THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 179/08

In the matter between:

STEPHANUS CORNELIUS VAN AARDT **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *S C van Aardt v The State* (179/2008) [2008] ZASCA 169 (2 December 2008)

Coram: Mpati P, Combrinck JA et Kgomo AJA

Heard: 5 November 2008

Delivered: 2 December 2008

Summary: Murder – vicious and sustained assault on deceased – appellant solely responsible for injuries causing death – state not required to prove which particular blow caused the death or what weapon (or means) used – once murder proved unnecessary to establish effect of accused intentionally preventing deceased obtaining medical assistance – conviction confirmed. Sentence – no misdirection – 12 years imprisonment on lenient side.

ORDER

On appeal from: the Grahamstown High Court, Eastern Cape Provincial Division (Pickering J, with Kroon and Dambuza JJ sitting as full court from judgment of Froneman J).

(1) The appeal against both conviction and sentence is dismissed.

JUDGMENT

KGOMO (MPATI P, COMBRINCK JA concurring)

[1] The appellant, a 49 year old farmer of Somerset East, was convicted by Froneman J sitting at the Grahamstown High Court of the murder of the deceased, Elliot Magabane, a 15 year old youth and was sentenced to 12 years imprisonment. The appeal to the full court of the Eastern Cape Division (Pickering J, Kroon and Dambuza JJ concurring) against both the conviction and sentence was unsuccessful. It is with the special leave of this court that the appeal serves before us.

[2] The state alleged that on 28 February 2006 the appellant assaulted the deceased on his farm, Clairvoux, in consequence of which he died of his injuries during the night of 1/2 March 2006. The indictment also specifies that after the assault the appellant unlawfully and with the intent to kill the deceased failed to obtain medical treatment for him which failure resulted in his death, alternatively accelerated his death. The state

further alleged that the cumulative effect of the assault and the deprivation of medical treatment constituted the crime of murder.

[3] The appellant pleaded not guilty to murder but guilty to assault common. In disclosing the basis of his defence in terms of s 115 of the Criminal Procedure Act, 51 of 1977, he stated in his written plea-explanation that he assaulted the deceased because he suspected him of having stolen about R350.00 from his vehicle. He slapped him several times in the face with an open hand and hit him several times with a plain stick (without a knob) on his body. All the strokes were aimed at the deceased's buttocks but some were deflected to other parts of the body as the deceased parried the blows or wiggled about. At worst, he says, this assault caused the following injuries: swelling and bruising to the face, left ear, left arm, buttocks, back, back of his legs and possibly on his sides.

[4] The appellant accordingly denied that the deceased died as a consequence of the assault and the resultant injuries. He further denied that a legal duty reposed on him to seek any medical intervention for the deceased.

[5] The facts relating to this case are briefly as follows. The appellant conducts a dairy business from a part of his farm. On 28 February 2006 he parked his bakkie next to his office which adjoins the milk parlour. While performing some administrative functions one Karel, a milker (who did not testify) apparently saw the deceased, a visitor to the farm, standing next to the appellant's bakkie from which the money went missing. He reported what he allegedly observed to his co-workers Kwekwe Mzizi, Tsitsikama Mbambani, Frank Koert and Mzwandile

Yantolo all of whom were engaged in cow-milking and who all testified.

[6] Kwekwe testified that the appellant, waiving an empty wallet and armed with a 1 metre long stick, 5cm in diameter, initially demanded the missing money from him. He protested his innocence and conveyed to the appellant what Karel had reported to them. When Karel was confronted he pointed out the deceased. The appellant, who was extremely agitated, accosted the deceased with this accusation. The deceased also protested his innocence but was manhandled and slapped with open hands by the appellant next to the milk parlour. The deceased led the appellant to a feeding trough and extricated a few coins from the animal fodder. This incensed the appellant even more. He partially strangled the deceased by squeezing the deceased's shirt around his neck, threw him to the ground, pinned him down with his knee on the deceased's chest and pummelled him with clenched fists in the face and sides.

