**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: A112/2015**
**DPP REF NO: 10/2/5/1-(2015/153)**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

14/12/15
DATE

SIGNATURE

In the matter between:

**PHIKA, THEMBISILE** Appellant

and

**THE STATE** Respondent

---

**J U D G M E N T**

---

**VICTOR, J:**

[1] There are two issues for determination in this appeal. Firstly whether the accused was accorded a fair trial in terms of s35 of the Constitution and

secondly whether the appellant was correctly found guilty of murder with her having intent in the form of dolus eventualis.

[2] After the state and the defence entered into an informal plea bargain the magistrate refused to accept a guilty plea of culpable homicide. The appellant had signed a plea of guilty in terms of section 112 (2) of the Criminal Procedure Act No 51 of 1977 (CPA) and set out the facts on which she pleaded guilty and in particular her role in the death of the deceased. On 28 August 2012 the appellant was convicted on one count of murder for stabbing her husband to death and she was sentenced to 10 years direct imprisonment. She was granted leave to appeal conviction and sentence on 13 November 2012.

[3] After reading the statement in terms of 112(2) of the CPA the magistrate refused to accept the plea and insisted that the appellant be charged with a more serious offence of murder. He noted a plea of not guilty in terms of s113 of the CPA. The very facts she pleaded guilty to in the informal plea bargain were the very facts used against her in the trial.

**The Magistrate's interference in the charge of culpable homicide instituted by the prosecutor**

[4] Against that background the question to be addressed is whether the appellant receive a fair trial in the circumstances. The initial indictment was based on the prosecutor's discretion and determination that the interests of the State were not served by seeking a more serious charge. It is unclear what motivated the magistrate to insist on the more serious charge in the absence of him knowing what the State's evidence was.

[5] This appeal bench requested further argument on the question as to whether it was appropriate for the magistrate in the court *a quo* to add the additional charge of murder. A further troubling aspect is that the magistrate then proceeded to adjudicate the case himself.

[6] At the outset it is necessary to determine whether the magistrate's conduct was appropriate in these circumstances. Upon a reading of the record it is unclear why the magistrate insisted on a more serious charge other than the debate about the contents of the guilty plea for culpable homicide. The record reveals that the murder charge is discussed at the time of the bail application. During the preliminary proceedings the prosecutor undertakes to the magistrate to speak to the senior prosecutor about adding the murder charge. It is also evident from the appellant's written and signed plea explanation that the magistrate would not accept a guilty plea to culpable homicide despite the defence counsel's attempts to provide further drafts of her statement. One gets the impression that there must have been discussions off the record.

[7] In *S v Sehoole* 2015 (2) SACR 196 (SCA) [10] Mbha JA stated

> 'The state as dominus litis has a discretion regarding prosecution and pre-trial procedures. For instance, the state may decide inter alia whether or not to institute a prosecution; on what charges to prosecute; in which court or forum to prosecute; when to withdraw charges, and so forth. The state can elect to charge a person with a less serious offence. It is the prosecutor who makes the decision. There is no statutory provision which compels the state to charge a person with the more serious offence. At para [12] 'Ordinarily, courts are not at liberty to interfere with the prosecutor's discretion unless there are truly exceptional circumstances for doing so. For example, this might happen where a prosecutor has not exercised his or her discretion properly. However, when preferring a particular charge against an accused, courts are not at liberty to interfere with the discretion exercised by the prosecution during a trial.

[8] In the matter of *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA) the following was stated as follows:

> 'Courts are not overly eager to limit or interfere with the legitimate exercise of prosecutorial authority. However, a prosecuting authority's discretion to prosecute is not immune from the scrutiny of a court which can intervene where such a discretion is improperly exercised. . . . Indeed a court should be obliged to, and therefore ought to, intervene if there is no reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated.'

[9] In *Minister of Police and another v du Plessis* 2014 (1) SACR 217 (SCA) Navsa JA held:

'However, a prosecuting authority's discretion to prosecute is not immune from the scrutiny of a court which can intervene where such a discretion is improperly exercised.'

In my view there is nothing to suggest the prosecutor exercised his discretion improperly particularly if regard be had to the poor quality of the State's witnesses.

[10] In terms of section 105A of the CPA plea bargain negotiations are defined. The State and the defence agreed that the appellant would tender a guilty plea on the basis that the State had only put the charge of culpable homicide to her. The negotiations were informal in nature. The procedural formalities as required by section 105A were not followed such as a formal agreement signed or handed up at the trial court. It was a section 112 (2) statement that was handed up.

