THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 321/2001

In the matter between :

NAIDOO AND TWO OTHERS **Appellant**

and

THE STATE **Respondent**

Coram: **MARAIS, ZULMAN *et* MPATI JJA**

Heard: **2 MAY 2002**

Delivered: **14 NOVEMBER 2002**

Murder – culpable homicide – conviction upon multiple counts of culpable homicide arising from single act – whether permissible. Sentence – approach in cases of culpable homicide.

J U D G M E N T

MARAIS JA/

MARAIS JA:

[1] On the afternoon of 24 March 2000 a tear gas canister was activated in the Throb Club in Chatsworth while it was packed with schoolchildren celebrating the end of a school term. A stampede ensued in which thirteen young people died and many were injured. Charges of murder, assault, and unlawful possession of the tear gas canister were preferred against three persons alleged to have been responsible for the activation of the canister.

[2] The murder charges failed because the court (Hugo J and assessors) concluded that it had not been proved that the deaths had been either desired or actually foreseen. The court found that the deaths should have been foreseen and convicted all three accused on thirteen counts of culpable homicide (a competent alternative verdict in terms of s 258 of Act 51 of 1977). They were also convicted on 57 counts of common assault and the count of unlawful possession of the tear gas canister.

[3] The three accused were each sentenced to eighteen months' imprisonment on each of the thirteen counts of culpable homicide. In the case of accused nos 1 and 2 the sentences imposed in respect of three of the counts were ordered to run concurrently with one another and with the sentences imposed in respect of the remaining counts of culpable homicide. No such order was made in respect of accused no 3. All of the accused were sentenced to six months' imprisonment in respect of their unlawful possession of the tear gas canister and five years' imprisonment in respect of the 57 counts of common assault which were taken together for the purpose of sentencing. These sentences were also ordered to run concurrently with one another and with the sentences imposed in respect of the convictions of culpable homicide. The net effect of it all was that accused nos 1 and 2 were sentenced effectively to fifteen years' imprisonment and accused no 3 to nineteen and a half years' imprisonment.

[4] Accused nos 1 and 2 were granted limited leave to appeal by the court *a*

quo. They were restricted to contending that their conviction upon multiple counts of culpable homicide and assault was impermissible in law and that they should have been convicted of one count of culpable homicide in which the death of thirteen people was involved and one count of common assault in which 57 people were assaulted. They were granted unrestricted leave to appeal against their sentences. They have not prosecuted their appeals and there was no appearance by them or on their behalf when the appeal was heard. I shall return to what the consequence of that should be.

[5] The court *a quo* granted accused no 3 unrestricted leave to appeal against all his convictions and sentences. Heads of argument were filed and counsel appeared on his behalf at the hearing of the appeal.

[6] The case which the State sought to prove against accused no 3 (to whom I shall refer hereafter as the appellant) was that he, a part owner of a rival club (the Silver Slipper) in Chatsworth, supplied accused nos 1 and 2 with the tear gas canister and commissioned them to smuggle it into the Throb Club and then activate it so that the patrons would flee the premises and repair to the Silver Slipper instead.

[7] The appellant denied that he had done so and raised alibis. He also called some witnesses in support of his case. The case for the State rested upon the evidence of an accomplice, one Dayalan Tyrone Pillay, and the corroboration of it which was submitted to exist. In essence, the defence case was that Pillay and the other two accused activated the canister for reasons of their own, more

specifically, to facilitate the robbing of patrons. That was said to be a technique which had been employed by a local gang on a previous occasion.

[8] The submissions of counsel for the appellant were, in broad, that the trial court's evaluation of the evidence of the accomplice Pillay and of the evidence which was said to provide material corroboration of it in respects implicating the appellant was faulty and that the evidence of the appellant and his witnesses had not been accorded the weight it should have been.

[9] Some of the criticisms of the evidence of Dayalan Pillay have substance but the trial court acknowledged that to be so and took them into account in evaluating his evidence. In deciding that these criticisms did not derogate from the acceptability of his incrimination of the appellant, the court *a quo* found satisfactory corroboration for it in a number of respects.

