that this would be justified. In two early reported decisions it was held in analogous circumstances that it is improper to convict an accused of two offences. I refer in this regard to *R v Golisili* 1927 EDL 115 and *R v Ntsukumbini* 1929 EDL 218. In

both cases the accused was charged with 'fighting' (also known as 'faction fighting') in contravention of a proclamation and culpable homicide – two separate counts. It was held to be improper to convict accused on both counts where the evidence was that the unlawful killing took place in the course of the 'fighting'. In his heads of argument counsel for the State does not answer the assertion that there is a duplication of charges in the charge sheet. He maintains that in terms of s 83 of the Criminal Procedure Act the State may put as many charges in a charge sheet as could be proved by the facts. This is undoubtedly so, but it does not follow that the court is entitled to convict on duplicated charges (see *R v Golisili* and *R v Ntsukumbini* supra). State is entitled to duplicate charges. The remainder of the State's argument deals with the tests adopted by courts over the years in relation to the issue of multiplicity of convictions. As pointed out earlier, where on the charge sheet there is a duplication, the tests referred to are irrelevant. It is so, as contended by counsel for the State, that this issue was not raised by the defence in the regional court, the court *a quo* and for that matter in this court until counsel's attention was drawn to it. Nevertheless it is a fundamental principle of our law that an accused should not be convicted and sentenced in respect of two crimes when he or she has committed only one offence. It forms part of the right to a fair trial which is enshrined in the Constitution. In my view, therefore, the appellants should not have been convicted on count 2. The magistrate should have dealt with this count in the same manner as he dealt with counts 3 and 4. I would therefore allow the appeal against conviction and sentence in respect of count 2.

[11] I turn now to deal with the issue of sentence. It is not clear from the magistrate's judgment whether, when determining an appropriate sentence in respect of the public violence count, he took into account the fact of the negligent killing of the deceased. The indications are that he did not as he imposed the same period of imprisonment in respect of both counts 1 and 2. Whether one sentences the appellants on the basis that they are guilty of public violence excluding the culpable homicide and guilty of a separate count of culpable homicide or whether one sentences them on the basis of a conviction of public violence including the culpable homicide, (with no additional count of culpable homicide), the sentence should be the same. Having set aside the sentence on

count 2, I would, after due notice of the intention to do so, and subject to what may be advanced by the parties, consider increasing the sentence on count 1 to the effective eight years imposed by the magistrate.

[12] Counsel was unable to point out any misdirection on the part of the magistrate in his judgment on sentence. He was constrained to limit his submission to one that the sentences cumulatively were shockingly inappropriate regard being had to the circumstances. The magistrate gave a very comprehensive judgment on sentence in which he recorded all the factors he had taken into account in considering what an appropriate sentence should be. He recorded and gave due weight to the personal circumstances of the appellants. He took into account the inordinate length of time it took to commence and conclude the trial and the effect it must have had on the appellants' lives. He had regard to the seriousness of the offences and the circumstances under which they had been committed. Lastly he discussed and gave due weight to the interests of the community. It was a fair and balanced judgment which cannot be faulted. The sentences were not startlingly inappropriate, nor do they induce a sense of shock. The appellants and their cohorts brazenly, in broad daylight, in the face of a substantial police presence, set upon a group of peaceful workers and severely assaulted them with lethal weapons. They indiscriminately smashed cars of innocent bystanders and pursued and assaulted other black persons who had nothing to do with the striking workers. Amongst those assaulted were women and elderly persons. It was demeaning and humiliating to them in the extreme. A substantial jail sentence was, in my view, warranted particularly where as a consequence of their actions a life was lost. The additional two years imprisonment imposed on appellant 7 was also justified. The assault of which he was convicted took place at two o'clock in the afternoon of the day in question, long after the main attack had taken place. According to the state witnesses an unknown black man came into a local doctor's waiting-room and hid behind the door. Five to six white men, one of whom was appellant 7, entered, struck the man repeatedly with pickhandles and sticks to such an extent that extensive bleeding from his head was observed. A tear-gas canister was activated and the witnesses fled. When they returned the attackers and the unknown black man had disappeared. The brutal assault on an unarmed man, outnumbered six to

one, by men armed with lethal weapons is deserving of an additional period of direct imprisonment.

