Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case number. KS 20/2014
Date heard: 27/02/2023
Date delivered: 01/12/2023

In the matter between:

ANTHONY FARMER **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: Phatshoane DJP, Williams J, Nxumalo J

JUDGMENT

WILLIAMS J:

1. The appellant, Mr Anthony Farmer, was convicted, in the circuit court held at Springbok, on charges of robbery with aggravating circumstances and murder and sentenced to imprisonment of 10 years and 18 years, respectively. The sentences were ordered to run concurrently. This appeal, with leave from the Supreme Court of Appeal, is directed against the conviction on the count of murder and the sentence of 18 years imprisonment only.

2. It is not in dispute that a causal nexus existed between the assault on the deceased by the appellant and her eventual death from pneumonia following a long period of hospitalisation after the assault. The only issue regarding the murder conviction is whether the trial court was correct in finding that the appellant was guilty of murder with the indirect intention or whether it should have been murder with the intent form of *dolus eventualis* or as counsel for the appellant contends, he ought to have been convicted of culpable homicide.

3. The appellant did not testify in his own defence, but at the commencement of the trial, Mr Cloete, who represented him at the trial, submitted a written plea explanation in which the appellant had pleaded not guilty to the count of murder on the basis that he did not have the intention to kill the deceased and had also not foreseen the possibility of her death when he pushed her away. The further relevant portions of the plea explanation, freely translated from Afrikaans, follows:

"On that particular afternoon I had consumed alcohol at Liquor Zone. I then decided to get some money from Shawn at the place where I worked. I arrived at his house in Koeroebees Street and found that he was not in.

I then saw the deceased standing at the door of the neighbouring house. I approached her and asked for money. She told me that she did not have money and entered the house.

The door was open and I also entered the house. I found her in the living room and pushed her. She fell between a chair and a sofa and hurt her head on the floor. Her head was bleeding.

I went to her bedroom where I found a black handbag. While I had the handbag in my hands, the deceased entered the bedroom and tried to grab the handbag from me. I pushed her again and she fell with her head on the floor in front of a mirror in the room. Her head was still bleeding.

I took R500 from a purse in the handbag. I then took a blue plastic bag from the bedside table and went to the kitchen. The deceased was still lying in front of the mirror and I could see that she was still breathing.

I then took two packets of meat out of the freezer and two bottles of wine and put it in the blue plastic bag. I also took a money box which was in the living room. I left through the front door which I pulled close and which locked automatically."

4. The deceased was found later that evening by her neighbours who had to break down the security gate at the front door to gain entry to the house. The front door itself had been pulled close but was not locked. The deceased was discovered lying on the floor in her bedroom, unconscious.

5. Dr Garrab who had attended to the deceased upon her admission to the local hospital found her to be disorientated and confused. She had several areas of ecchymosis over her body, specifically around the eyes, both cheeks, the lower chin and the anterior part of the neck. Ecchymosis was also found on both breasts, in the perineum area and the knees. He explained ecchymosis as being the escape of blood into the tissue from the rupture of blood vessels causing black or blue discolouration of the skin. There was no active bleeding present although dried blood was found in the nose of the deceased as well as in her hair at the back of her head.

6. According the Dr Garrab, the ecchymosis over both eyes of the deceased would most likely have been caused by an assault to both eyes rather that a fall which would cause unilateral ecchymosis. He could however not totally exclude the possibility that the ecchymosis could have spread from one side of the face to the other side, thus occurring around both eyes. He was also of the opinion that some of the bones in the deceased's face could have been fractured.

7. After being stabilised at the local hospital in Springbok, the deceased was transferred to a medical facility in Cape Town for further treatment. She died of pneumonia as stated herein some 4½ months later. Dr Alfonso, a pathologist based at the Tygerberg mortuary in Cape Town, performed the autopsy on the deceased.