[10] There was the evidence of Poobalan (Billy) Pillay that the night before the incident the appellant arrived at his flat in a white Golf motor vehicle and enquired about the whereabouts of accused no 1 and Dayalan Pillay. He asked the witness to tell them that they should come to him at the Silver Slipper. The witness testified further that on the morning of the incident the appellant arrived again at his flat in the same vehicle and again asked for accused no 1 and Dayalan Pillay. They were not there but accused no 2 was there and he and the appellant left in the appellant's vehicle.

[11] After the incident (at about 16h00) accused nos 1 and 2 and Dayalan Pillay came to his flat. Accused no 2 (who is his stepson) had blood on his clothes and the clothes of accused no 1 were creased. Both had a bath and left

his flat at about 18h00 together with Dayalan Pillay. Later that evening the police arrived. They were looking for accused no 2. Five to ten minutes after the police had left the appellant arrived in the Golf vehicle which he parked behind the building in a position in which it could not be seen from the road. (On the two previous visits he had parked it in the front of the building where it could be seen.) Accused nos 1 and 2 and Dayalan Pillay were with him.

[12] Upon being informed that the police had come looking for accused no 2, Dayalan Pillay and the appellant told accused no 2 to pack his clothes so that they could all "go". When the wife of accused no 2 remonstrated with them and asked who would provide for her in the absence of accused no 2, the appellant gave her R70,00 and told her not to worry. All four of them then departed in the golf vehicle.

[13] This witness also testified that the appellant subsequently offered him R70 000,00 and a half a packet of Mandrax tablets to induce his stepson (accused no 2) "not to talk about him". The appellant's evidence was that none of these allegations relating to him was true.

[14] It was not disputed that the appellant drove accused nos 1 and 2 and Dayalan Pillay to Umkomaas and left them there that very evening. The appellant's version was that he encountered accused nos 1 and 2 and Dayalan Pillay quite fortuitously that evening at a casino a few doors away from the entrance to the Silver Slipper Club. Accused no 2 asked him for a lift. He told them that he was going to watch soccer at the stadium and all three of them accompanied him to watch the soccer. About three quarters of the way through the match accused no 2 said that he needed to go home urgently. He looked very worried. As the soccer was boring he left with the three of them and took them to accused no 2'' home.

[15] Accused no 2 asked him to wait a few minutes for him as he wished to return to the casino. While waiting he heard "loud screams" emanating from the balcony on the second floor. Accused no 2 and his family were on the balcony and his wife was hysterical. They all looked "shocked" and "worried". They begged him to take accused no 2 to Umkomaas. He assented and accused no 1 and Dayalan Pillay accompanied them to Umkomaas where he dropped them and returned to the club.

[16] During a bail application by the appellant in the Magistrates' Court the appellant told the presiding magistrate that he wished to see a magistrate in private, that he did not want to talk to his attorney who was present in court and who wished to speak to him, and that he wanted to make a statement in private to a magistrate – "maybe a confession".

[17] While in custody the appellant indicated to Captains Govender and Cassim that he wished to see the investigating officer because he wanted to become a State witness. The appellant's evidence was that he said nothing of the sort to them.

[18] There was the evidence of Bradley Moonsamy that on the fatal day he was told by the appellant to have his entrance fee for the Silver Slipper Club ready because all the people from the Throb Club would be coming to the Silver Slipper Club. That such a statement was made by him was denied by the appellant.

[19] There was also the evidence given by accused nos 1 and 2 which implicated the appellant and confirmed Dayalan Pillay's evidence in many important respects. The court *a quo* bore in mind that they were accomplices on their own version and that a cautious approach to their evidence was needed.

[20] The evidence given at the trial had of course to be considered in its entirety before any conclusions could be safely reached. It is so that if the evidence given by the appellant and his witnesses is to be given its face value, the appellant was not implicated in the incident at the Throb Club. But that evidence cannot be regarded as reasonably possibly true or accurate because it is simply not reconcilable with facts which were proved beyond reasonable doubt to exist. The facts are those testified to by Poobalan (Billy) Pillay and Bradley Moonsamy and the appellant's utterances during his bail application and to Captain Govender and Cassim.

[21] Poobalan (Billy) Pillay was admittedly not a wholly disinterested witness. Accused no 2 is his stepson and accused no 1 his nephew. Yet the evidence which he gave for the State was adverse to their interests and plainly incriminated them. The possibility that he might have deliberately and falsely concocted the visits to his flat which the appellant denied having made is rendered remote when it is weighed up against, first, the undisputed fact that the appellant did in fact consort with accused nos 1 and 2 and Dayalan Pillay on the evening of the incident and that he took them to Umkomaas and deposited them there, and secondly, the utterances of the appellant to Bradley Moonsamy, and, during his bail application, to Captains Govender and Cassim.