[7] It was common cause that the deceased was lodging with Frank Koert on the appellant's farm just across the road from the milk parlour. Kwekwe saw the appellant and deceased heading for and entering Koert's house. The appellant was armed with a stick. From the confines of Koert's house came some thuds akin to a person being repeatedly bumped against a wall. These thuds were accompanied by the deceased's cries and the appellant swearing at him. Because he was busy milking a cow that was unable to move to the milk shed Kwekwe did not notice victim and culprit emerge from Koert's house. Once outside, however, he saw the appellant holding the deceased by the shoulder and shoving him about as a result of which the deceased fell. The appellant launched a vicious and sustained assault with a stick on the deceased who lay in a

foetal position. Kwekwe took fright and reported his observations to the other milkers in the shed. All of them were too scared to intervene.

[8] Kwekwe left to perform another chore in one of the paddocks. He witnessed from that vantage point the appellant dragging the deceased in the vicinity of the entrance to the shed. He dumped the deceased in a puddle there and stamped on him with booted feet on his chest area and head. The appellant swore at the deceased and ordered him off his farm or he would beat him to death. The appellant thereafter entered the shed. The deceased crawled with difficulty for about six metres and used baled hay as support to heave himself to his feet.

[9] The appellant instructed his employees not to move or accommodate the deceased. After the milking when Kwekwe kraaled the cattle he saw the deceased still slumped against the bales of hay.

[10] Yantolo corroborated Kwekwe's account that he heard the deceased cry in Koert's house and the appellant demanding that he produce the money. He later noticed the deceased seated in the puddle and being prodded with a stick by the appellant and told to get up and leave his farm. The deceased managed to get to his feet and staggered for about three metres before slumping to the ground. He got up again and unsteadily staggered up to the electrical pylons where he collapsed once more. It was common cause or not in dispute that this is where the appellant's employees found the deceased after work, also where Koert and Mehlo later covered him with a duvet cover and from where the appellant removed him the following day.

[11] Tsitsikama witnessed the appellant grabbing the deceased by the

clothes and forcing him out of the shed. Due to the droning of the milk machines he was unable to hear what took place outside. However when he later went to feed the calves after the milking he saw the appellant lashing out indiscriminately with a stick at the deceased who was sprawled on his back. The deceased, unable to stand up, crawled to the haystack against which he leaned. The appellant struck the deceased one blow to the head with a spade which floored him. He did not see the appellant stamp on the deceased. May I point out at this early stage that the defence vehemently criticized Tsitsikama's evidence relative to the attack with the spade on the basis that he was the sole witness on this aspect. There is no warrant for excluding credible evidence on this ground only. In *S v Sefatsa and Others* 1988 (1) SA 868 (A) at 890G this court held:

'The fallacy in the argument for the accused is that it presupposes that either or both of the witnesses must be untruthful or unreliable simply because their observations did not coincide. Such an approach to the evidence is unsound.'

The trial court therefore correctly rejected the argument.

[12] Mandla Mehlo, the deceased's friend, was staying at Koert's house where the deceased had visited him. He corroborates part of Kwekwe's version on how the deceased was manhandled and stamped upon at the puddle, struck with a stick and how the deceased wobbled and collapsed close to the electrical pylons. He accompanied Koert when the latter covered the deceased with a duvet cover later in the evening.

[13] Vuyisile Mabomba, the tractor driver, noticed the assault from a distance while he was busy balancing cattle feed compound with a mixer.

The deceased landed on the ground from the assault. The appellant helped him to his feet and walked with him in the direction of Koert's house. The following morning at around 05h00 he saw the appellant's bakkie at Koert's house. He later noticed that the deceased's face was swollen and he could not speak. The appellant poured water over the deceased which evoked a feeble lifting of the head. The next day the appellant told Mabomba that he was in deep trouble and that they (the workers) must take care of the farm if something untoward should happen to him.

[14] Frank Koert stays a short distance from the milk parlour and hosted the deceased through the latter's friend Mehlo. He was present when the appellant reported his money stolen and when Karel pointed out the deceased as the suspect. He paid no attention to what transpired thereafter as he focussed on milking the cows. When he next looked around he realised that the appellant had left the shed. He did not witness the assault on the deceased but learned from his co-workers who he accompanied after work to the electrical pylons where they pointed out the now immobile deceased. Those present were Karel, Goodman, Tsitsikama, Mehlo, Kwekwe and one Bungu. At that stage the workers had already knocked off duty and dusk was settling in.