[11] Once the appellant's plea was not accepted no objection was proffered on her behalf. This appeal court invited further argument on the effect of the pre-trial negotiations and the detailed plea and whether this constituted a fair trial. On behalf of the appellant it was submitted that the principles envisaged in terms of section 105A of the CPA are still applicable despite the informal nature of the negotiations. In pleading the facts in the plea bargain she availed herself of the possibility of a custodial sentence upon being convicted on a count of culpable homicide but not for a sentence on murder. She was facing a less serious charge at the time and felt free to place the facts before the court. It was submitted on behalf of the appellant that the purpose of section 105A is to circumvent a trial and to obtain in exchange a less harsh sentence. This prompted the appellant to play open cards with the court which should have resulted in a strong mitigating factor. A context of trust was also created between the State and the appellant during those informal plea negotiations and this trust was violated with the re-indictment on a more serious charge.

[12] The plea-explanation by the appellant coincided with the State's case on the stabbing of the deceased thus corroborating her openness and honesty in regard to the incident. The hypothetical question to be asked is whether the appellant would have given any plea-explanation if she knew she was facing a more serious charge of murder.

[13] In terms of section 35 of the Constitution the appellant had the right to remain silent and if she had done so because the evidence was so poor she might well have been acquitted. In terms of section 105A (6) (c) of the CPA if the court is unhappy with the agreement it must record a plea of not guilty and the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer. This did not happen in this case. The same presiding officer heard the trial. This of itself was a fatal irregularity sufficient to vitiate the proceedings. A

retraction of the offer by the State was not in accordance with section 105A (6) (c) of the Act. In any event at best for the State the trial should have started de novo before a different presiding officer. It was also submitted that in terms of section 105A (10) (a) of the Act a trial court should not have had any regard to the contents of the plea-explanation and therefore the trial was unfair. The magistrate's judgement was largely based on the contents of her guilty plea. Another irregularity sufficient to vitiate the trial.

[14] The State opposed any suggestion that the trial was unfair. Fairness was to be found in the fact that the appellant did have a legal representative and had an opportunity to call witnesses. The fact of adding the murder charge prior to the leading of evidence gave her an opportunity to consult. The point is also made that the appellant's counsel was amenable to the addition of the murder charge and the appellant was not prejudiced by the additional charge as she was not compelled to proceed with her trial at that juncture and she could have sought a postponement. She did not withdraw her admissions and thus according to the State was not prejudiced.

[15] The State relies on the fact that the record does not show a formal plea bargain agreement in terms of section 105A of the CPA and therefore contends the provisions of that section do not apply. The State also submits that the magistrate acted within the confines of section 112(2) of the CPA and was therefore entitled to question her in the inquisitorial manner that he did.

[16] The State relies on the fact that the agreement was not fully in accordance with the plea bargain provisions of section 105A of the CPA and this according to the State is corroborated by the fact that there was no signed agreement and therefore no plea bargain was concluded and the plea bargain provisions do not apply. It was submitted on behalf of the State that section 81 of the CPA allows the State to add more charges at any time before the evidence is led and this is what happened. This may well be but it is patently

unfair to illicit the details of the lesser offence and then reject the guilty plea and use those very details to convict the appellant on the more serious charge.

[17] In my view there were no facts justifying the intervention of the magistrate when he insisted the prosecutor prefer a more serious charge. It was the prosecutor who had consulted with the State witnesses and who knew the extent of what he was able to prove. In entering into the informal plea bargain the prosecutor had extracted the best he could for the state since the witnesses on behalf of the state were most unsatisfactory as will be referred to more fully. Our courts are pressed by heavy court rolls and limited resources. A straight forward plea bargain such as this is to be encouraged. Courts in foreign jurisdictions rely heavily on plea bargaining. The question is whether the appellant's right to a fair trial was sufficiently compromised to vitiate the proceedings and whether the trial was in accordance with notions of basic substantive fairness and justice. In my view the facts in this trial called out for the matter to be heard before another presiding officer. The question whether the matter should be sent back for re-trial would be inadvisable at this stage. The appellant has been in custody for many years and any further delay would be prejudicial to her.

[18] In *S v Chukwu and another* 2010 (2) SACR 29 (GNP) Poswa J in analysing whether an irregularity may be of such as nature so as to amount to a failure of justice which vitiates the proceedings referred to S v Mkhise; S v Mosia; S v Jones; S v Le Roux 1988 (2) SA 868 (A) at 871G – J where Kumleben AJA held the following regarding irregularities of this nature:

'It is a well-established principle that an irregularity in the conduct of a criminal trial may be of such an order as to amount per se to a failure of justice, which vitiates the trial. (I shall, for convenience, refer to an irregularity having such effect as a 'fatal irregularity'.) On the other hand, less serious and less fundamental irregularities do not necessarily have that effect. As Holmes, JA said in S v Naidoo 1962 (4) SA 348