[22] When seen in isolation the first of those factors is not conclusive but when weighed in conjunction with the second factor, which is in itself well nigh conclusive of the appellant's involvement in the commission of the crimes, their combined impact is such as to remove any shadow of doubt that may have existed about the incrimination of the appellant by Dayalan Pillay and accused nos 1 and 2 and the evidence of Poobalan (Billy) Pillay as to the appellant's visits to his home both before and after the incident.

[23] The appellant's attempts to explain away his statement that he wished to

see a magistrate in private and maybe make a confession failed to provide any reasonably possibly true explanation consistent with his non-involvement in the crimes and the same can be said of his explanation as to how it came about that he was with accused nos 1 and 2 and Dayalan Pillay after the incident and why he took them to Umkomaas.

[24] The value of the evidence of the witnesses called in the defence of the appellant has to be discounted in the light of what has been said in the previous paragraphs. To the extent that any of it is incompatible with the involvement of the appellant, it cannot possibly reasonably be true or accurate. To the extent that it remains compatible, it is of course of no help to the appellant.

[25] Much was made of evidence that the appellant's own son and another person to whom he is related was, to the appellant's knowledge, at the Throb Club. It was argued that that rendered it highly improbable that the appellant would have exposed them to teargas. Even if they were indeed there I do not think that that rules out the appellant's involvement. He obviously thought no more than temporary discomfort would be caused because he banked on the persons who fled the Throb Club repairing immediately to his own club.

[26] In the final analysis a court of appeal does not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong. In my view neither has been shown and the appeal against the appellant's convictions must fail unless his alternative contention that he should have been convicted of only one count of culpable homicide succeeds. I turn to that question. (No submissions were made relating to the multiple convictions of common assault and I refrain from expressing any opinion on that issue. The convictions were taken together for the purposes of sentence and the sentences imposed were ordered to run concurrently with the sentences imposed in respect of the convictions of culpable homicide.)

[27] What the crimes of murder and culpable homicide have in common is a fatal outcome for a human being. Absent a death, absent the particular crime. What they do not have in common is that absent a death, there may be a conviction of attempted murder but not a conviction of attempted culpable

homicide. The reason for the difference lies in the distinction between the two forms of *mens rea* which are essential elements of the respective crimes of murder and culpable homicide.

[28] The crime of murder cannot be said to have been committed unless the act or omission which caused death was intentionally committed or omitted and death was the desired result, or, if not the desired result, at least actually foreseen as a possible result the risk of occurrence of which the accused recklessly undertook and acquiesced in. In short, *dolus* in one or other of its manifestations (*directus, eventualis, indeterminatus, etc)* is the kind of *mens rea* which must have existed. Where the act or omission is accompanied by such *dolus* but death does not in fact ensue, it is easy to understand why the accused's conduct should be visited none the less with penal sanctions. A deliberate attempt to commit the crime of murder cannot be ignored and left unsanctioned simply because the perpetrator has failed to achieve his or her objective.
[29] The crime of culpable homicide, on the other hand, (certainly as regards the consequence (death) of the impugned act or omission) postulates an absence of *dolus* and the presence of *culpa*. The fact that the crime of culpable homicide may be committed even where the act which causes death is an intentional act of assault should not be allowed to obscure that essential truth. In such a case the perpetrator is not convicted of culpable homicide simply because he or she deliberately assaulted a person as a consequence of which it so happened that the person died. If the perpetrator could not reasonably have foreseen that death might ensue, a conviction of culpable homicide cannot be justified. *Aliter* if death should have been foreseen as a possible consequence. What this shows is that it is the perpetrator's culpable failure to foresee the possibility of death in cases where an assault has resulted in death and, in cases not involving an assault, that failure coupled with a further culpable failure, namely, a failure to do what could and should have been done to prevent the occurrence of death, that is the rationale for the conviction of culpable homicide. *Culpa* is therefore always present in the crime of culpable homicide. Sometimes it is also associated with *dolus* (as in intentional assaults resulting in reasonably foreseeable but actually unforeseen death). Sometimes it is not (as in negligent conduct resulting in reasonably foreseeable death). For a

penetrating and instructive analysis of these matters see Professor Roger Whiting's article *"Negligence, Fault and Criminal Liability"* in (1991) 108 SALJ 431.

