

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NUMBER:**

SS35/2010

5 **DATE:**

2011-04-21

In the matter between:

**THE STATE**

and

10 **M MBULI**

**AND 7 OTHERS**

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

15 **HENNEY, A J:**

The Court will hand down *extempore* judgment.

The accused in this matter are employed as policemen in the  
20 South African Police Force, some of them permanent members,  
and the others, members of the Reservist Force. It would  
seem the majority of them are members of the Reservist Force.

During the commission of the offences as indicted, on the 28<sup>th</sup>  
25 of September, all eight of the accused were on duty as police  
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officers in Site C, Khayelitsha. They were indicted on four counts. Count 1 is murder, in that they were accused of murdering Mr Siyuvele Manyanda by banging his head to a lamppost and on the pavement, kicking and hitting him with a  
5 brick in the stomach. A second charge was an assault perpetrated against Busisiwe Mbadiwe by slapping her and kicking her. A third count was also an assault perpetrated against Zuko Mbuleti by beating and kicking him. There was a fourth count, and that was a charge of kidnapping, in that they  
10 deprived Busisiwe Mbadiwe of the freedom of movement by taking her to the scene at Rose Street, and to the police station at Site B, Khayelitsha.

To all these charges, the accused pleaded not guilty.

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Insofar as the first count was concerned, they denied that they had assaulted the deceased in any manner. Their version was that the deceased was apprehended by members of the community, who, at that stage, wanted to assault him because  
20 he was suspected of having committed an offence. The members of the community assaulted the deceased. Although they were looking for the deceased because he was sought on a charge of robbery, when they got to him, the members of the community had already assaulted him.

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Insofar as the second, third and fourth counts were concerned, they denied that they had assaulted Busisiwe Mbadiwe, the complainant on the second count, and Mr Mbuleti, the complainant on the third count. They also denied the  
5 kidnapping charge on the second complainant.

Various witnesses testified for the State. I am not going to repeat all the evidence that was led in this matter; it is on record.

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The evidence of the State was mainly based on the oral testimony of eyewitnesses to the assault on the deceased, who testified that the deceased had been assaulted by some of the accused by being kicked, slapped, hit, trampled on, hit with a  
15 brick. That evidence is also on record; I am also not going to repeat that for the purposes of this judgment. I will deal with this later where necessary.

For the defence, Accused 1, 3 and 8 testified; the other  
20 accused did not testify. I might also mention at this stage, an application was brought, in terms of section 174, at the end of the State's case, for the discharge of the accused on all four charges. At that stage the Court granted the application insofar as counts 2, 3 and 4 were concerned. Insofar as the  
25 first count was concerned, the Court did not grant the

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application for discharge, although the Court, at that stage, after consultation with the assessor, felt that the evidence was of a very poor nature and quality. On the objective evidence and the common cause facts, the Court was of the view that  
5 the accused, being policemen, had a duty of care, to assist the deceased, who was in their custody, and to assist him to get medical attention. On that basis, on a lesser charge of culpable homicide, there was something the accused had to answer for.

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After having listened to the evidence of the State, I was of the view that it was very poor. It was contradictory in nature. It was not safe to rely on. It was difficult for this Court to make factual findings on the evidence if any of the witnesses, either  
15 collectively or cumulatively, that any of the accused, or all of them, had, indeed, assaulted the deceased that lead to his death, as alleged by the State. The evidence was of such a poor quality, highly contradictory in all material respects. There was nothing substantial from which one can factually  
20 state that an attack or assault had, indeed, taken place by the accused. The record bears this out, and it speaks for itself with regards to the quality of evidence.

On the objective and uncontradicted evidence, in the absence  
25 of a credible version from the State, it was clear that the

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deceased was assaulted by persons unknown, that he had sustained injuries, and that at a later stage he was in the custody of all the accused, in the course of the scope of their employment as police officers.