[15] The deceased's body was swollen and he was unable to speak. Koert tried in vain to make him sit up. The workers left the deceased lying at that point because they were scared of defying the appellant's earlier injunction not to help or house him. Later that evening, under cover of darkness, Koert and Mehlo returned to the deceased who was still lying at the same spot and covered him with a duvet cover. It is convenient at this stage to deal with the contention by the defence that the workers could have removed the deceased or rendered assistance in the

absence of the appellant. This argument ignores the fact that by virtue of the employer-employee relationship the appellant exercised inherent authority over them. They had also just witnessed him mete out a severe beating on the deceased. In addition most were mere children with their ages ranging between 15 and 18 except Bungu and Yantolo who were 30 and 58 years, respectively.

[16] Early in the morning following the assault the appellant called Koert away from his milking chores to the latter's house where he found the deceased lying on the back of the appellant's bakkie. On the appellant's instructions he offloaded the deceased, who at 15 years was of slight build and weighed only 46kg, and laid him down on a bed. Koert suggested that he (Koert) notify the deceased's parents concerning their child's condition but the appellant forbade him and told him that when the deceased became well enough he could walk home. When the deceased's condition deteriorated Koert approached the appellant again for permission to summon the deceased's parents to fetch him. The appellant informed him that he did not want an ambulance or the police on his farm.

[17] The deceased was barely conscious. That morning he had managed to swallow two pills that the appellant had supplied. The deceased also managed to eat a small piece of bread and drank some milk fed to him by Koert. He could not talk and was groaning continually. Koert placed him on the stoep to give him some air. He was unable to sit and Koert supported him. The appellant returned that afternoon and poured cold water over the deceased and into his ear. The deceased shook his head. The appellant and Koert tried to feed the deceased with more tablets but were unsuccessful because the deceased was unable to swallow them, not

even when desolved in water. Notwithstanding all this the appellant assured Koert that the deceased would recover. Later during the evening the appellant called at Koert's house with a torch which he shone into the pupils of the deceased's eyes.

[18] The morning following the events described in para 17 (above) the appellant repeated the torch-pupil experiment and exclaimed (in Afrikaans): "O Gods!" The deceased was dead. The appellant left but returned after a while. He told Koert to tell the police when they arrived that the body of the deceased was discovered next to the road. That is also what Koert told Inspector Mayekiso who investigated the death. He also reported to him that the deceased's assailants were unknown. The inspector left with Mehlo and promptly returned and intimated to Koert that he had discovered the truth, whereupon Koert spilled the beans.

[19] Dr George William Groves, a general medical practitioner for over 30 years, conducted the medico-legal post-mortem examination on the body of the deceased on 7 March 2006 and compiled a report. He also testified for the state. His recorded findings, which are not in dispute, are as follows. The deceased sustained fractures of the left 2nd, 3rd, 4th and 6th ribs and of the right 5th and 6th ribs and the hemithorax appeared sunken. He suffered pulmonary congestion bases of both lungs; contusion of the angle of the right mandible; subaponeurotic and subperiostical haematoma; contusion of the right occipital lobe with intracerebral haematoma; contusion over the left cerebellum; contusion over an eye; contusion of apex of the heart; contusion of the mesentery and contusion of the liver. The cause of death is recorded as: 'Cerebral injury secondary to multiple blunt trauma'.

[20] Dr Groves, elaborating on his post-mortem findings, testified that the fracture of the deceased's ribs could not have been caused by a single clench-fist blow or a single kick and that he thought 'die waarskynlikste, meer waarskynlike meganisme sou wees as daar 'n swaar gewig op daardie borskas geplaas is' and that '[h]y was vir my baie swaar beseer'.

[21] Dr Groves explained that to cause the brain injury sustained by the deceased the latter was subjected to a great amount of force (''n kwaai mate van geweld'). In particular regard being had to the injury to the cerebellum he would have expected the deceased to have lost consciousness instantly and it would have been surprising and very exceptional had the deceased been able to walk (the measured distance of 73 metres) after the infliction of that injury.

