Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**YES**

IN THE HIGH COURT HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CA 63/2022

In the matter between:

JACOB DITEBOGO PHEFO **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Petersen ADJP, Moagi AJ

Heard: 20 October 2023

The judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 29 January 2024 at 15h00pm.

Summary: Criminal Appeal against conviction and sentence imposed in the Regional Court – Appeal against conviction and sentence dismissed.

ORDER

On appeal from: Regional Court, Mmabatho, North West Regional Division, (Regional Magistrate S du Toit sitting as court of first instance):

(i) The appeal is re-instated.

(ii) Condonation for the late noting and prosecution of the appeal is granted.

(iii) The appeal against conviction is dismissed.

JUDGMENT

PETERSEN ADJP

Introduction

[1] This is an appeal against conviction on a charge of murder read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 ('the CLAA'), committed on **04 January 2017** where the appellant is alleged to have killed the deceased by hitting him with a blunt object and a sjambok**.** Leave to appeal against conviction is with leave of the court *a quo* granted on **29 July 2022**.

[2] The trial commenced on **23 May 2019** before Regional Magistrate S du Toit and two lay assessors Messrs Modisaemage and Mosiane. The appellant pleaded not guilty and elected not to disclose the basis of his defence by providing an explanation of plea. The appellant, following a protracted trial, was duly convicted as charged on **11 September 2020**. On **28 January 2021**, he was sentenced to Ten (10) years imprisonment and confirmed to be unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

Application for re-instatement of the appeal and condonation for the late noting of the appeal

[3] The appeal was enrolled on **05 May 2023** before a Full Bench (Petersen J and Reddy AJ). The appeal could not be entertained on the said date as result of loadshedding and a non-operational generator at the High Court. The parties were consequently heard on **08 May 2023**, on which date the appeal was struck from the roll for failure of the appellant to comply with Practice Directives 13(2)(b)(aa) and (cc) of the North West Division of the High Court.

[4] Rule 67(5A)(a)(ii) of the Magistrates' Court Rules provides that in the event of an appeal being struck-off or removed from the roll for any reason, the appeal shall the be enrolled within ten (10) days of the date of such striking-off or removal, failing compliance therewith, the appeal shall lapse. On **19 May 2023**, the appellant filed an application for re-instatement of the appeal, supported by an affidavit deposed to by the appellant. The affidavit is brief and save for stating the reason why the appeal was struck-off on **8 May 2023**, states nothing more except that compliance with the applicable Practice Directives would be adhered to.

[5] The application for re-instatement of the appeal was not addressed by the State as respondent. The application for re-instatement accordingly succeeded and the appeal was entertained on its against conviction.

The grounds of appeal against conviction

[6] The grounds of appeal against conviction are said to be based on the following factual and legal grounds:

"1. In imposing a guilty conviction on the Appellant, it is respectfully submitted that the Learned Magistrate erred and misdirected himself in the following respects:

1.1 In failing to apply the principles relating to the determination of *dolus eventualis* correctly;

1.2 In making unmerited conclusions that the Appellent acted unreasonably in apprehending and detaining the deceased;

1.3 In failing to consider and give proper weight to the fact that material contradictions exist in the evidence of Ketsing Evelyn Garadje relating to the alleged stolen items of the Appellant;

1.4 In making speculative conclusions that the Appellant could have reasonably have foreseen the death of the deceased;

1.5 In failing to properly consider and/or in overlooking the evidence of the Appellant that supports that the Appellant acted in self defence when he apprehended the deceased;

1.6 In failing to consider and give proper weight to the fact that material contradictions exist in the evidence of Ketsing Evelyn Garadje in respect of her statement to the police and her oral evidence adduced at trial;

1.7 In concluding that the contradictions in Ketsing Evelyn Garadje's testimony did not adversely affect the credibility and reliability of her evidence;

1.8 In making speculative conclusions that the Appellant did not have the intentions of reporting the incident to the police;

1.9 In finding that the evidence tendered by the Appellant could not have been reasonably possibly true;

1.10 In failing to consider and or give due weight to the evidence of the Appellant that he prevented further assaults on the deceased by members of the community;

1.11 In failing to attach sufficient way to the fact that there is no evidence that the Appellant the assaulted deceased before they returned from town;

1.12 in failing to attach sufficient weight to the fact that it could not be found that the specific injuries inflicted by the Appellant caused the death of the deceased;

1.13 In failing to correctly assess and determine the probability of the evidence adduced by Bernard Matseka;

1.14 in giving undue weight to the evidence of Bernard Matseka;

1.15 in failing to consider an attach sufficient weight to the fact that numerous persons assaulted the deceased which contributed to the injury sustained by the deceased;

1.16 in failing consider that the appellant could not have foreseen that members of the community would assault the deceased;

1.17 in failing to find that the appellant lacked the necessary *dolus* to cause the death of the deceased;

1.18 In concluding that the appellant is guilty of murder despite the existence of doubt as to what injuries ultimately caused the death of the deceased."