[13] I would therefore have:

(a) allowed the appeal of all the appellants against their conviction and sentence on count 2 and set them aside;

(b) dismissed the appeal on sentence in respect of count 1 and appellant 7's appeal against his sentence on count 3;

(c) considered increasing the sentence on count 1 in respect of all appellants to an effective 8 years imprisonment.

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P C COMBRINCK
JUDGE OF APPEAL

Concurs:

FARLAM JA

NAVSA *et* VAN HEERDEN JJA:

[14] We have had the benefit of reading the judgment of our colleague Combrinck JA. Whilst we agree with his conclusion that, on the facts, the regional magistrate correctly convicted the appellants of culpable homicide, we are constrained to disagree that a confirmation of a conviction on that charge would amount to a duplication of convictions.

[15] Before addressing that question we consider it necessary to place our perspective of the behaviour of the appellants and their cohorts on record. A white librarian, Ms Greyling, testified that shortly before the attack she witnessed a number of vehicles and white people gathering in an area which she was clearly able to see. One of their number addressed the assembled crowd. A bakkie arrived bearing a pile of new pick-axe handles which were then distributed. It is common cause that, apart from these pick-axe handles, others of the group bore sjamboks or kieries. A municipal ambulance accompanied this crowd as they set off in the direction of where the black workers had gathered. It is also common cause that at some stage during the attack either an iron rod or a kierie was seen lying on the seat of the ambulance and those black persons who had been injured had understandably been most reluctant to be transported by that ambulance to the hospital. The driver of the ambulance refused to allow at least one injured person entry to the ambulance; the perception of this person was that the driver formed part of the white crowd.

[16] An important aspect of the attack which we deem necessary to record is that the first victim of the attack was a nature conservation official who had arrived at the taxi rank near where the workers had gathered to drop his aunt off there. He was oblivious of the workers' strike and was totally unconnected to the protest action. The white crowd had, without any provocation, set upon his car as he reversed to leave the area. The car was damaged and he was physically threatened to such an extent that he felt in danger of his life. Without prompt police intervention he would, at the very least, certainly have been seriously injured.

[17] Other important details of the attack and its consequences are set out hereafter. Later that day, one black person was pursued by a small group of white assailants (including appellant seven) into a doctor's waiting rooms where he was set upon and severely assaulted.

[18] A group of attackers proceeded partly on foot and partly in bakkies to a parking area alongside a shopping centre and attacked people in the vicinity, wielding pick-axe handles and sjamboks.

[19] An attack was also unleashed on customers at a fast food outlet within a shopping complex. The attacks were indiscriminate, certainly not limited to members of the group of striking workers, and with women and elderly people also being victims.

[20] One man was attacked as he was attempting to close-up at his place of employment. He was severely beaten and a woman at his place of employment, who was attempting to leave the scene, was pulled out off her vehicle and set upon.

[21] It is common cause that the police had to intervene to prevent attackers in a bakkie from proceeding to the nearby black township.

[22] An additional important fact is that at least some members of the police appeared sympathetic to the attackers.

[23] Seen in proper perspective the attack was intended to put the workers, who had dared to go on strike, in their proper place. It was an unashamed racist attack perpetrated more than a year after the introduction of a constitutional order. It was arrogant in the extreme and incited terror amongst the black citizens of Kuruman.

[24] Cars of innocent passers-by were also attacked and damaged by the marauding white assailants.

[25] During the course of the attacks referred to above, Mr Garoetelwe Adam Brown (the deceased) was so severely injured that he subsequently died in hospital of blunt trauma to the head. Another tragic consequence of these events was the revenge attack on a white correctional services official in the nearby black township, who was burnt alive in his vehicle.

