THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 866/2018

In the matter between:

RODERICK BASIL FRANCIS	**FIRST APPELLANT**
MOHAMED SYD CHUNARA	**SECOND APPELLANT**
INDROOS MEYER	**THIRD APPELLANT**
and	
THE STATE	**RESPONDENT**

Neutral citation:	*Francis & others v The State* (866/2018) ZASCA 177 (2 December 2019)
Coram:	Ponnan, Mbha, Mocumie and Mbatha JJA and Weiner AJA
Heard:	14 November 2019
Delivered:	2 December 2019

Summary: Criminal law – murder committed with intent in the form of *dolus eventalis* – having regard to the nature, extent and circumstances of assault on deceased – the only reasonable inference to be drawn is that appellants subjectively foresaw that their conduct could result in the deceased's death but were reckless as to such consequence – appeal dismissed.

ORDER

On appeal from: Witwatersrand Local division, Johannesburg (Boruchowitz J sitting as court of first instance):

The appeal against conviction and sentence is dismissed.

JUDGMENT

Mbha JA (Ponnan, Mocumie and Mbatha JJA and Weiner AJA concurring):

[1] The three appellants were convicted on 5 September 2007 in the Witwatersrand Local Division, Johannesburg (the high court) (per Boruchowitz J), of murder read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act). After finding that there were substantial and compelling circumstances present that justified a departure from the prescribed minimum sentence of life imprisonment, the high court sentenced each appellant to a term of ten years' imprisonment, five years of which was suspended on certain conditions. They appeal with leave of the high court against both conviction and sentence.

[2] The factual background that gave rise to the conviction is largely undisputed or common cause. During the course of the evening of 21 January 2007, the deceased

Stephen Peter Barnes, was brutally assaulted and subsequently died as a result of multiple blunt force injuries to his head, chest and abdomen. Earlier that evening, at approximately 20h30 to 21h30, the three appellants had travelled together in a Mercedes Benz motor vehicle, driven by the second appellant, and which belonged to a client of the latter, to a block of flats in Vrede Park, Johannesburg, known as Beech Court. At the flat they visited Ms Lavern Lyners who was with her sister, Nazlee, and their cousin Chrystal. Whilst they were all seated in the living room consuming alcoholic beverages, a Mr Natalian Steward arrived and reported that the deceased had broken into the Mercedes Benz motor vehicle and stolen a radio-tape from the instrument panel.

[3] Upon receiving the report, the appellants and the three ladies went out to inspect the vehicle. Thereafter they went looking for the deceased, who they later pursued and ultimately caught up with outside number 5 Palm Court. When they caught up with the deceased the first appellant struck him with a fist causing him to fall heavily to the ground. Thereafter, all three appellants – individually and jointly – kicked, jumped and trampled upon the deceased's head, chest and abdomen. After the assault, the first and second appellants dragged the deceased from the point of the assault in front of number 5, Palm Court, for a distance of approximately 20 metres towards another block of flats known as Tambotji Court. All three appellants thereafter returned to the Mercedes Benz motor vehicle and drove away. The deceased died later that same evening of multiple blunt force injuries.

[4] At the trial, although each of the appellants, who testified in their defence, admitted that they had assaulted the deceased, they stated that it was far less severe than testified to by the state witnesses. They denied that in doing so they possessed the requisite *mens rea* to cause the deceased's death. They accordingly contend that they should have been found guilty on the lesser charge of culpable homicide or perhaps even assault with intent to commit grievous bodily harm or common assault.

[5] Five witnesses testified on behalf of the State, namely Ms Lyners, Mr Oren Virgil Magascan and Ms Minie Janse Van Rensburg who were eye-witnesses to the assault, as well as Mr Steward and Dr Annemarie Louis Mattheus, a pathologist who performed the autopsy on the deceased. The court also called a further witness, Ms Thanya Billings, in terms of s 186 of the Criminal Procedure Act 51 of 1977(the CPA), who is the owner of number 5 Palm Court and who also witnessed the assault.

[6] The high court, in analysing the totality of the evidence led at the trial, found that it had been established that each of the appellants participated in the assault on the deceased by either jumping on or kicking him with their booted feet and by jumping and trampling on his head, chest and abdomen after he had fallen to the ground, thus inflicting the serious injuries which caused his death. It found that this was the golden thread that ran through the evidence of each of the State witnesses who witnessed the assault.