[22] The appellant's version of the event is that when he discovered that his money was stolen from his bakkie he suspected Kwekwe, who he had sent to the bakkie earlier to fetch the keys, but Karel blamed the deceased. The deceased disclaimed any knowledge of the money. He grabbed him by the scruff of the neck and slapped him a few times. The deceased screamed and produced R7 in coins from a feeding trough. The deceased was unco-operative, so he struck him with a stick as alluded to in his plea- explanation. The deceased took him to Koert's house to point out the money but led him on a wild goose chase. He denied any suggestion that he may have banged the deceased's head against the wall of Koert's house.

[23] The appellant says he pushed the deceased through the gate which caused the deceased to fall into a puddle. He ordered the deceased off his farm. The deceased got up and trotted off limping, due to the effects of

the lashing he gave him with a stick on his buttocks, back and legs. At that stage the workers were through with the milking and were cleaning up. The appellant busied himself at the dairy for about 15 minutes and got into his bakkie and drove towards his residence. When he was opposite Koert's house he saw the deceased in the company of two people (he is unsure whether they were men or women). He again screamed at the deceased to leave his farm.

[24] The appellant says the following morning when he was on his way to inspect the irrigation pivots on his land he noticed the deceased lying next to the electrical pylons already referred to. There was a duvet cover next to him. His body was swollen and he appeared to be unconscious. He reckoned that the deceased must have been attacked by some unknown assailants after he (the appellant) had chased him away from his farm. He took the deceased to Koert's home because he had established that he had put him up. He surmised that they were related. As he was not the cause of the deceased's condition he was not prepared to assume responsibility for his care or transportation to a hospital or become involved with the police, because he had chastised the deceased the previous day.

[25] From this point the appellant's version corresponds substantially with Koert's account and bears no repetition. He says when he saw the deceased for the third time that day he appeared to be unconscious. He enquired from his doctor-friend in Bethulie how he could determine whether the deceased was not shamming. He applied the proposed methods and elicited the responses testified to by Koert. On discovering the next day that the deceased had died he telephoned an acquaintance, detective Botha, and reported that the deceased 'het pak gekry' and was

dead. On Botha's advice he telephoned the aforesaid Inspector Mayekiso.

[26] The appellant denied striking the deceased with a blunt object or a spade on the head as testified and pointed out to the police by Tsitsikama. He also denied that he refused permission to Koert to notify the deceased's parents of his serious condition. He states that the death of the deceased was the furthest thing on his mind and did not foresee it.

[27] Dr Keely, a neurosurgeon for over 36 years, testified as a defence witness. His opinion is based on the post-mortem report compiled by Dr Groves and the photos of the body of the deceased, more particularly those of the brain used by Dr Groves. Part of Dr Keely's evidence-in-chief went as follows:

'Now can you give the Court an indication of the seriousness of these injuries to the brain? --- These injuries would eventually have become fatal.
And can you give the Court an indication of the mechanism whereby such injuries could have been caused? You have noticed that there are no skull fractures. --- I have noticed that M'Lord.
And you have noticed that at the post-mortem the doctor described bleeding, extra cranial under the skin. --- Yes M'Lord, the mechanism of this injury would have been first of all a contact type of force applied to the back of the head. It would have been of extreme magnitude, the inter cerebellum haematoma is not described, the injuries are very extensive in that it involves the occipital lobes, the cerebellum which would be, which is the point of impact, there is contusion of the right frontal lobe which is a contra [coup] lesion, there, with such obvious very severe macroscopic injury there would have been as well defuse less obvious microscopic injury involving mainly the fibre tracts of the brain causing a defuse axonal injury. Unusual in this type of injury is the contusion of the cerebellum, the cerebellum lies deep in the skull at the back of the head protected by a thick layer of muscle at the back of the neck, and it is an unusual injury, seen more often at autopsy than in clinical practice.

