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IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between -

FRANS BURGER ..... Appellant.

and

THE STATE ..... Respondent.

Coram: HOLMES, TROLLIP, JJ.A., et GALGUT, A.J.A.

Heard: 18 September 1975.

Delivered: 29 September 1975.

J U D G M E N T.

HOLMES, J.A., :-

The appellant, and another, were charged before Hart, J., sitting with assessors in the South West Africa Division, with the murder of Johannes Katzen on 29 June 1974 in the district of Swakopmund.

They /.....

They pleaded not guilty, were legally represented, and were convicted of culpable homicide. The appellant was sentenced to imprisonment for six years, of which three years were suspended on relevant conditions. He appeals with leave granted under section 350 (6) of the Criminal Procedure Ordinance 34 of 1963 (S.W.A.). His co-accused, Charles Edward Rose received a much lesser sentence because of his lesser participation. He has not appealed.

The facts, in broad outline, are that the appellant and Rose assaulted the deceased on Saturday 29 June 1974, the blows including a few kicks, from the appellant, at or below the deceased's stomach. The appellant was wearing shoes. In consequence, so it was held on the medical evidence, the deceased sustained a perforated small intestine, which was the cause of his death on 1 July 1974.

The facts do not stop there, because the deceased, on the Monday after he was assaulted by the appellant and Rose, was thrashed by two other men. However, the medical evidence, as accepted, was that

was that this thrashing did not cause the deceased's death; that he would have died as the result of the first assault and the resultant perforated small intestine even if he had not been thrashed on the following Monday; and that, at most, such subsequent thrashing might have had the effect of hastening his inevitable death.

In this Court, counsel for the appellant challenged the conviction and sentence on a broad front, with the following contentions couched in the alternative -

(a) The State did not prove the cause of death.

(b) There was no proof that it was the appellant who caused the fatal injury.

(c) There was a novus actus interveniens.

(d) The State did not prove culpa in relation to the death, i.e., that the appellant ought reasonably to have foreseen the possibility of resultant death.

(e) The sentence was grossly excessive.

As to the law, in general -

(i) Culpable homicide is the unlawful, negligent causing of the death of a human being; see S. v. Ntuli, 1975 (1) S.A. 429 (A.D.) at page 436 A, and cases there cited.

(ii) Basically there must be some conduct on the part of the accused involving dolus (such as an assault), or culpa (such as an operation by a surgeon without due care, or the driving of a motor vehicle without keeping a proper look-out).

(iii) Such conduct must cause the death of the deceased.

(iv) In addition there must be culpa in the sense that the accused ought reasonably to have foreseen the possibility of death resulting from such conduct; see S. v. Bernardus, 1965 (3) 287 (A.D.). This is because culpable homicide is the unlawful, negligent causing of the death of a human being.

(v) It follows from the foregoing that causation of death, even as the result of an unlawful act which is criminally punishable, is not of itself sufficient to constitute the crime of culpable homicide. To disregard the additional requisite

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reasonably
of the foreseeable possibility of resultant death, would be to re-instate the doctrine of versari in re illicita, which was outmoded by S. v. Bernardus, supra.

(vi) If an accused does foresee - as distinct from ought to have foreseen - the possibility of such resultant death and persists in his conduct with indifference to fatal consequence (or if he actually intends to kill) the crime would be that of murder; see S. v. Sigwhala, 1967 (4) S.A. (A.D.) at page 570 B - E. Having regard to the requirements of foresight and persistence, the dividing line between (a), murder with dolus eventualis and (b), culpable homicide, is sometimes rather thin.

(vii) Culpa and foreseeability are tested by reference to the standard of a diligens paterfamilias ("that notional epitome of reasonable prudence" - Peri-Urban Areas Health Board v. Munarin, 1965 (3) S.A. 367 (A.D.) at page 373 F) in the position of the person whose conduct is in question. One does not expect of a diligens paterfamilias any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a diligens paterfamilias treads life's

pathway with moderation and prudent common sense.

With that prelude I turn more fully to the facts; and thereafter I shall consider the grounds of appeal seriatim.

Neither of the appellants gave evidence. The following is a summary as found by the learned Judge and his assessors. About the end of June 1974 there was a road camp between Usakos and Hentiesbaai, in connection with a road which was being built. It was about 80 kilometres from Usakos and 35 kilometres from Hentiesbaai. In charge of the road party were the appellant and his co-accused, Rose; also Marthinus Boshoff and Daniel Greef. Other Europeans were also in the party. All of these lived in caravans. The non-European labourers on the road works included the deceased, Ruben Petrus, Josephat Katjiango, Jacobus Isaks, Elias Seibeb and Walter Kariseb. They lived in tents or corrugated iron rooms. The general area of this remote South West African scene appears from the photographs to

be a sandy waste. The nearest non-European hospital was in Walvisbaai, which is 110 kilometres south of Hentiesbaai. The district surgeon, Dr. de Klerk, was stationed in Swakopmund.