[30] Since the notion that an intentional unlawful killing may yet be merely a case of culpable homicide (the so-called "hybrid" case) was jettisoned in *S v Bailey* 1982 (3) SA 772 (AD), it has been possible to define without qualification the crime of culpable homicide as the unlawful **negligent** killing of a human being. See Snyman, *Criminal Law*, 4th ed at p 425; Burchell and Milton, *Principles of Criminal Law*, 2nd ed at p 474; Milton, *South African Criminal Law and Procedure* Vol 11, 3rd ed at p 364. The intellectual athleticism sometimes devoted in the past to identifying *culpa* in such situations in order to justify a verdict of culpable homicide despite the obvious existence of *dolus* in the form of an intention to kill, is no longer required. Such situations are now classified as murder and the circumstances which in the past might have prompted verdicts of culpable homicide now come into consideration as possibly mitigating factors only when sentence has to be imposed.

[31] All this may seem to be an unnecessary excursion into the differing nature of the respective crimes when the issue is whether appellant should have been convicted of thirteen counts of culpable homicide or only one count involving thirteen deaths. But the analogy (or lack of it) of murder featured in the arguments addressed to the court and in the cases in which the question has been considered in the provincial divisions and it would be as well to have a clear understanding of the similarities and differences between murder and culpable homicide before attempting to answer the question.

[32] In *S v Mampa* 1985 (4) SA 633 (C) it was held by Van Heerden J and

Rose-Innes J that a negligent motorist who caused the death of two of his passengers by driving too fast around a sharp bend should not have been convicted upon two counts of culpable homicide. Much of the judgment is devoted to a general discussion of the law relating to the splitting of charges and the drawing of a distinction between murder and culpable homicide where more than one death is the result of the accused's single act. With respect, I do not find the general discussion of the problem of splitting of charges to be of great assistance in finding the answer. More importantly, I consider the particular distinction drawn between an intended act of homicide which causes the death of more than one person and an unintended act which has the same result to be based upon a false premise. Rose-Innes J said: "The gravity of an accused's conduct in offences based on negligence cannot be judged by its actual consequences. *R v Msimango* 1950 (2) SA 205 (N) at 209-210. It follows that to charge and convict an accused with one offence or several offences of culpable homicide arising from a single negligent act or omission according to the number of persons whose deaths were caused by the accused's negligence would be arbitrary and unrelated to his criminal blameworthiness." (At 639 C–E).

[33] First, it is undoubtedly so that the reasonably foreseeable consequences of an accused's conduct do play a role in assessing the gravity ("criminal blameworthiness") of the offence even where the conduct was negligent and not intentional and that there is no arbitrariness in that. The *dicta* in *R v Chamboho* 1964 (1) PH H 69 (SR) and *R v Barnardo* 1960 (3) SA 552 (A) which Rose-Innes J quoted at 638 H-I appear to have been misunderstood. Those were not cases in which more than one death had been caused. The point that was made in those cases was that the result of negligent conduct is adventitious and *ex hypothesi* not intended. Two identical negligent acts might have vastly different consequences: one might have no consequence at all, the other might cause death. In each case the departure from the standard of care required of a reasonable person is the same and the moral guilt of the persons involved in the departure is the same. However, the fact remains that the common law does not visit the negligence in the one case with any penal sanction but it does in the other simply because of the difference in consequence of the departure.

[34] Both *dicta* emphasise the importance of bearing that in mind when sentencing for culpable homicide but both accept that, nevertheless, the

reasonably foreseeable seriousness of the consequence must receive recognition despite the fact that it was not intended. Once that is so, it must follow logically that "criminal blameworthiness" is indeed greater where a large number of deaths has ensued provided of course that a reasonable person should have appreciated that a large number of deaths might be caused. Society at large will not take kindly to any suggestion that the sentences imposed upon a motorist whose high speed around a bend has caused his vehicle to capsize and a hitchhiker to whom he had given a lift to lose his life, and upon a bus driver whose identical conduct has caused twenty people to lose their lives, should be the same. In so far as parity of gravity was invoked as a reason for restricting the prosecution to one count of culpable homicide where reasonably foreseeable multiple deaths have resulted from a single negligent act, I do not think it was a good reason.