Doctor after having received these injuries what would the effect of that have been on the individual who received these injuries, his level of consciousness, that sort of thing? --- He would have been rendered immediately unconscious and would have remained so.
Doctor is there any possibility that the individual with this sort of injuries to his brain would have been able after having been injured to walk any distance? --- No M'Lord.
Can you be quite certain about that? --- I am M'Lord'

[28] Dr Keely was adamant that after having sustained these injuries the deceased would not have been able to get to his feet under his own steam and walk any distance, least of all 73 metres. He opined that the brain injuries were fatal but if there had been immediate medical intervention the most optimistic diagnoses would have been that the deceased would have survived in a permanent vegetative state. Dr Keely's dogmatic insistence that the deceased's brain injury must have caused him to fall immediately into unconciousness upon receiving the heavy blow and that he would not have been able to swallow tablets is inconsistent with the objective facts. The deceased unquestionably walked a distance of at least 73 metres after receiving the blow; he swallowed two tablets; ate a piece of bread and drank some milk the following morning. This calls into serious question the reliability of his opinion. The more acceptable explanation is that of Dr Groves that for the deceased to have done these things was surprising and exceptional.

[29] Pickering J gives an accurate summary of the approach adopted by the trial court in these terms:

'In his judgment Froneman J found that the State had failed to prove beyond reasonable doubt that the appellant had had the intent to kill deceased at the time of his assault upon him. He found further, however, that the State had proved beyond reasonable doubt that the appellant had caused all the injuries to the deceased referred

to in the post-mortem report and that, despite the appellant having appreciated the risk that the deceased could die in consequence of those injuries, had deliberately chosen not to obtain medical assistance for him because he feared that the matter would be reported to the police, notwithstanding that there was, in the circumstances, a legal duty on him to secure such medical assistance. The appellant therefore had the requisite intent in the form of *dolus eventualis* to kill the deceased. He was accordingly convicted of murder.'

Having examined the evidence in some detail Pickering J stated that Froneman J was correct in his finding that the appellant caused the injuries to the deceased in consequence of which he died and that 'having regard to the deceased's obviously severely injured state and his unsatisfactory physical responses to the stimuli applied by the appellant, I am of the view that the appellant must have foreseen, and by necessary implication did in fact foresee that there was a reasonable possibility that the deceased might die if not medically treated'.

[30] The immediate question that falls for determination is: who caused the fatal injury to the deceased's brain? The defence suggested that the deceased could have been attacked by strangers or by the appellant's employees during the hiatus that the appellant saw the deceased with two people and the employees converging after work at the electrical pylons where the mortally wounded deceased was lying. Unfortunately no time-lapse is discernable from the evidence for this period. However, having regard to the evidence of the eyewitnesses and that of the appellant himself the time-span could not have been inordinate. It must have been a matter of minutes rather than hours.

[31] The appellant's counsel placed the state-witnesses' evidence under a microscope and, as Pickering J for the full court stated, he subjected it

'to trenchant criticism'. The trial court, Froneman J, was alive to the contradictions and conflicts in the state-witnesses' evidence and dealt fully with them and accepted their evidence as credible. In respect of the evidence of Kwekwe and Tsitsikama the learned judge's main reservation was that they exaggerated their evidence. I find it unnecessary to rehash the incongruous points in the respective witnesses' evidence because I am, in the first place, not persuaded that Froneman J erred in his credibility findings. Secondly, it is not sufficiently appreciated by the defence that the witnesses were not always in each others presence as the events unfolded and they therefore occupied different vantage points. For example the tractor driver was mixing the animal feed elsewhere; one of the milkers milked one of the cows that could not walk outside the shed, others were milking the cows in the shed; another heard the commotion in Koert's house when he went to fetch a pair of pliers at the appellant's residence; another watched a different stage of the assault when he went to feed the calves and yet another when he kraaled the cattle.

[32] It follows that the witnesses could not necessarily corroborate each other on all points. They merely recounted what they observed at a particular stage. What is essential is that there is no suggestion that they were not present on the farm and observed some assault. In fact the evidence emanating from the appellant as well suggests that he interacted with his workers in the ordinary course of them performing their duties. A factor that also counts in favour of the veracity of the witnesses' evidence is that the appellant admits a measure of assault on the deceased albeit that he has minimized his assault to a mere whipping.