The issues identified by the court *a quo*

[7] The court *a quo* identified the following issues as being common cause or not disputed, which has not been assailed on appeal:

"1. That the deceased was apprehended by the accused at the accused's premises during the morning of 4 January 2017. It was suspected that the deceased stole money and cellphone from the accused's house.

2. That the accused tied the deceased's hands and knees with the assistance of his neighbour.

3. That the accused and Mr Matseka drove the deceased to town to look for the accused's property. The deceased was still tied at that stage.

4. That they returned to the accused's premises and the mother was present when they returned.

5. That the deceased passed away at the premises of the accused."

[8] As to the issues in dispute, the court *a quo* formulated the issues as follows:

> "1. Whether the deceased was assaulted at the accused's house;
> 2. If he was so assaulted, whether the accused participated in the assault that caused the death of the deceased.
> 3. If it is found that the accused participated in the assault on the deceased whether he did so with intention to cause the death of the deceased."

The test on appeal against conviction

[9] The approach by a court of appeal to the factual and credibility findings of the trial court are trite. A court of appeal will not lightly interfere with such findings as "*the findings of fact of a trial court are limited… In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and it will only be disregarded if the recorded evidence shows them to be clearly wrong."* See *S v Mkohle* 1990 (1) SACR (A) at 100e; *S v Francis* 1991 (1) SACR 198 (A) at 204c-e, *S v Monyane and Others* 2008 (1) SACR 543 at paragraph [15].

The factual findings of the court *a quo*

[10] The credibility and reliability of the evidence of the mother of the deceased, Ketsing Evelyn Garadje, is challenged as being

unreliable evidence of a single witness, which challenge is directed at her oral testimony and what is essentially said to be a previous inconsistent statement made to the police.

[11] In *S v Mahlangu and another* 2011 (2) SACR 164 (SCA), Shongwe JA (Streicher JA and Petse AJA concurring) restated the approach to the evidence of a single witness as follows:

> "[21] Section 208 of the Criminal Procedure Act 51 of 1977 provides that:
>
> 'An accused may be convicted of any offence on the single evidence of any competent witness.'
>
> The court can base its finding on the evidence of a single witness as long as such evidence is **substantially satisfactory in every material respect** or **if there is corroboration**. The said corroboration need not necessarily link the accused to the crime (See *S v Hlongwa* 1991 (1) SACR 583 (A), *Stevens v S* [2005] 1 All SA 1 (SCA) para 17 and *S v Artman* 1968 (3) SA 339 (A) at 341A-B)." (emphasis added)

[12] The appellant contends that the court *a quo* relied heavily on the evidence of Ms Garadje. The assault on the deceased the submission goes is the very core element which must be considered in determining the appellant's guilt. The court *a quo* is said to have erred in accepting the evidence of Ms Garadje, on the basis that the assault perpetrated on the deceased by the

appellant, as she testified to in her oral testimony is omitted from her statement to the police. Issue is also taken with Ms Garadje disavowing the fact that she told the police that the appellant informed her that the deceased had stolen his cellphone. This it is said is a material inconsistency in her evidence which must raise doubt that the appellant assaulted the deceased. The issue of the cellphone does nothing to impact the credibility of the evidence of Ms Garadje. In any event, the appellant himself testified in chief that that Ms Gardje did not converse with him at all which he changed under cross examination to state that he in fact spoke to her and told her what her son did. The question is whether the omission of the assault on the deceased by the appellant should have led to the rejection of her evidence *in toto*.