[26] Lest the incorrect impression be created, it is necessary to point out that the appellants in their heads of argument did not attempt to challenge the conviction of culpable homicide on the basis that it constituted a duplication of

convictions with the conviction on the public violence charge. Indeed, the following part of the notice of application for leave to appeal is to the contrary:

'[H]oewel dit afsonderlike skuldigbevindings regverdig het, moes die verhoorlandros die aanklagte saamgeneem het vir doeleindes van vonnis.'

[27] In respect of the charge of culpable homicide the State's case was that, in perpetrating excessively violent assaults with dangerous weapons on unarmed people, the white attackers ought reasonably to have foreseen that the death of one or more of the victims might result. The defence to this charge throughout the trial was that the death of the deceased was caused by people unconnected to the group of assailants and, in the alternative, that there was no reasonable foresight of death of any person. From a careful perusal of the record as a whole, it is in our view evident that neither the State nor the defence would have conducted the trial any differently had paragraph (c), as referred to earlier,[1] not been included in the public violence charge sheet.

[28] The appellants in their heads of argument and in their notice of appeal contended that no factual basis existed for the conviction on the charge of culpable homicide. Combrinck JA has effectively dispelled this contention.

[29] It is also necessary to record that during the hearing the question of the duplication of convictions was initially raised *mero motu* by members of the Bench. Counsel for the appellant was invited to respond and twice disavowed reliance on this point. The presiding judge then decided to invite the parties to submit further written argument on this aspect. This has been received.

[30] We turn to deal with the question of duplication of convictions. It is important to note that in the magistrates court and in the court below the parties were under no illusion that they were dealing with two separate charges even though the following paragraph was, as pointed out by Combrinck JA, included in the charge sheet dealing with public violence:

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[1] See para 17 above.

'That the accused are guilty of public violence in that they on 31 August 1995 at Kuruman . . . unlawfully and with common intent to disturb the public peace by violent means and to infringe the rights of other persons, committed acts which assumed serious dimensions in that they:

(a) . . .

(b) . . .

(c) unlawfully and negligently killed Garoetelwe Adam Brown by hitting him with pickaxe-handles, sticks, sjamboks and other objects; . . .'

[31] With respect, Combrinck JA appears to see the inclusion of this subparagraph as an end in itself. In proper perspective the reasoning appears to be as follows: since the State chose to include the unlawful and negligent killing of the deceased as one of the acts going to prove public violence it is bound by that choice and it necessarily follows that in convicting the appellants of both public violence and culpable homicide there is a duplication of convictions.

[32] It is necessary to consider first, the applicable section of the Criminal Procedure Act 51 of 1977 (the Act). Section 83 provides as follows:

'If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.'

[33] Du Toit et al *Commentary on the Criminal Procedure Act* (Service 38, 2007) at 14-5 summarises the effect of s 83 in the following manner:

'Section 83 authorizes the inclusion in the charge sheet of all the charges that could possibly be supported by the facts, even if they overlap to such an extent that convictions on all or on some of the counts would amount to a duplication of convictions . . . An accused may thus not object, at the beginning of the trial, to the charge sheet or indictment on the basis that it contains a duplication of charges. Such a duplication will occur where more than one charge is supported by the same culpable fact . . . In short, it is the court's duty to guard against a duplication of convictions and not the prosecutor's duty to refrain from the duplication of charges'.[2]

[2] See in this regard *S v Grobler en 'n Ander* 1966 (1) SA 507 (A) at 513E-H (per Rumpff JA) and at 522E-523E (per Wessels JA). See also *S v Gaseb and Others* 2001 (1) SACR 438 (NMS) at 441a-442b and 465f-466d. In the latter case the accused were charged with four counts of rape, the wording of all the charges being identical. Faced with an argument based on duplication of convictions, the Namibia Supreme Court upheld all the convictions, holding that each of the four

[34] The proper enquiry is whether in reality there has been a duplication of convictions. In order to address this issue it should be borne in mind that a single act may have numerous criminally relevant consequences and may give rise to numerous offences. Robbery for example may be committed by means of more than one act.