8. Dr Alfonso's findings on autopsy (other than the lung infection) were consistent with head injuries due to an alleged assault. He found evidence of a previous subdural haemorrhage over the back of the deceased's brain. Fractures of the left upper and right lower jaw were observed as well as the right orbit (the bone next to the right eye). He concluded that the cause of death was *"blunt force head trauma and the consequences thereof (unnatural)."*

9. According to Dr Alfonso the ecchymosis (deep bruising) around both eyes of the deceased could have been caused by more than one blow to the face or a single more significant blow to the forehead. The bilateral injuries to the deceased's face could have been caused as follows: if the deceased had been pushed onto a hard surface, the injuries to the left side of her face would have required her to fall forward on her left side and the injuries on the right side of her face would have required her to fall on her right side.

10. As far as the amount of force inflicted, Dr Alfonso was of the opinion that the fractures to the deceased's face would have required a significant amount of force but that the brain injury (the subdural bleeding) would not have required much force. He was also of the view that, based on a pathology point of view, the injuries inflicted appeared to be survivable injuries. From a clinical point of view the doctors who had treated the deceased would have a better understanding of her condition since *"the brain being a very sensitive organ, you may have significant injury to the brain, without there being any visible pathology or visible thing that I can see at autopsy. Given the history that I received about the patient's level of consciousness during admission being low, it would suggest an injury of greater magnitude or more injuries to the brain than purely what I saw at autopsy."*

11. The trial court, of necessity, given the appellant's failure to testify, had to infer the intention of the appellant when pushing the deceased, taking into account the relevant circumstances, the available evidence and the plea explanation of the appellant. The trial Court in his judgment held as follows:

"Now in my opinion, if the only intention of the accused was to subdue the deceased, it would not have been necessary to use "the tremendous force' the doctors found would have been necessary to cause both the extensive bruising and the fractures recorded on the deceased's face. In fact, the doctor went so far as to say there must have been tremendous force, or imply that there must have been tremendous force on both occasions when the deceased was pushed to cause those injuries on both sides of her face, and again I find that it would not have been necessary to use such force if the accused's only intention was to subdue her. And it was obvious to the accused that he was dealing with an old lady. The fact that he used tremendous force in inflicting these wounds, negates his version that his only intention was to subdue the deceased.

Any reasonable person in the position of the accused, and I am not making this an objective test, I am well aware it remains a subjective test. That's why I say in the position of the accused, would have appreciated that such tremendous force would have caused serious injuries.

I find that the accused reconciled himself to these serious injuries and their consequences by virtue of the fact that he pushed her with tremendous force, or must have pushed her with tremendous force a second time in the bedroom. This is sufficient to find intention in the form of dolus indirectus on the charge of murder. And I accordingly find the accused guilty of murder on the third charge."

12. Snyman in Criminal Law, seventh edition, defines the intent form ***dolus indirectus*** as follows at p160 thereof:

"In indirect intention (dolus indirectus) the prohibited act or result is not X's goal, but he realises that if he wants to achieve his goal the prohibited act or result will of necessity materialise."

13. The learned author provides a useful illustration of this form of intent as follows. A person sitting inside his neighbour's house sees a bird outside. He decides to take a shot at the bird. He realises that his shot will necessarily shatter the window but nevertheless proceeds to aim at the bird and shoots the window to pieces. He cannot then say, when charged with malicious damage to property, that he meant only to shoot the bird.

14. *In casu* a finding of *dolus indirectus* would mean that the appellant, in assaulting the deceased during the course of the robbery, knew full well or for a fact that her death would ensue. Such a finding does not accord with the proven facts.

15. In my view the trial court erred in finding that the appellant had committed murder with the indirect intent. It appears to have been an inadvertent mistake made by the trial court by imputing the requirements for *dolus eventualis* onto the intent form of *dolus indirectus.* The reference to the appellant reconciling himself with the possibility of death ensuing, in the excerpt of the judgment quoted above and which is a requirement for *dolus eventualis,* is telling thereof.

16. But be that as it may. What is required now is to establish whether the appellant should have been found guilty of murder with the intent form of *dolus eventualis* or whether he lacked the necessary intent and ought to have been convicted of culpable homicide.

17. A person acts with intention in the form of ***dolus eventualis*** if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but: (a) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused; and (b) he reconciles himself to this possibility (Snyman p 161).