[13] The court *a quo* dealt with this issue as follows in its judgment, with the court *a quo* reminding itself of the approach to discrepancies in oral testimony of a witness and a statement to the police, as enunciated in *S v Mafaladiso* 2003 (1) SACR 583 (SCA) AT 593 to 594:

"The evidence of Ms Garadje in Court was clear and straightforward. She did not contradict herself in giving evidence in chief and when she was cross examined. She answered all questions put to her by the prosecution as well as the defence forthrightly and without hesitation. Her evidence is, however, not without criticism. She was confronted with the contents of the statement

she made to the police. The fact that she saw the accused assaulting the deceased is not contained in her statement. She also mentioned in Court that the accused did not tell her that her son took his cellphone but it appears in the statement that he did tell her about the cellphone.

…

The difference between the witness's evidence in Court and the statement to the police with regard to the fact that she saw the accused assaulting the deceased cannot be considered as a contradiction. The fact that she saw the accused assaulting the deceased is omitted from her statement. She was adamant that she did tell the police about this fact. Her evidence in Court in this regard is straightforward and of course this aspect must be considered in the totality of the evidence.

…

Her evidence, to a certain extent is corroborated by Matseka despite some discrepancies in the evidence which will be dealt with hereafter. If her evidence is considered holistically and in light of all the evidence as a whole the Court is satisfied that the differences between her evidence in Court and the police statement do not adversely affect the credibility and the reliability of her evidence."

[14] Despite the approach of the court *a quo* to the evidence of Mr Matseka being assailed, his evidence was correctly assessed by the court *a quo*. The evidence of Mr Matseka did not contradict that of Ms Garadje and neither did it corrobate her evidence. At most, his evidence confirmed the issues which are common cause or which were not denied, insofar as it relates to him. The evidence of Mr Matseka is in a nutshell, that at the request of the appellant he transported the appellant and the deceased whom

the appellant had found in his house, to town, to point out where the appellant's money and cellphone was; that the deceased was already severely assaulted and he requested the community not to assault the deceased as he may die; and that upon returning from town to the appellant's house the deceased was assaulted further. Mr Matseka was evasive and did not want to implicate the appellant in any assault on the deceased. Despite being present when they returned from town, he simply testified that he saw the community assaulting the deceased and was evasive when asked to describe the assault by the community.

[15] The appellant denied any assault on the deceased at any stage. As the court *a quo* correctly found, there were several material discrepancies and contradictions in his evidence. To a lesser degree he told police officer Dambuza that he was assisted by two people to catch and restrain the deceased whilst in oral testimony he spoke of only one person. The appellant told Dambuza that the deceased was tied and taken to town and upon returning to his house, the deceased had passed away, without him seeing who assaulted the deceased. In cross examination, however, he testified that when they returned from town the deceased was not injured and not assaulted when they returned from town. Later, he testified that the deceased was assaulted by some people in town and he intervened to stop them. Contrary to his initial evidence in chief that he did not see who assaulted the

deceased, he later testified that when returning from town the community again assaulted the deceased and he told them not to assault him. This he retracted again under cross examination.

[16] Whilst there is no onus on the appellant to prove anything, and similar to the approach of the evidence of a witness for the State, not every contradiction or discrepancy affects his credibility or reliability, the court *a quo* correctly found that the number and nature of contradictions in his evidence and his version put to Dambuza could not be attributed to the lapse of time from the incident to his testimony in Court.

[17] No fault can be found with the evaluation of the evidence by the court *a quo* and its factual findings (facts found to be proven) which were formulated as follows:

> "1. That the deceased was apprehended at the accused's home and that the accused with assistance tied the deceased's hands and feet.
> 2. That the deceased was severely injured at the time that he was loaded onto the back of the vehicle of Mr Matseka.
> 3. That the accused, Matseka and others drove with the deceased to town.
> 4. The deceased mother Garadje was at the accused's house when they return from town.
> 5. That the deceased was assaulted in the presence of Garadje by a number of perpetrators.
> 6. That the accused also assaulted the deceased, he was using the thick part of a sjambok.

7. That the mother pleaded with the accused to let the deceased go but he refused.
8. That the deceased died at the accused's premises as a result of the assault on him."

[18] The appeal against the factual findings of the court *a quo* must therefore fail.

The question of law – *dolus eventualis*

[19] In my view and also as submitted by *Adv Riley* for the appellant, the main issue in this appeal (the heart of the appeal) is the assertion that the court *a quo* failed to apply the principles relating to the determination of *dolus eventualis* correctly, which implicates the first ground of appeal which incorporates the fourth, ninth, tenth, eleventh, twelfth and fifteenth to eighteenth grounds of appeal. This involves a question of law and by implication an application of the facts found to be proven against the principles applicable to intention (*dolus*) and more specifically *dolus eventualis*.

