

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A543/2007

5 DATE:

22 FEBRUARY 008

In the matter between:

GOSPEL NDAWULE

Appellant

and

10 THE STATE

Respondent

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J U D G M E N T

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DE SWARDT, AJ:

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[1] The appellant in this matter stood trial in the Regional Court at Strand on a charge of murder. The trial was held on 26 May and he was convicted on the same day, not on a charge of murder but on a charge of culpable homicide. The appellant initially pleaded guilty but after 20 certain questions had been put to him the magistrate changed the plea to one of not guilty. Having found the appellant guilty of culpable homicide, the magistrate sentenced him to six years' imprisonment.

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[2] The appeal before us was originally brought against the sentence in the matter. However, once we had perused the record, we had certain concerns in regard to the conviction. Acting in terms of our inherent powers of review, we have accordingly also dealt with the conviction of the appellant. We are satisfied that it will serve no purpose, in the particular circumstances of this case, to remit the matter to the magistrate for comment, inasmuch as the all of the evidence is before us on the record.

[3] The evidence which was proffered by the State was sparse to say the least. Certain admissions were made at the commencement of the proceedings and these are noted at page 8 of the record. These included an admission as to the identity of the deceased - that she was the person who was referred to in the charge sheet and the place where the incident had occurred. The appellant also admitted the contents of the post-mortem report and that the report referred to the deceased in the matter. Other usual admissions were made, such as that the deceased had not sustained any further injuries between the time that she died and was removed from the place where she had died until such time as the post-mortem had been performed.

[4] The only oral evidence that was proffered by the State in this matter was that of a Mr Thomas Ndawule who said that he was the brother of the appellant. In short, if one had to summarise his evidence, it amounts to the fact that the appellant woke him up during the course of the night and made a report to him. As a result, he accompanied the appellant to the latter's house but when they arrived there it was evident that the deceased had already died. The appellant then said to the witness that he had hit the deceased with a stick. That was the sum total of the evidence that was tendered by the State.

[5] The appellant, on the other hand, testified that he and the deceased had spent the day at a place where they had consumed alcohol. He and the deceased subsequently left and he went to his home and she went to hers. Some time later she came back to the appellant's home, accompanied by a friend. The three of them went to another shebeen. Eventually they left there and the appellant and the deceased returned to the appellant's home.

[6] The appellant decided to go to sleep but woke up during the course of the night and remembered that he never

received his change after he had paid for the drinks at the place where they had been that evening. He asked the deceased to give him the money, an argument ensued, they commenced hitting each other and he apparently retrieved a stick or "kierie" from under his bed and proceeded to assault the deceased. He said that he hit her on her legs. It appears that he must have hit her quite hard, because he conceded in cross-examination that the stick broke. The appellant testified that in the course of the fight he and the deceased had ended up on the floor ("(hulle) het mekaar op die vloer gegooi"). Eventually, after this altercation, appellant went to sleep and when he woke up again the deceased was dead.

15 [7] If one looks at the post-mortem report which was prepared by the district surgeon in this matter, Dr van Zyl, he lists the following injuries which had been sustained by the deceased:

- 20 "1. Oppervlakke laserasie linker agterkop.
2. Veelvuldige kneusplekke oor die hele liggaam.
3. Onderhuidse bleeding frontaal, regs temporaal en oksipitaal.

It is accordingly clear that there were bruises over the entire body and that there also had been an injury to the head.  
25 However, when the district surgeon had to express an opinion

as regards the cause of death, he merely noted "word ondersoek". In other words, he was unable to find what the cause of death was and had to make further investigations in this regard.

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[8] Apropos this post-mortem report, it appears that the matter was then forwarded to the office of the state pathologist. It came before a Dr Basson, one of the state pathologists, who filed a which dealt with the cause of death.

10 In doing so, she had regard to the post-mortem report which had been prepared by the district surgeon and certain other evidence such as a witness statement which had been placed before her. In dealing with the cause of death, she found that she could also not say definitively what the cause of death in  
15 this particular instance was. She referred to various possibilities, listed at page 35 of the record of proceedings, one of which was that the deceased could have suffered a bilateral pneumothorax. She could not determine, however, whether or not this had occurred, because it was not apparent  
20 from the post-mortem report prepared by Dr van Zyl whether or not he had performed any investigation to ascertain whether the deceased had suffered a bilateral pneumothorax when he performed the post-mortem examination.

[9] The significant portion of Dr Basson's report, however, to my mind is the following extract where she refers to the following potential cause of death:

5 'Die moontlikheid van kortstondige bewussyns-  
onderdrukking na trauma aan die kop met  
posisionering van die lyf en liggaam op die grond  
met die neus en lyf wat op die grond lê en die  
persoon 'n suurstof tekort kry. Weer eens is sekere  
10 inligting van die beskuldigde belangrik, naamlik of  
die oordeene te enige tyd met die mond en die  
neus bewusteloos op die grond gelê het.'

She then concludes at the foot of the page:

15 'Na bestudering van die dokumente en ander  
artikels soos genoem kan ek dus nie met sekerheid  
sê presies wat die oorsaak van dood was nie, maar  
ek gee dan dus wel my bogenoemde opinie oor  
moontlikhede.'

[10] I have referred to the evidence of the appellant to the  
20 effect that when he and the deceased had been engaged  
in a fight, they in fact had fallen onto the floor. It is not  
clear from the evidence whether the deceased remained  
on the floor. It is also not clear exactly what position she  
was lying in on the floor. However, when one looks at  
25 the totality of the evidence, it would appear to me that

one cannot say with any degree of certainty what the cause of the deceased's death was. It could have been the result of the assault which had been perpetrated on her but she could also have lost her life, as the pathologist said, because she was lying in a position in which she could not breathe; she might have been lying on her face.

[11] In these circumstances I am satisfied that the State has not proved beyond reasonable doubt that the deceased lost her life as a result of the assault which the appellant perpetrated upon her. It is accordingly clear to me that the conviction of culpable homicide cannot stand.

[12] What is equally clear, however, is that on the appellant's own admission he had assaulted the deceased and that he had assaulted her with a stick or a "kierie". I am satisfied that in these circumstances the appellant, on his own evidence, is guilty of assault with intent to do grievous bodily harm.

[13] That leaves the issue relative to sentence. Assault with intent to do grievous bodily harm is indeed a serious offence, but there are also circumstances to be taken into account in favour of the appellant. It was clear from

the evidence that both he and the deceased had been drinking for a substantial portion of the day and alcohol, it would appear, played a very large role in the events which occurred on this day and which resulted in the deceased losing her life. By far the most important aspect, which has to be given sufficient weight in dealing with the sentence in this matter, is that the appellant is a person with a clean record at the age of 62 years (his age when he was convicted). In other words, he appears to be a person who has been an upstanding citizen in society. It is also clear that he has had substantial remorse. He has tried to make restitution to the family of the deceased and has paid certain damages to them.

15 [14] On a conspectus of all of the relevant factors to sentence in this matter, I am satisfied that the appellant ought not to serve any more time in jail. He has already served a period of one year and nine months' imprisonment and that would appear to me to be a fair sentence in these circumstances.

[15] I would accordingly uphold the appeal in the matter. Both the conviction and sentence of the magistrate are set aside and the conviction is substituted with the conviction of the appellant on a charge of assault with



intent to do grievous bodily harm. In respect of that conviction, the appellant is sentenced to imprisonment equal to one year and nine months.

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DE SWARDT, AJ

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CLEAVER, J: I agree and it is so ordered.

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CLEAVER, J