[33] The appellant's testimony that he saw the deceased with two strangers is fanciful. These imaginary people were fabricated to create the

impression that the deceased was not fatally wounded when he was evicted from the farm and that those strangers could have harmed him. The problem with this piece of evidence is that whereas the strangers' existence is broached in the plea-explanation none of the witnesses was confronted with it under cross-examination. (*President of RSA v SA Rugby Football Union* 2000 (1) SA 1(CC) at 36J-38A, paras 61-65). A further reason why the appellant could not have seen the deceased with two strangers is that several witnesses testified that they saw the deceased stagger away from the appellant and collapse at the electrical pylons. This evidence, which the trial court correctly accepted, leads to the irresistible conclusion that when the deceased collapsed at the electrical pylons the fatal brain injury had already been inflicted. This eliminates the probability of any strangers assaulting the deceased or causing his death. The trial judge's rejection of the appellant's evidence on this aspect cannot be faulted.

[34] The conduct of the appellant after the assault speaks volumes. He ordered his workers not to house the deceased. It could not have escaped him that the deceased was seriously injured because he says the deceased seemed unconscious and yet he was indifferent to his plight. The appellant's early morning trip to the electrical pylons had as its objective, I suggest, to check whether the deceased was gone or had been removed. It was an act of heartlessness not to transport the deceased, badly hurt as he was, to a nearby hospital but to Koert's home. This was done to keep the assault a secret. Koert's two pleas to send for the deceased's parents were rebuffed. If the appellant had merely chastised the deceased he would not have played doctor and would have summoned an ambulance or the police at the latest on the morning that he took the deceased to Koert's home. The appellant also influenced Koert to lie to the police and

to say the deceased's body was found next to the road. This is the conduct of a person who knew that he had committed a serious crime and had to account for his deeds.

[35] The following are the proved facts. When the appellant accosted the deceased for the first time the deceased seemed to have been in good health. He was certainly unscathed. There is direct testimony from eyewitnesses that the appellant in full view of these witnesses slapped the deceased, pummelled him with clenched fists, attempted to strangle him, assaulted him with a stick, kicked and trampled him with booted feet. The deceased was constantly in the presence of the appellant from the time that he first grabbed him until he ordered him from the farm. The deceased was not assaulted by anyone else but the appellant until he collapsed, mortally wounded, at the electrical pylons. There can be no doubt that the appellant inflicted all the injuries described hereinbefore and consequently caused the deceased's death.

[36] What remains is to determine whether the appellant is guilty of culpable homicide or murder with the direct form of intent or *dolus eventualis*. The appellant's counsel urged us to find that the appellant was guilty of assault alternatively culpable homicide if he was the one who caused the deceased's death. The thrust of his argument is that no evidence was produced to show which specific blow was fatal or what instrument was used to that end. This argument has no merit.

[37] The principle to determine what form of intent to murder an accused should be convicted of or whether only culpable homicide has been proved was expressed in these terms by Holmes JA in *S v Sigwahla* 1967 (4) SA 566(A) at 570B-E:

‘1. The expression ‘intention to kill’ does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*.

2. The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. 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 *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide.

3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.’

[38] The medical evidence does not redound to the benefit of the appellant but, on the contrary, is against him. Both Drs Groves and Keely were of the view that the deceased was struck a colossal blow to the head which led to the deceased’s death. Tsitsikama testified that the appellant struck the deceased one blow on the head with a spade. Dr Keely conceded that the brain injury was consistent with it having been inflicted with the face of a spade. In saying so I must add that the trial court was fully justified in preferring the evidence of Dr Groves above that of Dr Keely. Dr Keely conceded that the photographs relating to the post-mortem report were unhelpful to him because they did not depict the brain injury adequately or at all and he had to rely on the post-mortem report and the notes of Dr Groves.

[39] I am in respectful agreement with the following statement by the Namibian Supreme Court in *S v Van Wyk* 1992 (1) SACR 147 (Nm) at 161e-h:

'The State is, from the nature of things, seldom able to offer direct evidence of the accused's state of mind at the time of assaulting the deceased and must therefore rely on inferences to be drawn from the circumstances of the assault (including its nature and duration), the nature of any weapons used and the nature, position and extent of the injuries inflicted. These must in turn be weighed up against any other circumstances (such as the consumption of drugs or alcohol) which may indicate that the accused did not foresee the consequences of his actions. This does not involve any piecemeal assessment or process of reasoning. All the relevant facts which bear on the accused's state of mind and intention must be cumulatively assessed and a conclusion reached as to whether an inference beyond reasonable doubt can be drawn from these facts that the accused actually considered it a reasonable possibility that the deceased could die from the assault but, reckless as to such fatal possibility, embarked on or persisted with the assault.