[20] *Adv Riley* submits that the State failed to prove *dolus eventualis* as a form of intent beyond reasonable doubt, by proving that:

1. The appellant foresaw the possibility of death, and

2. The appellant reconciled himself with such foresight.

[21] *Adv Riley* submits that it should firstly be determined if the appellant assaulted the deceased, secondly whether the appellant had foresight that such assault could have possibly caused the death of the deceased, and thirdly whether the appellant reconciled himself with such possibility. The submission further goes that if it is found that the appellant did not participate in the assault, that the second and third requirements fall away.

[22] This Court has accepted that the factual findings of the court *a quo* were correct. Inherent in those findings is that the appellant himself had assaulted the deceased with the thick part of a sjambok as witnessed by his mother, who was present at the assault at the appellant's house, where the deceased succumbed to his injuries. *Adv Riley* puts much play on the court *a quo* concluding that there is no evidence that the appellant assaulted the deceased before they returned from town, but that it was the appellant who tied the hands and feet of the deceased. Emphasis is also placed on the finding by the court *a quo* that it could not find that the specific injuries inflicted by the appellant caused the death of the deceased. This cannot be considered in isolation but must be considered with due regard to the events that transpired that day, as a whole.

[23] What remains to consider on the submissions of *Adv Riley* against the applicable law, is whether the appellant had foresight that the tying of the hands and feet of the deceased, the assault at the house of the appellant before the deceased was taken to town, and the assault perpetrated at the house of the appellant upon returning from town could have possibly caused the death of the deceased, and whether the appellant reconciled himself with such possibility. I hasten to add that sight must not be lost of the fact that the appellant reckless as to the consequences of any such acts, not only reconciled himself with such possibility, but continued, nonetheless.

[24] In passing, it is noted that the State did not rely on common purpose as envisaged in *S v Mgedezi and others* 1989 (1) SA 687 (A) or on the similar facts in *S v Jacobs and Others* 2019 (1) SACR 623 (CC), predicated on active association. The facts in this matter speak directly to common purpose and implicates the decisions in *Mgedezi a*nd *S v Musingadi and Others* 2005 (1) SACR 395 (SCA). The failure of the State to rely on common purpose considering the Supreme Court of Appeal decision in *Msimango v The State* (698/2017) [2017] ZASCA 181 (01 December 2017) is inexplicable but may account for the approach of the court *a quo* to the question of *dolus eventualis* against the proven facts.

[25] The court *a quo* following its findings on the proven facts stated that *"The issue now to be decided is whether on the accepted facts the accused had intention to kill the deceased. The question is whether it can be inferred from the facts that the accused intended to cause the death of the deceased."*

[26] The court *a quo* considered the judgment in *Director of Publci Prosecutions Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) at paragraph 26 where the following was said in respect of two forms *dolus* which arise in murder matters:

"[26] In cases of murder, there are principally two forms of *dolus* which arise: *dolus directus* and *dolus eventualis.* These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased. *Dolus eventualis*, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to *dolus directus*, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, **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**."

(my emphasis added)

[27] It is apposite to quote the evaluation of the court *a quo* of the facts found to be proved relevant to its finding on *dolus eventualis*:

"The deceased was subjected to a continuous and severe assault causing the injuries described in the medical legal post-mortem report and also depicted in the photos. The post-mortem report indicates that there was an uncountable amount of tram line injuries to the head, body and limbs. The cause of death is hypovolemia due to body bruising.

There is no evidence that the accused assaulted the deceased before they returned from town. It is however the accused would tied the hands and feet of the deceased. Matseka's evidence is to the effect that the deceased was tied and badly assaulted when he was put onto his vehicle. It was requested by the accused to take him and the deceased to town to look for his items. Even though the accused must have been aware of the state of the deceased he showed no consideration for the life or limb of the deceased. It is apparent that the deceased was not taken to the police station, so he could be

assaulted further. It was also the evidence of the mother when she asked the accused to release her son, he said no he has to be further assaulted and even though the deceased was already badly assaulted, the accused participated in the further assault of the deceased.

The deceased was still tied when the accused assaulted him. It cannot be found that specific injuries inflicted by the accused caused the death of the deceased. But considering the nature of the assault and the injuries inflicted upon the deceased the possibility of death would have been obvious in accordance with common human experience. Nevertheless, the accused continued to participate in the assault.