The deceased and Jacobus Isaks occupied a tent. They worked under the aforementioned Boshoff. The deceased was a Bantu whose estimated age was 19 years; and, according to the medical evidence, his "weight" was"140 lb.". His height is reflected in the post mortem report as 5' 11". It is clear from the photographs that he was slightly built and gangling.

During the late afternoon of Saturday, 29 June 1974,most of the labourers were under the influence of intoxicating liquor. These included the deceased, Jacobus Isaks, Elias Seibeb and Walter Kariseb. A quarrel or argument arose between the deceased and Elias Seibeb. This was at a party at the quarters of Ruben Petrus. Isaks (aged 22 years) intervened as peace-maker, and led the deceased away. Elias Seibeb was prevailed upon to lie down on the seat in the cab of a

lorry which was parked there. He was fairly heavily under the influence of liquor, and he fell asleep. The deceased, however, was still in a fighting mood and, later in the evening, came to the lorry and tried to stab the sleeping Seibeb. Isaks again intervened and, in the ensuing struggle, he sustained a stab-wound in the back. The deceased had intended this blow for Seibeb. The weapon used was a table knife. Isaks bled and was in pain. About half an hour later, during the evening of that Saturday, 29 June, the appellant and his co-accused, Rose, arrived on the scene. The incident was reported to them. With commendable humanity, the appellant took Isaks in a light truck to Hentiesbaai to seek medical attention for him. The quest was unsuccessful and they returned to the camp. They were running short of petrol. They had travelled, in all, 70 kilometres on this mission. Rose gave Isaks a pill, presumably for the pain, and he slept.

The appellant and Rose then proceeded to the tent where they found the deceased [redacted] asleep under

blankets. The deceased was dragged out by one leg. The appellant assaulted him with his fists and kicked him more than once in the stomach. He was wearing shoes. Rose only struck the deceased once, with his fist, on his forehead. It was not a hard blow.

The deceased got up and ran away into the night, in a bent position, holding his stomach with his hands. Later that evening the deceased was seen by Walter Kariseb. He was ashen pale and in great pain.

On the following morning (Sunday) Josef Katjiango saw the deceased, walking in a bowed position, with his hands on his stomach. He appeared to be upset. The appellant, who had apparently come to enquire after the deceased, told the witness that, if he had had enough petrol, he would have taken the deceased to Swakopmund (presumably to a doctor).

That Sunday afternoon (30 June) the appellant called the deceased to help him with some corked drums of water which were on a lorry. They had to be re-arranged so that they could roll off when the lorry was

tipped up. The deceased did help. He was bowed forward and was pressing one hand against his stomach. Thereafter he returned to his tent.

The scene now shifts to Monday, 1 July 1974, the day of the deceased's death. Early in the morning the deceased was lying in the tent and he appeared to Isaks to be drunk and confused. (In fact his appearance may well have been due to his injury, not intoxication, for the post mortem examination found no signs or smell of alcohol in the stomach and contents). Soon afterwards Boshoff and Greeff arrived at the tent, before sunrise. Boshoff called out to the deceased and Isaks to get up and come to work. As they emerged from their tent, Boshoff caught hold of both of them. The deceased seemed to be half dazed, and pale. His gait was lurching and stooped. As the trial Court said, it was plain that the deceased was not normal. On Boshoff's instructions, Greeff rolled an empty 44-gallon drum into position at the steps of a trailer. Boshoff ordered the deceased to take off

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his trousers and underpants and to lie over the drum. The deceased came forward, swaying and slightly bowed forward, and did as he was bidden. Boshoff handed to Greeff a piece of flexible plastic garden-hose, 1⅛ metres in length, half an inch in diameter, and folded double. With it Greeff thrashed the deceased, striking his buttocks, between sixteen and nineteen blows. The deceased tried to scream but was almost incapable of doing so. Afterwards he was very weak and he could not pull up his trousers more than halfway. Thereafter Greeff similarly thrashed Isaks. The latter says he received seventeen blows. So far as appears, there was no connection between this assault and the previous assault by the appellant.

As the Attorney General indicated to the trial Court that there would be proceedings arising out of this second assault, it is undesirable to expand upon it.

Thereafter, about 7 a.m. that Monday morning, Boshoff and Greeff took the deceased and Isaks to the

gravel pit. On arrival, the deceased fell off the lorry as he was trying to climb down from it. He landed on his side. Boshoff told him to go and sit near a bush. He staggered thither and laid himself down. Then he returned, and just stood there. Boshoff hit him on his left cheek. He fell down. He lost consciousness. Later he tried to stand up, and came on his knees to the gravel pit. Another European dragged him back to the bush, about 20 paces. At 1 p.m. he was found there, sprawled out on the sand, and dead.

