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

CASE NO: A160/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED: YES

23 March 2017

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In the matter between:

MAOENG, NIMROD PABALLO Appellant

and

THE STATE Respondent

JUDGMENT

MUDAU J:

[1] The appellant appeared before the Regional Court, Kagiso, on a single charge of murder. On 21 September 2015 he was convicted as charged. Consequently, he

was sentenced to undergo 10 years' direct imprisonment, the trial court having found that there were substantial and compelling circumstances justifying a departure from imposing the mandatory minimum sentence of 15 years in terms of s 51 (2) of the Criminal Law Amendment Act 105 of 1997. Aggrieved with his conviction and sentence, his appeal is with leave of this court.

[2] The salient facts regarding this matter are as follows. On 6 December 2014 and at about 2 am, the deceased was in the company of a group of people that had just left Mandlovu's tavern, at Kagiso township, in the Westrand. The appellant, the deceased, the two eye-witnesses called by the State and others, consumed liquor prior to the incident that led to the death of the deceased. They all left the tavern around the same time but in different groups, with the appellant's group walking ahead of the deceased's group. The appellant had an altercation with some of the persons that were in the company of the deceased, but not with the deceased. The appellant stabbed the deceased with an object on his forehead. The deceased fell and sustained injuries. The deceased was taken to hospital where he died five days later on 11 December 2014. The cause of death according to the medico-legal autopsy report was determined to be "HEAD INJURIES".

[3] The appellant formally admitted in terms of s 220 of the Criminal Procedure Act 51 of 1977 ("the CPA") that he stabbed the deceased once in the forehead with a screwdriver. The appellant relied on self-defence.

[4] The State called two eye-witnesses, namely Pogiso Isaac Lefifi ("Isaac") and Refilwe Moamogwe ("Refilwe"). The State also called Dr Julian Dawid Jacobson ("Dr Jacobson") who performed the post-mortem on the deceased. The appellant testified in his own defence. Refilwe testified that as she walked the appellant was carrying two cans of beer in both hands which he spilt one on her. She protested and told him to stop what he was doing, to which the appellant responded with reference to all those in her group with the "F" word. Thereafter

the appellant crossed the street to where one of her companions, "Tshepo", was walking.

[6] The appellant slapped Tshepo with an open hand. A fight then ensued between Tshepo and the appellant. She and one Matsehla separated the two who were fighting. The appellant left and got into "a passage" and emerged again. She overheard Matsehla say in reference to the appellant that "he has a knife". She thereafter grabbed the appellant and dared him to stab her instead. It was at that point that the deceased emerged from the passage. The appellant broke loose from her grip and approached the deceased. The next she saw was the appellant raising his hand in an attacking stance against the deceased. The deceased fell on his back. The appellant disappeared. The deceased stood up until he reached the tarred road where he again fell. He was bleeding from his head. The deceased had done nothing to the appellant.

[7] Isaac testified and essentially confirmed Refilwe's testimony. He also testified that after he and one "Ishmael" had separated the appellant and Tshepo from their fight, the appellant ran to his group and ran back with an "okapi" knife towards their group. The appellant "opened" the okapi knife at which point Refilwe dared him to stab her instead. After pushing Refilwe aside the appellant went past him to the deceased whom he then stabbed on his forehead and ran away without any prior altercation. The area on the passage where the deceased first fell is rocky. The deceased was taken to the hospital by taxi for examination.

[8] Dr Jacobson testified and confirmed that the cause of death was "HEAD INJURIES". The deceased had brain swelling, with blood around the brain with "intra ventricular brain bleeding" affecting the large and the small brain that complicated the lung condition due to the rising blood pressure and added further:

> "if we look at the deceased, you know, we are dealing here with somebody that has been that sustained injuries beyond medical help, in terms of there is not a

> single procedure or anything that can be done and five days later the injured, the injured person demises. So in somebody, head injuries, beyond medical help, that leads to death ..."
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> "...but you know, your immediate action would be to make sure that patient gets oxygen, to try and relieve him of brain swelling and if there is anything that is operable, that will be done by a neurosurgical team, but this is now a defused bleeding across the brain with lots of swelling, with bleeding in side of the small brain, with bleeding inside of the brain ventricles, and in spite of all ways, you know, giving the patient oxygen and giving something for brain swelling, the prognosis is very bad."

Significantly, it was Dr Jacobson's testimony that the stab wound sustained by the deceased on the forehead was insignificant and was not the cause of death. The conclusion is unavoidable that the deceased received inadequate and negligent care at the Hospital he was admitted in for treatment.

[9] It is trite that the deliberate infliction of an intrinsically dangerous wound, from which the victim is likely to die without medical intervention, must generally lead to liability for an ensuing death, whether or not the wound is readily treatable, and even if the medical treatment later given is substandard or negligent. In *S v Tembani*[1] it was held at para [26] by Cameroon JA that:

> "an assailant who deliberately inflicts an intrinsically fatal wound embraces, through his conscious conduct, the risk that death may ensue. The fact that others may fail to intervene to save the injured person does not, while the wound remains mortal, diminish the moral culpability of the perpetrator, and should not in my view diminish his legal culpability".