In the light of all the facts in this case there is no reason to think that the accused would not have shared those foresight derive from common human experience without the members of the general population. The only inference to be made from the facts and circumstances of this case is that the accused foresaw the possibility that death may occur and with the disregard of that consequence continued to assault the deceased.

The accused therefore had the necessary intention in the form of *dolus eventualis* to cause the death of the deceased. The guilt of the accused in respect of the charge of murder was therefore proved beyond reasonable doubt. The accused is found guilty."

[28] The foreseeability of death on the part of the appellant must be deduced from the proven facts and the evidence as a whole. The approach to the requirement of foreseeability of death was succinctly dealt with in *Humphreys v S* (424/2012) [2013] ZASCA 20; 2013 (2) SACR 1 (SCA); 2015 (1) SA 491 (SCA) (22 March 2013). At paragraph 12, the SCA re-stated the trite principles applicable to *dolus eventualis* and the confusing terminology to describe 'recklessness' as follows:

"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.

At paragraph 13, the SCA goes on to place the requirements for *dolus eventualis* into proper perspective (in words, although the source was not identified as emanating from *Humphreys* by the court *a quo*), as follows:

"[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."

(emphasis added)

[29] Subjective foresight on the part of the appellant proven by inference from the proven facts in accordance with common human experience of a person of normal intelligence, is the test applicable in the present appeal. That from the findings of the court *a quo* was the approach adopted to the proven facts. To place these proven facts in proper context relevant to the requirements of *dolus eventualis*, the following is underscored.

[30] The appellant with assistance, whether by one of two neighbours, tied the hands and feet of the deceased. It is the act of the appellant that rendered the deceased "immobile" and unable to put a fight or run away. Whilst there is no evidence that the appellant assaulted the deceased at that stage, the evidence of Mr Matseka points to a severe assault having perpetrated on the deceased prior to the deceased being loaded onto the back of his vehicle, whilst still tied. The appellant was present during that brutal assault. Rather than seek the assistance of the police or medical intervention for the severely assaulted deceased, the

appellant sought the assistance of Mr Matseka to take the deceased to town to look for his stolen items. The appellant was solely responsible for depriving the deceased of freedom of movement. Again, whilst there is no evidence that the deceased was assaulted by the appellant whilst in town, evidence is that he was in fact assaulted further. The deceased was brought back by the appellant, still depriving him of his freedom of movement and still not seeking the intervention of the police or medical assistance for the deceased. In this regard, the court *a quo* cannot be faulted for its finding that the appellant had no intention of handing over the deceased to the authorities.

[31] The indisputable and common cause evidence is that the deceased was assaulted further by members of the community upon arriving back from town. The evidence of Ms Garadje in respect of the appellant is that he inflicted blows to the deceased with the thick part of a sjambok during the assault by the members of the community. Her evidence was further that the appellant refused to release the deceased whom he wanted to be assaulted further. This assault was perpetrated in circumstances where the deceased was already severely beaten at the time they left for town. The intimation by the court *a quo* that it cannot be said that the blows inflicted by the appellant caused the death of the deceased, does not avail the appellant. The appellant was present at all material times when clearly brutal attacks were

perpetrated on the deceased by community members, without intervening. He himself inflicted some of those blows with the thick part of a sjambok. The post-mortem report speaks of an “uncountable amount of tramline injuries to the head, body and limbs of the deceased”. The cause of death was attributed to hypovolemia due to body bruising, which speaks volumes of the brutality of the attack on the deceased, on at least three occasions that fateful day, where the appellant was present.

[32] Subjectively the appellant had to foresee that the continued brutal attacks which left an uncountable amount of tramline injuries to the body of the deceased, including his head, could be fatal. In accordance with common human experience of a person of normal intelligence, by inferential reasoning, the appellant cannot escape the fact that he in fact did foresee that the death of the deceased was a possibility and shared this foresight with other members of the general population.

[33] The appeal against conviction on the requirements of *dolus eventualis*, as with the appeal on the facts, stands to fall, and the appeal against conviction stands to be dismissed.

Order

[34] In the result, the following order is made:

(i) The appeal is re-instated.

(ii) Condonation for the late noting and prosecution of the appeal is granted.

(iii) The appeal against conviction is dismissed.

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A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

_____

M MOAGI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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