On the medical evidence the injuries which caused death were the blows to the head. It is not possible to link up particular fist blows or kicks with particular injuries, nor is the trier of fact required to do so. Once it is established that accused No 1 killed the deceased, and it has rightly been so found by the Court *a quo*, the trier of fact can look at the assault as a whole in order to determine what accused No 1's intention was.

In a case such as the present the trier of fact is not required to enquire into the subjective state of mind of the accused as he inflicted each injury. Neither principle nor common sense requires this.' (Emphasis added)

[40] The deceased was defenceless and never retaliated. On the other hand the appellant was a 49 year old man who was much larger than the deceased and weighed 100 kg. The assault on the deceased was sustained and vicious resulting in the injuries already described. The evidence does not establish that the appellant had the direct intent to cause the death of

the deceased, and the state did not contend otherwise. However I am satisfied that the appellant subjectively foresaw the possibility of his conduct causing the death of the deceased and was plainly reckless as to such result ensuing. He is accordingly guilty of murder with *dolus eventualis* as the form of intent.

[41] Froneman J convicted the appellant of murder, *dolus eventualis*, on the following basis:

'Afgesien van enige argument oor onregmatigheid dink ek daar bestaan min twyfel dat hy dan sonder om twee keer te dink die oorledene mediese behandeling sou laat verkry het, met ander woorde hy sou die risiko van dood voorsien het en hom glad nie met daardie moontlike gevolg versoen het nie. Die rede waarom hy dit nie in hierdie geval gedoen het nie, was omdat hy aanmelding van die voorval by die polisie gevrees het, en nie omdat hy gedink het daar was geen gevaar dat die oorledene sou sterf as hy nie mediese behandeling ontvang het nie. Hy het gehoop dat die oorledene nie sou sterf nie, maar hy het geweet daar was 'n risiko dat dit wel kon gebeur. Nieteenstaande die risiko besef het hy doelbewus verkies om nie mediese hulp te verkry nie. In regs terme kom dit neer op subjektiewe versoening met voorsiene gevolge. Die gevolgtrekking is dus onvermydelik dat die Staat bo redelike twyfel bewys het dat ten aansien van die beskuldigde se versuimshandelinge hy die nodige opset in die vorm van dolus eventualis of te wel opset met moontlikheidsbewussyn gehad het om die oorledene te dood.'

[42] The full court agreed with the cited reasoning and confirmed the conviction on that basis. This reasoning was evidently inspired by the Rhodesian Appellate Division decision in *S v Chimbamba* 1977 (4) SA 803 (RAD) at 808H-809B where MacDonald CJ (Lewis JP and Davies JA concurring):

'Applying general principles, there can be no doubt at all that the crime of murder is committed if a person in need of assistance is intentionally prevented from obtaining it and in the result dies or dies earlier than he or she would otherwise have done. This, however, is a quite separate and distinct basis of liability from that relied upon in the indictment and no amendment of the indictment was applied for at any stage in the proceedings. It is unthinkable that an accused person should be found guilty of murder on a basis which has never been raised. Liability on this additional basis is in no way dependent upon complicity in the original assault giving rise to the need for assistance and cannot be regarded as being no more than an extension of it or as being embraced within it.'

[43] The Chimbamba *dictum* explains why the state framed the indictment to satisfy the ingredients missing in that judgment. However, for purposes of this judgment and in view of the finding set out in para 40 (above) it is unnecessary to make a finding on whether the basis on which the trial court convicted the appellant, which was subsequently upheld by the full court, was correct.

[44] On sentence: it suffices to state that having regard to the defencelessness of the deceased, his tiny frame, the sustained and viciousness of the assault by a much heavier man than the deceased, the appellant's denial of medical attention to the deceased and prevention that Koert summon the deceased's parents to fetch him, his influence that Koert mislead the police and his lack of remorse, I am of the view that a sentence of 12 years imprisonment is on the lenient side.

The appeal against both conviction and sentence is dismissed.

F D KGOMO
ACTING JUDGE OF APPEAL

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