[10] In this case however, it is clear that a proper reading of Dr Jacobson's evidence is essentially that proper, timeous and adequate medical treatment would with a high degree of probability have been effective to render the brain injury non-fatal. The question ultimately, is whether there is a sufficiently close link between the act and the consequence (see *S v Counter*).[2]

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[1] 2007 (1) SACR 355 (SCA) at para [26].
[2] 2003 (1) SACR 143 (SCA) at para [29].

[11] The appellant testified that the deceased, together with Tshepo, assaulted him. The appellant further testified that he took a few steps back where upon a bystander handed him a screwdriver, in contradiction to a version put by his legal representative to Isaac that the appellant was given a screwdriver by one "Nhlanhla" at the stage when Tshepo had pinned him down. He charged at his attackers but, was stopped by Refilwe. The appellant then saw the deceased approaching, whereupon he pushed Refilwe to the side and stabbed the deceased. The deceased took a few steps back and then fell.

[12] The appellant thought he severely injured the deceased and for that reason, fled from the scene. In cross-examination however, he conceded that he was angry at that stage, further that the deceased was not armed, and he had thought the deceased was going to attack him. In my view the learned Magistrate was correct in dismissing the appellant's account of the material events leading to the deceased's stabbing as false in the light of these material contradictions. The appellant had not acted in self-defence and was quite clearly the aggressor. The deceased was unarmed. In my view there was no justification for the appellant to resort to the use of a knife or by his version, a screw driver.

[13] From the authorities, it is trite that the crime of murder is committed whenever a life is unlawfully and intentionally taken because the crime of murder is so defined. 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.[3] In the context of this case the trial Court had to decide whether the State had proved beyond a reasonable doubt that the intention to kill was present when the appellant stabbed the deceased on his forehead. From the facts, there is no evidence that appellant had concerted a plan to kill the deceased directly, indirectly or by *dolus eventualis*.

[3] See generally CR Snyman *Criminal Law* 6th Edition at page 437 *et seq.*

[14] The appellant had not inflicted an intrinsically fatal wound on the deceased. The probabilities are the head injuries were sustained when the deceased fell on the rocky passage where the altercation took place, and again on the tarmac after the appellant had fled the scene. I cannot hold that in all the circumstances the appellant actually foresaw that if he stabbed the deceased on the forehead as he did, the deceased might die and that he was recklessly indifferent as to the occurrence of such a consequence. In this case there are no facts to support that the appellant could reasonably have foreseen that death might ensue, to justify a conviction of culpable homicide. There is no sufficient close link between the act and the consequence.

[15] I accordingly find that the State had failed to establish the *mens rea* essential to support a conviction for murder or for that matter, culpable homicide. There was no suggestion made by the State or for that matter any objective evidence that the appellant failed to foresee which he should reasonably have done, that death might result. In this case however, an unlawful and deliberate attack upon the deceased's bodily integrity which was intended to harm has resulted in the most irremediable harm of all: death. The attack on the deceased by the appellant was vicious and caused him to also fall on the rocks where he sustained head injuries. By his own version, the appellant ran away as he thought he severely injured the deceased.

[16] It follows that the appellant should not have been convicted of murder but of assault with intent to do grievous bodily harm, and the appeal must therefore succeed. The trial court clearly erred in finding the appellant guilty of murder. With the appeal against conviction succeeding; the sentence falls away and must be considered afresh. The natural indignation that the community must have at the appellant's conduct warrants appropriate recognition in the sentence. Plainly, any sentence imposed must have deterrent and retributive effect. Of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not

must be weighed the appellant's prospects of reformation and rehabilitation. The appellant was 24 years' of age at the time of his sentencing, single and without dependants. Under oath, he expressed remorse. He had no records of previous convictions.

[17] The sentence imposed by this court can, in terms of s 282 of the CPA, be backdated to the date on which sentence was imposed by the trial court. The conclusion to which I have come bearing all the above factors in mind is that a proper sentence would be six years' imprisonment backdated to 21 September 2015.

[18] In the premises I make the making the following orders:

1. The appeal is allowed to the extent set out below.

2. The appellant's conviction for murder and the sentence of ten years' imprisonment are set aside.

3. There is substituted a verdict of guilty of assault with intent to do grievous bodily harm.

4. The sentence is altered to six years' imprisonment backdated to 21 September 2015, half of which is suspended for a period of five years on condition that the appellant is not convicted of an offence in respect of which violence is an element committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine.

T P MUDAU

JUDGE OF THE HIGH COURT

I agree

M ISMAIL

JUDGE OF THE HIGH COURT

Date of Hearing:	23 March 2017
Judgment Delivered:	23 March 2017
APPEARANCES	
For the Appellant:	Mr Thomas Nel (Attorney)
Instructed By:	Thomas Nel Attorneys
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For the Respondent:	Adv E Du Plooy
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