(A) at 354D - F, in reference to such irregularities: 'Broadly speaking they fall into two categories. There are irregularities (fortunately rare) which are of so gross a nature as per se to vitiate the trial. In such a case the Court of appeal sets aside the conviction without reference to the merits. There remains thus neither a conviction nor an acquittal on the merits, and the accused can be re-tried in terms of s 370(c) of the Criminal Code. That was the position in Moodie's case [1961 (4) SA 752 (A)], in which the irregularities of the deputy sheriff remaining closeted with the jury throughout their two-hour deliberation was regarded as so gross as to vitiate the whole trial. On the other hand there are irregularities of a lesser nature (and happily even these are not frequent) in which the Court of appeal is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses.'

[19] The difficulty in this case is that the appellant did not testify in her own defence. This makes it difficult to separate the 'bad from the good'. A further difficulty is the determination of her intention when she stabbed the deceased. In her plea-explanation she stated that she did not have the intention to kill the deceased who was her husband at the time. She did however in her plea-explanation admit that she was negligent in her actions. The question is what weight this court can attribute to the facts in her plea-explanation when it would be unfair for the trial court to utilise same in its judgment. It follows therefore that it would be inappropriate for this court to do the same. The question is whether the irregularity was so gross so as to be fatal and therefore unnecessary to consider the merits. In my view the trial proceedings have to be considered as a whole. The appellant was represented throughout and her counsel could have noted an irregularity and did not do so. If this appeal court should vitiate the proceedings the appellant could be retried as there would no conviction or acquittal on the merits. This would be prejudicial to the appellant who has been in prison for several years. Upon a proper consideration of the nature of the irregularity and the potential for prejudice should the appellant be retried. I shall not vitiate these proceedings and therefor proceed to consider the merits.

**Should the murder conviction stand?**

[20] The appellant was legally represented and a further complicating factor was that she was advised not to testify. Whether the decision not to testify amounted to the appellant being effectively defended or not is not necessary for this court to determine. The magistrate emphasised in his judgement that that the appellant had a "burden to adduce evidence in rebuttal" See *S vs Alex Carriers Pty Ltd* 1985(3) SA79T Flemming J. The magistrate also relied on *Burchell & Milton Principles of Criminal Law 3 ed* that in order for the appellant to succeed in a defence of self-defence there must be evidence on this if it cannot be gleaned from the state witnesses. In such a case the appellant bears the evidential burden.

'The quantity and strength of the rebutting considerations required by the accused to prevent the State producing a convincing case depends, in the nature of things, on the strength of the State case. The accused has to do nothing more than to cause the court, when reaching its decision, to have a reasonable doubt concerning the guilt of the accused'.

Notwithstanding it is the State that bears the onus throughout and it is necessary for this court to evaluate whether the evidence of the state was sufficient to justify a conviction of murder.

[21] It would have been helpful to have the appellant's explanation in order to determine the distinction between the crime of culpable homicide and murder dolus eventualis. The context of the crime played out in a situation of a drunken spree lasting many hours and possibly a day and overnight. She claimed in her plea of guilty statement to be defending herself from an attack by the deceased who was her husband of 18 years. He had beaten her up many times in the past.

[22] On the day in question there was an argument about using their grocery money to buy more alcohol for his friends who both testified. In her

statement she claimed that the deceased had hit her in the face with a clenched fist. She chased his friend Oscar away with a knife in her hand, the deceased approached her with a brick in his hand whereupon she retaliated and stabbed in his direction using the knife in her hand. Her intention was to scare him away. It proved to be a fatal stab.

[23] The two state witnesses had consumed alcohol during the day. There was also a contradiction between Mr Nkosi and Mr Khumalo. Nkosi did not see the stabbing but only heard a "*doof*" sound of the knife entering the chest cavity. He also admitted that he had made a false statement to the investigating officer.

[24] Mr Khumalo was a single witness to the stabbing. He stated that he did not see what instrument the appellant used to stab the deceased. He testified that he did not see how the deceased was stabbed because he was too drunk. He had been drinking the whole night. He testified that before the stabbing the deceased was standing next to the wall. He stood 5 metres away from the appellant. He claims the deceased had nothing in his hand. If he did not see the instrument used in the stabbing and was nonetheless able to in his drunken state to testify that the deceased had nothing in his hand, I find that to be unreliable evidence. He could not even describe the knife. The deceased had sponsored the drinking spree that entire day. There clearly was an argument about who was paying for the liquor that day. It was the appellant who had gone to buy the drinks. He had never seen a previous assault by the appellant on the deceased. He denied that the deceased became aggressive when he was drunk. The deceased was angry with the accused. There was an argument. He denied that it was about the amount of liquor that was being consumed. He denied that the appellant had chased him away. He admits lying to the police under oath. He conceded he told the appellant not to make the deceased angry because everyone was drunk. He in fact reprimanded the appellant. He was unable to provide an explanation as to why the appellant would have stabbed the deceased. He does not know

what happened and conceded that he was very drunk. He had also conceded that a person who is very drunk cannot testify accurately. He conceded that the deceased attacked the appellant. He did not see the brick because he was drunk. In re-examination he stated that he ran away from the appellant because she had a knife in her hand.