The assault by the appellant upon the deceased on the Saturday night was described by Ruben Petrus and Josaphat Katjiango. These two witnesses made a good impression on the three members of the trial Court, and their evidence in regard to the assault was accepted.

The post mortem examination was performed on Tuesday, 2 July 1974. The cause of death was stated in the district surgeon's report to be -

> "small bowel perforation with shock and septicaemia".

The district surgeon said in evidence that septicaemia and peritonitis meant more or less the same. He added that, as the result of the perforation, the contents of the intestine seeped into the abdominal cavity, and so caused the inflammation of the bowels. The septicaemia ensued. Normally, a person with such a perforation dies within 2 or 3 days if he does not have medical attention. Any reasonably hard blow on the abdominal wall could cause the perforation - a good blow with the fist or a good kick from a shod foot. The folded hose pipe (with which Greeff had thrashed the deceased) could not cause a perforation. The thrashing on the Monday could not have caused the death. It might have accelerated death by worsening the shock and pain and suffering and reducing the body's resistance. He also said that, with a perforation, a person would immediately experience pain and would be inclined to walk with a forward stoop.

The defence made an attempt to establish that

Walter Kariseb reported that he had been told that on the Saturday evening Isaks had thrust at the deceased's stomach with a spade; and that that was the reason why the deceased stabbed Isaks. Hence, so it was argued, it might have been the spade-thrust, and not the appellant's assault, that caused the fatal injury to the deceased. In my view this was a forlorn defence. I do not consider it necessary to say more, for the three members of the trial Court examined it at length and found no substance in it. I am unpersuaded that they were wrong.

I proceed now to deal with the main arguments of the appellant's counsel.

1. Did the appellant cause the fatal injury to the deceased? On this aspect of the case, counsel attacked the evidence of the only two witnesses who testified to the appellant's assault upon the deceased on the Saturday night. They were Ruben Petrus and Josaphat Katjiango. It was conceded that there was <u>an</u> assault by the appellant. What was challenged was its nature and extent. I do not think that

it is necessary to deal with the minutiae of the argument. In my view it is sufficient to say that counsel succeeded somewhat in denigrating the reliability of the witness Katjiango. On the other hand, the criticism of the reliability of the witness Petrus was not successful. He emerges as a reasonably good witness. He was accepted as such by the three members of the trial Court. Furthermore, the appellant did not give evidence. Nor did he call any witnesses, (save in regard to the forlorn defence of an alleged spade-thrust at the deceased, which in any event could only relate to a time some hours before the assault by the appellant). Thus there is nothing to gainsay the evidence of Petrus. It was therefore proved that the appellant's assault on the deceased included a few kicks in the stomach, the appellant wearing shoes.

2. Was there proof that it was the appellant who caused the deceased's death? This is bound up with the question whether the thrashing of the appellant by two men on the Monday morning was a novus actus interveniens. In my view these matters must be considered in the light of the evidence of the district surgeon. Although

he was cross-examined, no evidence was led to contradict him. His evidence reads well. He was confident that the cause of death was the perforated small intestine, with shock and septicemia. He was emphatic that the thrashing on Monday morning could not have caused such a perforation. He gave his reasons. Asked where the perforation was, he said -

"Dit was by die aansluiting van die duodenum en die jejunum ..... daardie deel van die dunderm is heeltemal vas aan jou, aan die buik agter vas, heeltemal vas, hy is nie beweegbaar soos die jejunum nie. In daardie gedeelte is hy gefikseer ..... die punt van jou sterum en jou naeltjie, tussen die twee, in die middel daarvan."

Having thus indicated the site of the perforation, the doctor explained how a blow on the stomach caused it -

"Met n besering word hy (die dunderm) vasgedruk teen die werwelkolom, en dit veroorsaak n gaatjie in die derm."

That situation, he said, could not have come about as the result of the subsequent thrashing.

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As to the effect of such a perforation, the evidence was as follows -

"Hoe lank nadat 'n persoon 'n perforasie in sy dunderm opdoen van die aard wat u gesien het by die oorledene, sou daar voldoende derminhoud uitgelek het en kon die man se dood veroorsaak. Om dit duideliker te stel, hoe lank nadat 'n persoon so 'n perforasie van sy dunderm opgedoen het, sal hy gewoonlik normaalweg sterf? Is dit 'n kwessie van ure of dae? --- Ek sal sê so twee, drie dae.

Dit is nou vir die ontsteking om sy dodelike effek te he? --- Ja, om sy effek te hê.