18. **Culpable homicide** is the unlawful, negligent causing of the death of a person. The test for negligence is in principle objective. The court must ask itself; (a) whether the reasonable person in the same circumstances would foresee that death may result from his conduct; (b) whether the reasonable person would have taken steps to guard against such a possibility; and (c) whether his conduct deviated from what the reasonable person would have done in the circumstances (Snyman at 391).

19. Pivotal to appellant's counsel, Mr Steynberg's, argument against a finding of *dolus eventualis* being present is the nature of the assault and the fact that the deceased had died of pneumonia a few months after the assault. The contention is that a person in the position of the appellant would not have been able to foresee the occurrence of such a result as a reasonable possibility.

20. That the deceased died of pneumonia is however an issue which relates to the casual chain of events and not one relating to intention. In *S v Nair* 1993 (1) SACR 451 (A) the deceased had been assaulted and thereafter thrown in the sea. There was no evidence as to whether the deceased was still alive or already dead when thrown into the sea. The majority of the court held that, having regard to the nature of the attack, the only reasonable inference was that it was carried out with the intent to kill, at least in the form of *dolus eventualis*. If the deceased was already dead before throwing him in the sea, the death of the deceased must have been foreseen. If he was still alive, by throwing him into the water it must have been foreseen that the deceased would die. A mistake relating to the precise way in which a deceased would die is thus irrelevant.

21. Mr Steynberg's reliance on *S v Humphreys* 2015 (1) SA 491 (SCA), where the court held at paragraph 13 thereof that *"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 the members of the general population," to suggest that the appellant would not have foreseen the deceased's death as a result of pneumonia as it would not be in accordance with common human experience obvious to any person of normal intelligence, is untenable. The issue is not whether the appellant would have foreseen that the deceased's would die of pneumonia, but whether he would have foreseen death ensuing as a result of his actions.

22. This brings me to the nature of the assault *in casu* and the foreseeability of death ensuing. In *Director of Public Prosecutions, Gauteng v Pistorius [20016] (1) All SA 346 (SCA)* the court held at paragraph 26 thereof that:

". . . a person's intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act 'reckless as to the consequences' (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been 'reconciled' with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent."

23. Relevant to the foreseeability of death as a possible consequence of the actions of the appellant are the following:

23.1 The deceased was a vulnerable, elderly person aged 73.

23.2 When the appellant pushed her the first time, she fell with her head on to a hard tiled surface.

23.3 On the appellant's own version, the deceased was bleeding from the head after the first fall. The photographs of the scene which served before the trial court show substantial amounts of blood pooling, blood spatters and smears all over the inside of the deceased's house.

23.4 Despite her having bled profusely after the first assault, the appellant pushed the deceased for a second time, where she, having incurred bilateral injuries to the head, must have fallen on the other side of her head onto the tiled floor.

23.5 According to the medical evidence, substantial force had been used to cause the injuries sustained by the deceased.

23.6 Common human experience dictates the possibility of death ensuing after the infliction of serious injury to the head of a person.

23.7 After assaulting the deceased, the appellant left her helpless and bleeding and locked the security gate on his way out.

24. In these circumstances it cannot be said that the appellant did not foresee the possibility of death ensuing as a result of his actions or that he did not reconcile himself with that possibility. He was thus correctly convicted of murder – though incorrectly with the intent form of *dolus indirectus* as opposed to *dolus eventualis.*

25. As far as the sentence imposed is concerned, the trial court found that there were substantial and compelling circumstances present to justify a departure from the prescribed minimum sentence of life imprisonment, essentially because of an absence of premeditation and what was seen as

an opportunistic crime. There is no reason to justify an interference with the sentence imposed.

The following order is made:

The appeal against the conviction on the count of murder and the sentence imposed thereon is dismissed.

CC WILLIAMS
JUDGE

I concur

PHATSHOANE
DEPUTY JUDGE PRESIDENT

I concur

APS NXUMALO
JUDGE

For Appellant:	Mr H Steynberg Legal Aid SA
For Respondent:	Adv R Makhaga Office of the DPP