[35] There is no infallible formula to determine whether or not, in any particular case, there has been a duplication of convictions. The various tests that have been formulated by our courts (to which Combrinck JA refers) are not rules of law, nor are they exhaustive. They are simply useful practical guides and in the ultimate instance, if these tests fail to provide a satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness of the court. [3]

[36] It has always been accepted that a logical point of departure is to consider the definitions of those offences in regard to which a possible duplication might have taken place.[4]

[37] In the present case we have to start with the definition of culpable homicide which is the unlawful, *negligent* killing of another human being. Negligence is assessed objectively, according to the standard of the reasonable person. For a conviction of culpable homicide it must be shown beyond a reasonable doubt that a reasonable person, in the same circumstances as an accused, would have foreseen the death of a victim as a consequence of his or her conduct and that a reasonable person would have taken steps to guard against the foreseeable death.[5]

[38] Public violence on the other hand may be defined as the unlawful and *intentional* commission by a number of people acting in concert of acts of

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appellants had had sexual intercourse with the complainant without her consent and that each had assisted the three others in turn in the rapes committed by them.

[3] See *R v Kuzwayo* 1960 (1) SA 340 (A) at 343H-344C; *S v Prins en 'n Ander* 1977 (3) SA 807 (A) at 813H-814A; *S v Christie* 1982 (1) SA 464 (A) at 485G-486A and *Gaseb* supra, at 451d-g.

[4] Du Toit et al (Service 38, 2007) 14-6 *Grobler* supra at 512A, *Prins* supra at 814F; *S v N* 1979 (3) SA 308 (A) at 311E; *S v Moloto* 1982 (1) SA 844 (A) at 849-850.

[5] Jonathan Burchell *Principles of Criminal Law* 3 ed (2005) pp 159-160 and 674.

sufficiently serious dimensions which are intended forcibly to disturb the public peace or security or to invade the rights of others.[6]

[39] In contesting multiple convictions it is often submitted that they are premised on the same set of facts. This is, in fact, the so-called 'evidence test' sometimes applied by the courts in determining whether or not there is a duplication of convictions. This test enquires whether the evidence necessary to establish the commission of one offence involves proving the commission of another offence. In this regard, Bristowe J, in the case of *R v Van Der Merwe* 1921 TPD 1 at 5 pointed out that '…if the evidence necessary to prove one criminal act *necessarily* involves evidence of another criminal act, those two are to be considered as one transaction. *But if the evidence necessary to establish one criminal act is complete without the other criminal act being brought in at all then the two are separate crimes*.' (Emphasis added).

[40] That the evidence test is not necessarily at all decisive is also borne out by the following dictum of Rabie CJ in *S v Nkwenja en 'n Ander* 1985 (2) SA 560 (A) at 571H-J:

'Die appellante se advokate het voor Coetzee R aangevoer dat die appellant nie aan albei misdade skuldig bevind kon gewees het nie omdat "op dieselfde getuienis betrefende die geweld wat uitgeoefen was, staatgemaak is om beide misdade te bewys". Dit is 'n verkeerde siening van die saak. Strafbare manslag en roof is twee heeltemal verskillende misdade. By die eerste het 'n mens te doen met die nalatige dood van 'n mens, en by die roof gaan dit om die gebruik, of dreigement, van geweld om diefstal te pleeg. Die oorweging dat die geweld wat in die uitvoering van 'n roof gepleeg is tot die dood van die slagoffer gelei het, kan aan die essensiële verskille tussen die misdade nie afdoen nie. 'n Verhoorhof sal vanselfsprekend trag om 'n beskuldigde nie tweemaal vir dieselfde geweld te straf nie, maar dit beteken nie dat iemand wat 'n ander in die loop van 'n rooftog dood, nie aan sowel roof as strafbare manslag skuldig bevind kan word nie.'