DEUR DIE HOF: En in daardie tydperk, u het die skatting twee, drie dae gegee, as 'n man byvoorbeeld onmiddellik na so 'n besering mediese behandeling kry, is dit moontlik om sy lewe te red? --- Ja, sy kanse is baie beter.

Kan ek dit so stel, hoe langer die vertraging hoe slegter die kanse? --- Dit is reg."

The doctor went on to say that a kick in the stomach with a shod foot would be much worse

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than a blow with a fist, because the sole of the shoe is hard and does not give. He further explained that a perforation, so caused, would result in immediate pain; and the victim would be induced to walk in a stooped position. The latter evidence is significant, for there was testimony as to the deceased's bowed posture (normally alien to him) immediately after the assault by the appellant, and thereafter as well. His holding of a hand to his stomach is also indicative of injury in that region, as the result of the appellant's assault.

To sum up on this aspect, I am unpersuaded that the trial Court erred in finding that the deceased's death was caused by the appellant's assault which included kicks in the stomach with a shod foot; and in finding that the subsequent thrashing by others did not cause the fatal perforation.

3. Ought the appellant reasonably to have foreseen the possibility of death resulting from the kicks in the stomach with a shod foot? It must be remembered that the

deceased was a tall, slightly built, gangling youth. The appellant was stronger and heavier.

A diligens paterfamilias may not have heard of the Queensbury Rules but it would be asking too much to suppose that he would not appreciate the possibility that kicks by a strong young man, wearing shoes, in the stomach of a slender youth might well cause serious injury; and that such injury could bring death hovering in attendance. Serious injury and death are sombrely familiar as cause and effect in the walks of human experience, for the vulnerabilities of the human body are legion, and death may come to mortals through a variety of corporeal hurts and derangements. See S. v. Bernardus, 1965 (3) S.A. 287 (A.D.) at page 307 A - C, and S. v. Thenkwa en n Ander, 1970 (3) 529 (A.D.).

To sum up on this issue, I am unpersuaded that the trial Court was wrong in holding that the appellant ought reasonably to have foreseen the possibility of death resulting from his kicking of the deceased in

the stomach. (This, of course, does not mean that he did foresee: had that been the case, the verdict would have been murder). In the result, the appellant was negligent in relation to the resultant death; and the verdict of guilty of culpable homicide cannot be disturbed.

4. Sentence.

1. In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal -

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the

discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

See, as to all of the foregoing, R. v. Mapumulo and Others, 1920 A.D. 56 at page 57; R. v. Freedman, 1921 A.D. 603 at page 604, in fin.; S. v. Narker and Another, 1975 (1) S.A. 583 (A.D.); and S. v. Rabie, (A.D. 23 September 1975).

The general guidelines in arriving at an appropriate sentence are set out in Rabie's-case, supra.

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As to the crime. This was a cowardly assault. For one thing, the odds were hopelessly against the deceased. He was a youth of 19 years and slight of build, who was rather the worse for liquor. He was attacked by two Europeans, both of them older and of heavier build. Moreover, he was kicked in the stomach when he was down. From then on he suffered pain and walked in a stooped position, more often than not holding one hand to his stomach. Death was hovering in attendance. The appellant ought reasonably to have foreseen the possibility of resultant death.

The criminal. No doubt the appellant was frustrated and angry. He had just returned from an unavailing drive of 70 kilometres at night to secure medical aid for the person whom the deceased had stabbed. On his return he blew up and vented his frustration and anger on the cause of it. That was understandable;

but he had no right to take the law into his own hands as he did. He must be deterred from such conduct. In his favour are his age (21 years), his clean record, and his humanity in driving the deceased's victim a distance of 70 kilometres at night to seek medical aid. It may well be that, if he had had sufficient petrol, he would also have driven the deceased as far as Swakopmund for medical attention, in which event death could have been defeated. Also relevant are the facts that the assault by the appellant was of short duration and that no weapon was used, lethal or otherwise.

Society. Man should be free to live out his life peacefully and unmolested. Society requires the recognition of this right; and requires that persons, who might be inclined to emulate the offence of the appellant, should be punished and deterred by his appropriate sentence.

Balancing all relevant considerations, I come to the conclusion that an appropriate sentence would be

one of imprisonment for four years, with two years thereof suspended. The latter Damoclean warning is calculated to induce the appellant to watch his step in treading life's pathway - to the benefit of society.

This result is sufficiently disparate from the actual sentence to warrant interference on appeal.

To sum up -

1. The appeal is allowed in part.

2. The sentence is reduced to one of imprisonment for four years, of which two years are suspended for three years from date of conviction. The condition of suspension is that during that period the accused is not convicted of any offence, committed during that period, involving assault in respect of which the sentence is imprisonment (whether suspended or not).

G.N. HOLMES,

JUDGE OF APPEAL.

TROLLIP, J.A.)
GALGUT, A.J.A.) Both concur.