[7] In arriving at the above conclusions, the high court found that the evidence of the eyewitnesses to the assault was consistent with the medical evidence by the pathologist, Dr Mattheus. This evidence established that those who perpetrated the assault, applied blunt force to the deceased's head, that heavy blunt force was applied to the deceased's chest resulting in the deceased sustaining fractures to his ribs and to the abdomen, resulting in the tearing and laceration of his liver, mesentery and kidneys. Further, that the sub-arachnoid haemorrhaging in the brain and the multiple haemorrhages found on the deceased's head were all indicative of the infliction of heavy pressure, which was consistent with what Ms Lyners, Mr Magascan and Ms Van Rensburg had testified to. In the latter regard, Mr Magascan and Ms Van Rensburg testified in particular, to the deliberate moving of the deceased's head after he had fallen, and the propping of his head against the drain, whereafter one or more of the appellants trampled upon and kicked him.

[8] The test for the element of intention in the form of *dolus eventualis* required for murder, was described as follows by Holmes JA in *S v Sigwahla:*[1]

'1. The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis* as distinct from *dolus directus*.

2. The fact that objectively the accused ought reasonably [to] have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position

[1] *S v Sigwahla* 1967 (4) SA 566 (A) at 570B-E.

of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide.

3. Subjective foresight, like any other factual issue may be proved by inference. To constitute proof beyond reasonable doubt, the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.'

[9] The chief post-mortem findings record that the deceased sustained 26 abrasions over his body. It is significant that Dr Mattheus was of the view that the injuries to either the head, the chest or abdomen of the deceased could have killed the deceased. Each of the appellants sought to downplay their role in the assault on the deceased. During cross-examination of the state witnesses it was sought to be suggested that other persons, who were present during the assault on the deceased, may have been responsible for the very serious injuries inflicted upon the deceased. But, no evidence was forthcoming from any of the appellants, when they testified to support such a proposition. On their own evidence, given the presence of each at different times during the assault of the deceased, it was simply not possible for other persons to have inflicted such serious injurious without them being aware of it. Clearly, the superficial assaults that the appellants persist in saying they inflicted on the deceased cannot be accepted as true, in the light of the medical evidence.

[10] After appellant number one struck the deceased in his face with a clenched fist causing him to fall, the deceased remained in a prone position on the ground. It must

have been obvious to each of the appellants that the deceased was seriously injured. At least one of the state witnesses testified to him snoring. This, Dr Mattheus explained, would have been as a result of his difficulty in breathing on account of both his head and chest injuries. That notwithstanding, each thereafter participated, to a greater or lesser extent, in the assault on the deceased, including jumping and trampling on him with booted feet. Following upon the assault, the deceased had to be dragged by two of the appellants. It is difficult to conceive that the appellants could have been completely oblivious to the impact of an attack as savage as described by Dr Mattheus on a defenceless individual. Furthermore, it is clear that the assault was perpetrated over a sustained period of time.

[11] Ultimately, the high court cannot be faulted for concluding that the test set out in *Sigwahla* for *dolus eventualis* was satisfied in this case.

[12] The appeal against conviction must accordingly fail.

[13] Regarding sentence, the appellants' counsel conceded that the sentence imposed was rather lenient given the circumstances of the assault. The high court found there were substantial and compelling circumstances in the appellants' case. If the judgment of the high court on sentence can be criticised at all, in my view, it is that it is far too lenient. This was a brutal attack, for the most part on a defenceless individual. Feeling that they had been wronged by him, they chose to take the law into their own hands.

[14] The high court correctly took into consideration the appellants' personal circumstances, the interests of society and the seriousness of the offence. Ultimately, it found that the imposition of a custodial sentence was warranted.

[15] It has not been demonstrated that the high court misdirected itself in any way, when it imposed the sentence it did. In the circumstances the following order is made:

'The appeal against conviction and sentence is dismissed.'

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B H Mbha

Judge of Appeal

APPEARANCES:

For First Appellant:	J Henzen du Toit
Instructed by:	Johannesburg Justice Centre, Johannesburg
	Bloemfontein Justice Centre, Bloemfontein
For Second Appellant:	H L Alberts
Instructed by:	Johannesburg Justice Centre, Johannesburg
	Bloemfontein Justice Centre, Bloemfontein
For Third Appellant:	C Joubert
Instructed by:	Johannesburg Justice Centre, Johannesburg
	Bloemfontein Justice Centre, Bloemfontein
For Respondent:	V Maphiri
Instructed by:	DPP High Court, Johannesburg
	DPP High Court, Bloemfontein