[41] It is clear that the State can and often will be able to prove the crime of public violence without any reference whatsoever to the negligent or other killing of any person. The opposite is also true ─ the offence of culpable homicide is capable of proof independent of acts of public violence. Both propositions hold good in the present case. The evidence of the general disturbance caused by the

[6] Ibid p 867.

assailants to the public order would be sufficient to secure a conviction on the public violence charge. The State was at liberty to continue to prove the offence of culpable homicide.

[42] Another test which is sometimes applied by the courts in determining whether there is a duplication of convictions is the so-called 'intention test'. In terms of this test, if a person commits several acts, each one of which could be a separate offence on its own, but they constitute a continuous transaction that is carried out with a single intent, his or her conduct would constitute only a single offence.[7] However, as pointed out by Wessels JA in *Grobler* supra at 523F-H:

'In so far as the "single intent" and "continuous transaction" test is concerned, the distinction between motive and intent and the different intents inherent in different offences must not be overlooked . . .If a person breaks into a room intending to steal from the occupiers and does so at one and the same time it might be said that in substance he committed only one offence. Assuming he enters and steals the goods of the first person while he is asleep and then proceeds to the next person who awakes after his property has been stolen. In order to silence this person the accused renders him unconscious with a blow to the head. The third person is awakened, and the accused then forcibly deprives him of his goods before departing. Common sense suggests that the accused may properly be convicted of housebreaking with intent to steal and theft, assault and robbery.'

[43] It can hardly be said that a group of people can have a common *intention* to commit culpable homicide, as the fault element of this offence by definition lies in negligence. This is a common-sense approach.

[44] In the present case the group that had gathered near the library had conspired to intimidate and teach the black workers a lesson. They were clearly intent on committing acts of sufficiently serious dimensions and thereby forcibly to disturb the public peace. If in so doing they commit acts separate from that which was intended, such as in this case the negligent killing of the deceased, it is clearly not only permissible, but also eminently fair and just that they be held liable on that basis. Indeed, a court may well in those circumstances be duty-bound to hold actors liable for the separate unlawful acts perpetrated by them. Anything less will frustrate the public interest and the rule of law.

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[7] See Du Toit et al (Service 38, 2007) op cit 14-8.

[45] What we have said above is substantiated by the manner in which the entire trial was conducted in the trial court. The State set out to prove public violence by relying on the general mayhem caused, and intended to be caused, by the white assailants. The primary defence to this was that the State did not prove the participation of the appellants (ie a question of identification).

[46] It is clear from the regional magistrate's judgment that this is also the manner in which he viewed the matter. In his judgment, the evidence in respect of the culpable homicide charge is dealt with in an entirely separate and distinct discussion from that on the public violence charge and the legal principles governing public violence.

[47] For all the reasons set out above, the conviction on the charge of culpable homicide does not amount to a duplication of convictions and must therefore be confirmed.

[48] The court below recorded that it had seriously considered giving notice of the possibility of an increase in sentence but decided against it because of the lengthy delay in finalising the trial. In this regard the appellants were fortunate. At the commencement of this judgment we recorded our perspective of the moral opprobrium attaching to the conduct of the appellants. The effect of what Combrinck JA suggests might be to arrive at exactly the same result as that arrived at by the regional magistrate on the question of sentence. It appears that the approach by our colleague is, in effect that, although the appellants cannot legitimately be held liable for culpable homicide, over and above their being guilty of public violence, they might in any event be punished for both. On his approach the conviction of culpable homicide falls away, but the sentence for this offence might effectively be 'transposed' and 'added' to the sentence previously imposed in respect of the conviction of public violence. In our view this would effectively translate into the duplication which he apparently feels himself constrained to avoid.

[49] We see no reason to interfere with the sentences and accordingly the following order is made:

The appeal is dismissed.

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M S NAVSA
JUDGE OF APPEAL

_____
B J VAN HEERDEN
JUDGE OF APPEAL

CONCUR:

D MLAMBO JA