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I would also like to deal with the evidence of Busisiwe, because the State relied on that heavily insofar as the second incident at the police station is concerned. I think the record speaks clearly for itself and bears out that this witness was a  
10 poor witness insofar as what happened at the police station. She was a single witness, and the evidence of a single witness should be treated with caution insofar as it incriminates, especially Accused 8. In dealing with the evidence of a single witness, the Court has to look at it critically; the Court has to  
15 weigh it up against other acceptable evidence, and the Court also has to look at the probabilities of their version.

I am in agreement with Advocate Zilwa, that, even if I should rely on the evidence of Busisiwe insofar as it relates to the  
20 incrimination of Accused 8 at the police station, the evidence indicates that there was not a kick, but it was more of a trampling with the heel of the shoe against the face of the deceased. According to the evidence of Professor Wadee, the hyoid bone of the deceased was broken. In order for this  
25 injury to have been sustained, there had to be direct trauma to



the hyoid bone. If one has regard to the place on the body where the hyoid bone is situated, it would have been difficult for the deceased to have sustained the injury if one should find that Accused 8 had kicked the deceased. According to  
5 Professor Wade, the hyoid bone is situated in the throat area of the neck, directly under the jaw bone, and, should a person be kicked, the jaw bone would always be able to protect it; it is under the jaw bone, direct physical trauma, or force has to be applied to the hyoid bone, and the evidence does not bear  
10 that out.

The State advocate argued that it could have been caused by the deceased falling forward on his face, with a part of the stoep, which was elevated and protruding, that might have  
15 caused the injury, but there is no evidence to suggest that, and that is, as Advocate Zilwa has correctly argued, speculation.

In the end, ultimately, this Court is unable to find how this  
20 injury was caused to the hyoid bone. The Court cannot find it was caused by the actions of any of the accused, and this injury to the hyoid bone also led, ultimately, to the death of the deceased.

25 The next point that I need to address, is that, in the absence

of clear and credible evidence on the part of the State, that the accused assaulted the deceased. The Court had to rely on the objective and common cause facts. From this, it was clear that the accused had an injured person, whilst they were on duty as  
5 police officers, in their custody and care.

On those facts, the Court then rejected the application on the first count of murder, because there was a chance that the accused could have been convicted on a count of culpable  
10 homicide, which would be a competent verdict to murder.

On a conspectus of the evidence, it seems that there were no visible injuries, except for some bruises in the face and the fact that the mouth was bleeding of the deceased. The overall  
15 condition of the deceased was also not of such a nature as to warrant immediate and urgent action on the part of the accused. There was no indication on the part of the deceased that he was in need of urgent medical attention. As I said earlier, the evidence of Professor Wadee indicates that the  
20 injuries that were fatal, were internal, and it could only have been sustained by direct blunt force or trauma to the neck area directly under the chin or jaw bone. The injury to the hyoid bone. There is no evidence that any of the accused were aware, or made aware of this injury to the hyoid bone. The  
25 overall condition of the deceased seems to indicate that he  
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was in a position to walk and talk prior to him having the seizures or convulsions at the police station. This was all borne out by the evidence, and the witnesses who testified.

5 As a result of the lack of credible evidence on the part of the State to prove beyond reasonable doubt that the accused had, indeed, either individually or collectively, as police officers, assaulted the deceased, the Court has no option but to grant the accused the benefit of the doubt. The State has failed to  
10 prove its case beyond reasonable doubt insofar as Count 1 is also concerned, the main count, and also, as I said earlier, on the competent verdict of culpable homicide, because of them being police officers who had a duty of care, to see that the deceased be granted immediate medical assistance.

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Therefore, on Count 1, I am of the view that the State has failed to prove its case beyond reasonable doubt against all of the accused, and ALL EIGHT ACCUSED ARE ACQUITTED ON COUNT 1, the murder charge.

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I have already granted an application for discharge insofar as Counts 2, 3 and 4 are concerned. In result, therefore, ON COUNTS 2, 3 AND 4 THE COURT FINDS ALL EIGHT ACCUSED NOT GUILTY.

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The accused are all free to leave.

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HENNEY, A J