[35] Secondly, in *S v Grobler en 'n Ander* 1966 (1) SA 507 (A) this court accepted that the crime of murder is committed whenever a life is unlawfully and intentionally taken because the crime of murder is so defined. The illustration given was that of A throwing a bomb at B and C intending to kill them. That was regarded as amounting to the commission of two murders although they were the result of one act. In *S v Prins en 'n Ander* 1977 (3) SA 807 (A) this court emphasised that it is of the essence of the crime of murder that it is a crime against life. In my view, exactly the same applies to the crime of culpable homicide. They are both narrowly consequence-oriented crimes in the sense that the death of a human being is a *sine qua non* of both. It is of

course so that all crimes (save, obviously, attempts to commit crimes) are consequence-oriented but the distinction between a crime like, say theft, on the one hand, and murder and culpable homicide, on the other, is the very particular and unique specificity of the required social consequence of the misconduct. Thus, and subject of course to the exception of things which are either absolutely or relatively incapable in law of being stolen, to constitute the crime of theft it matters not what particular thing is stolen. But, as we have seen, without the death of a human being there can be no talk of the crimes of murder or culpable homicide having been committed.

[36] Just as in the case of murder it is immaterial whether multiple killings were the result of one act (such as throwing a grenade) and as many counts of murder as the number of people who have been killed may be preferred, so too in the case of culpable homicide where multiple deaths have been caused is it immaterial that they were caused by a single negligent act or omission provided only that multiple deaths were a reasonably foreseeable consequence.

[37] To hold otherwise would have peculiar results. If A is legitimately charged with three counts of murder in that on the same occasion he unlawfully and with intent to kill set his vicious dogs upon X, Y and Z as a consequence of which they were killed and the court finds that he did not foresee the possibility that they might be killed but that he should have, is the court precluded from returning an alternative verdict of culpable homicide upon each of the three murder counts? Surely not. If it be suggested that a single alternative verdict of culpable homicide of X, Y and Z could be returned, to which of the three individual counts of murder may it be returned? Whichever one be chosen the consequence would be that the accused would be convicted of unlawfully killing two persons to whom the chosen count of murder did not relate. That would not be permissible for obvious reasons.

[38] It may be suggested that in such cases the State should be obliged to forego its right to rely upon the competent alternative verdict for which s 258 of

Act 51 of 1977 makes provision and instead draft a single alternative charge of culpable homicide to all three of the murder charges in which alternative charge X, Y and Z are all named as having died. But by virtue of what principle of law is the State to be deprived of its right to a statutorily provided competent alternative verdict against the accused upon **each** of the counts of murder? I know of none and none has been suggested. Moreover, if it is indeed only one offence of culpable homicide, the principle of *autrefois convict* would apply to it and in cases where further deaths ensue after an initial successful prosecution has run its course, it would not be possible to invoke any further criminal sanction for the unlawful causing of those additional deaths. *Autrefois acquit* may stand on a different footing depending upon whether the doctrine of issue estoppel is available against the State in a criminal prosecution. This problematical aspect of the matter has received some attention in the reported cases but, with respect, I am left unconvinced that satisfactory answers to the conundrum which a plea of *autrefois convict* raises have been provided.

[39] In *S v Mavuso* 1989 (4) SA 800 (T) the court accepted that a person who throws a bomb into a room intending to kill A but not caring whether other persons who are known to be in the room are also killed, can properly be charged in separate counts with the murder of each person killed. However, it sought to distinguish the case where a person fires a single shot knowing that it might hit and kill a person, but it hits and kills two persons. It said that it was

unaware of authority for the proposition that two separate counts of murder could be preferred.

[40] With respect, there is, in my view, no reason in principle or in considerations of fairness why they should not be. If such a person intends to shoot and kill one person (or fires a shot in the direction of one person realising that it may hit and kill that person but not caring whether that happens) but he neither knew nor should have known of the presence or possible presence of another whom it also hits and kills, he cannot be held guilty of either the murder of that other person or of the culpable homicide of that person. If he did know of the presence of the other person and actually foresaw that the shot he intended to fire might strike and kill both persons but fired the shot not caring whether he also hit and killed the other person, his position is no different in principle from that of the bomb thrower. If he was not aware of the presence or possible presence of another, he cannot be convicted of the murder of that person. If he should have been aware of it and should have appreciated that he was putting that person's life at risk, he can be convicted of culpable homicide of that person and of murder of the person whom he intended to kill.