[25] In my view the State has not discharged the onus of proving beyond reasonable doubt that the appellant was guilty of murder with the intention in the form of dolus eventualis. In *S vs Pistorius* 96/2015 SCA. Leach JA defined that 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.'

[26] In this regard Leach JA also referred to the dicta of Holmes JA emphasised in *S v Sigwahla* 1967 (4) SA 566 (A) at 570C-E.

'The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a [reasonable person] in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. What was required in considering the presence or otherwise of *dolus eventualis* was whether he had

foreseen the possible death of the person behind the door and reconciled himself with that event.'

[27] Leach JA also went on to state:

'What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.' See *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449j-450c.

[28] There is no evidence in this matter to suggest that the appellant foresaw the death of the deceased and reconciled herself with fact. The evidence of the state witnesses on the question of murder was poor. There was an argument between the deceased and the appellant but the evidence of Khumalo and Nkosi was contradictory and unsatisfactory. Everyone on the scene was very drunk. Nkosi who was apparently standing next to the deceased did not even see the knife, he heard a sound. The witnesses were unable to comment on the threatening imminent attack by the deceased on the appellant with the brick. The state was unable to deal with that in any persuasive manner. The witnesses were too drunk.

[29] Where the State has succeeded in establishing a *prima facie* case the appellant does run a risk if she does not testify. The *State v Peppas* 1977 (2) SA 643 (A). She did not have to give evidence to involve herself in the murder charge. See *Osman v Attorney General, Transvaal* 1998 (2) SA 493 (CC). In my view the State did not prove murder in the form of intention dolus eventualis despite the appellant not testifying. It is not for an accused person to amplify the state's case by going into the witness box to self-incriminate herself. See *S v Lubaxa* 2001 (2) SACR 703 (SCA). The duty to adduce rebutting evidence was unnecessary in these circumstances where the

State's evidence was poor and unsatisfactory. The evidence produced by the two state witnesses was adduced through a hazy fog of drunken stupor. It was contradictory and unreliable.

[30] In the light of the above the question is whether the count of culpable homicide should stand. In assessing the evidence of the state witnesses the common feature is the appellant stabbed the deceased. The poor nature of the evidence led by the State is insufficient to support a finding of murder. In the absence of an explanation by the appellant other than in her statement the question of why she stabbed the deceased is left open. Without considering the contents of her statement which is procedurally tainted one is left with a suggestion of negligence and that has to be taken into account when assessing the evidence as a whole. To that extent the conviction on culpable homicide must stand. In the result the conviction of murder should be replaced with a conviction of culpable homicide.

**Sentence**

[31] Having replaced the conviction from murder to culpable homicide an appropriate sentence becomes an important consideration. The question is whether this Court can impose an appropriate sentence without the matter being referred back to the court a quo. As stated above the appellant has been in custody for many years. To delay the matter for another few years for a consideration of an appropriate sentence would be unfair.

[32] In my view once the conviction is overturned the question of sentence can be determined by this Court in order to do justice to the matter. The situation was fraught with alcohol use by all on the scene resulting in unreliable evidence by the state. What is clear from the evidence if one were to disregard the explanation of the plea, the appellant did not simply act in a fit of gratuitous violence. I ma of the view however that for the purposes of sentence in these circumstances the facts contained in the statement can be

used as a mitigating factor. She has no previous convictions. I am of the view that an appropriate sentence in these circumstances would be five years.

The order that I would make is the following:

1. The conviction of murder is set aside and substituted with a conviction on culpable homicide.

2. The sentence of 15 years is set aside and a sentence of 5 years is imposed.

3. The Department of Correctional Services is requested to consider the question of the appellant's release as soon as possible having regard to the conviction of culpable homicide and the number of years that the appellant has been incarcerated for.

**M VICTOR**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**I concur**

**L ADAMS**
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

COUNSEL FOR THE APPELLANT: ADV JACQUES NEL

INSTRUCTED BY : THE JUSTICE CENTRE

COUNSEL FOR THE RESPONDENT: ADV F MOHAMED

INSTRUCTED BY: THE DIRECTOR OF PUBLIC PROSECUTIONS.