[41] If that be so, (the same act resulting in separate convictions for crimes which both entail the unlawful ending of a life) what reason is there to balk at

separate convictions of culpable homicide if the State should fail to prove that the accused intended to kill anybody (whether by *dolus* or by *dolus eventualis*) but proves that he should have foreseen that he might kill more than one person if he fired the shot? I see none.

[42] The court's erroneous view of the example which it posed in *S v Mavuso, supra,* was compounded by what I consider, with respect, to be its equally erroneous analysis of the legal blameworthiness of an accused in cases of culpable homicide where negligence is the form of *mens rea* which characterises the crime. It said: "Die heersende oordeel omtrent billikheid is dat in die konteks, die feit dat meer as een persoon gedood is nie daarvan afdoen nie dat 'n beskuldigde wesenlik een stafbare handeling begaan het en nie twee of ses of 17 maal gestraf behoort te word nie." (At p 806 B–C.)

[43] First, there is a *petitio principii* involved in the statement. To assert that such an accused has committed only one punishable act and that reasonableness requires that he or she face only one count is to answer the question before it has been addressed. For the reasons I have given, it is the foreseeable and actual consequences of the accused's negligent act which determine whether he or she is liable to be charged with one or more counts of culpable homicide. The punishable act is by definition the unlawful negligent killing of a human being. The unlawful negligent killing of more than one human being gives rise to more than one punishable act irrespective of whether the negligent act which caused death was a series of different acts or the same single act.

[44] Secondly, the reference to repetitive punishment for the same unlawful conduct is misplaced. There should be no difference (subject of course to jurisdictional sentencing limitations) in the sentence imposed whether multiple deaths have been the subject of separate counts or combined in one count of culpable homicide. Whether multiple deaths are the subject of a single count or

a number of separate counts, the totality of the sentence to be imposed will depend upon the personal circumstances of the accused, the degree of culpability present in both his or her conduct and in the failure to foresee the reasonably possible consequences of that conduct, and the actual consequences of that conduct. I conclude therefore that the appellant was correctly convicted of thirteen counts of culpable homicide. I turn to the appeal against the sentences.

[45] The circumstances in which the crime of culpable homicide may be committed range across a wide spectrum. At one end is the case where a momentary lapse in concentration on the task at hand has a tragic result. Neither the lapse nor the failure to foresee the consequences of it is deliberate. Yet they have resulted in a loss of life. They could just as easily not have had that result. Sentencing fairly and appropriately in such a case is one of the law's most difficult tasks. The *culpa* may have been slight but the result stirs an understandable call from society at large (and *a fortiori* from those close to the deceased) for the sentence to visit tangible retribution upon the culprit. Balancing the need for a sentence that, on the one hand, will not appear to rate the loss of a life with all the attendant trauma to those to whom the deceased was near and dear as not too serious against, on the other, the need to calibrate the

degree to which the accused's conduct deviated from the standard of care expected of a reasonable person and, if it is found to be slight, to also reflect that adequately in the sentence to be imposed, is inherently difficult. The outcome will often satisfy neither those close to the deceased nor those close to the accused, being too lenient in the eyes of the former and too severe in the eyes of the latter. But that does not absolve a court from its duty to strive as best it can to achieve a proper balance between those objectives.

[46] At the other end of the culpable homicide spectrum is the type of case where the accused has deliberately assaulted the deceased but has not been convicted of murder because the State has failed to prove beyond reasonable doubt that death was actually foreseen as a reasonably possible consequence of the assault. Because it should have been foreseen a verdict of culpable homicide is returned. Here there is more involved than *culpa*. An assault has been committed. *Dolus* is present. A deliberate attack upon a person's bodily integrity which was intended to harm has resulted in the most irremediable harm of all: death. Few would quibble at the justness of substantial custodial sentences for that type of culpable homicide. But even within that class of case there are distinctions to be drawn. Was a weapon used? How obviously potentially lethal was it? Was there provocation? How great was the negligence in failing to foresee that death might result?

[47] Here we have a case which is situated somewhere between those two ends of the spectrum. An assault of sorts was involved. Intentional use of teargas to induce physical discomfort for no lawful purpose is plainly an assault. But it was not the assault which was the immediate physical cause of the ensuing deaths. It was the stampede which followed upon the release of the teargas and the severely limited number of exits which were available to patrons desperate to evacuate the club without delay. It is also relevant that the appellant knew of an earlier similar incident at another club. No one had been killed or seriously injured on that occasion. While that did not entitle him to ignore the

objectively appreciable risk of possible loss of life should the release of the teargas precipitate a stampede, it was calculated to induce a belief (albeit misplaced) that no one would suffer serious harm, far less be killed. As the court *a quo* found, the appellant could not have envisaged serious harm because he hoped that those present would forsake the Throb Club and proceed instead to his club. Moreover, he was not aware of the exceptionally large number of persons who were in the Throb Club and there was evidence which cannot be dismissed (because it accords with the probabilities) that he asked for the canister to be activated soon after the Throb had opened its doors. He is also a first offender. Those are, in my opinion, important mitigatory factors.

[48] As against those factors there are aggravating factors. No less than thirteen young lives have been cut short. The anguish of their families and friends must have been immense. The motive was mercenary: to deviate custom to his own club. The palpable anger of the community from which the victims came is entirely justified and fully understandable. The exploitation of economically vulnerable young men by requisitioning them to place and activate the teargas canister is also something which tells against the appellant.

[49] When all is said and done anything less than a substantial custodial sentence would justifiably be regarded by society at large as an unduly lenient response to the tragic consequences of the appellant's unlawful conduct, motivated as it was by commercial considerations. Yet the sentences imposed by the court *a quo*, when regarded cumulatively (effectively years' imprisonment), and even taking into account that they were also imposed in

respect of the 57 convictions of common assault and the count of unlawful possession of the teargas canister, are so far removed from what I consider to be an appropriate sentence that they fall to be characterised as strikingly inappropriate and therefore to require amelioration by this court. It is therefore unnecessary to deal with the alleged misdirections of which the court *a quo* was submitted to have been guilty by counsel for the appellant. It suffices to say that the submissions were not without some substance.

[50] I make the following orders in respect of the appeal of the appellant:

(a) The appeal against the convictions fails and is dismissed.
(b) The appeal against the sentences imposed in respect of the thirteen counts of culpable homicide succeeds. Those sentences are set aside and the following sentences are substituted for them and, if appellant has been serving the sentences since they were imposed, antedated to the date upon which he commenced to serve the sentences: "On each of the thirteen (13) counts of culpable homicide, nine (9) months' imprisonment".
(c) For the rest, the sentences imposed by the court *a quo* remain unaltered.

(This means that appellant's sentences now amount effectively to nine (9) years' and nine (9) months' imprisonment. In imposing these sentences I take into account that the appellant was in custody for eight months prior to his conviction).

[51] Finally it is necessary to record that although Selvan Naidoo and Vincent Pillay were granted leave to appeal against their "multiple convictions of

culpable homicide and assault and in respect of sentence" (no leave to appeal against the finding that the crimes of culpable homicide and assault had been committed by them was sought), no heads of argument were filed on their behalf and they were neither present nor represented at the hearing of the appeal. The explanation given from the bar was that it was assumed that if the appellant's contention that, at worst, he should have been convicted of only one count of culpable homicide and one count of assault was accepted and, if his sentences were reduced, the court would also *mero motu* ameliorate the positions of Naidoo and Pillay. The court having indicated that the assumption was not well-founded, counsel were given an opportunity of considering the question and furnishing further written submissions. This they have done and are *ad idem* that the appeals of Naidoo and Pillay should not be dismissed for want of prosecution in terms of Rule 13 (3) of the Supreme Court of Appeal Rules and that their appeals should simply be struck from the roll thus leaving it open to them, if so advised, to apply for condonation of their non-prosecution of their appeal and for its reinstatement. Indeed, counsel for the State was prepared to allow this court to adjust their convictions and sentences now should the appeal of the appellant succeed in a respect which would justify doing so. That cannot be done. Apart from this Court's lack of any inherent review jurisdiction in criminal matters, Naidoo and Pillay would not have been heard. It is ordered therefore that the appeals of Selvan Naidoo and Vincent Pillay be struck from the roll.

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R M MARAIS
JUDGE OF APPEAL

ZULMAN JA)
MPATI) CONCUR