IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A863/2016

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
4/8/17
DATE
SIGNATURE

REBECCA MKHWANAZI **Appellant**

and

THE STATE **Respondent**

ORDER

On appeal from the Regional Court for the Regional Division of Gauteng,

(Molefe J and Swanepoel AJ sitting as court of appeal):

1. The appeal against conviction is dismissed.

JUDGMENT

Swanepoel AJ (Molefe J concurring):

1. The Appellant was charged in the Sebokeng Regional Court with one count of murder, in that on 5 July 2014, and at Evaton in the Regional

Division of Gauteng, appellant unlawfully and intentionally killed Vindikulu Ezekiel Mkwanazi ("the deceased").

2. Appellant pleaded not guilty and exercised her right to remain silent. After hearing evidence, the court convicted appellant. She was sentenced to 13 years' imprisonment, three of which was suspended for 5 years on condition that appellant was not convicted of murder committed within the period of suspension.

3. Appellant sought leave to appeal against both the conviction and sentence. The court *a quo* granted leave to appeal in respect of conviction only[1]. Counsel for appellant submitted that it is not advisable to appeal against the conviction only, without also appealing against the sentence. This submission is without merit, and there is no reason why an appeal cannot lie against conviction only.

THE EVIDENCE

4. On behalf of the State, Mr. Thukelo Godfrey Mosia ("Mosia") testified that on 5 July 2014 he was at his friend Mpho's home. The deceased was already at the same home when appellant arrived, looking for the deceased. Mosia testified that appellant entered the home

[1] p 188

holding the deceased by the neck, and assaulting him with the branch of a tree ("stick"). The length of the branch was estimated to be approximately one meter. The record contains no estimate of the thickness of the branch.

5. Mosia stated that he saw appellant hit the deceased repeatedly on the head and body with the stick, although he was unable to estimate the number of blows. The deceased grabbed the stick with which he was being beaten, and sought help from Mosia. When Mosia tried to intervene, appellant looked at Mosia in such a manner as to scare him off. At this stage Mosia went outside. Upon hearing something fall inside the house, Mosia went back inside, found the deceased lying on his back on the ground and appellant demanding the car keys from him. The deceased was not talking, but Mosia did notice that the deceased was bleeding from a bite mark on his cheek.

6. Appellant went out to the deceased's car, and upon her return she pulled the deceased from the room to the kitchen by his legs. She proceeded to wash the blood from the deceased's cheek. She also closed the deceased's eyes, and she took the car keys from him. At this stage it was Mosia's observation that the deceased had already died.

7. Appellant made a telephone call after which one Thapelo arrived. He tried to resuscitate the deceased. When that seemed to fail, appellant

asked them to take the deceased to a nearby clinic in their vehicle. Appellant accompanied them. A while later they returned with the deceased and placed him back in the kitchen. The deceased's body was eventually removed by a mortuary vehicle.

8. Mosia further testified that appellant told him that the reason for the quarrel was that the deceased was undermining her through her children.

9. It was put to Mosia by appellant's counsel, that upon arriving at the house, appellant knocked on the door, took the car keys and told the deceased that they were going home. Appellant had allegedly come to fetch the deceased in order for him to take his medicine. I digress to say, that it is common cause that the deceased was a very ill man, and that he suffered from pulmonary tuberculosis, stenosis of the coronary arteries, fibrosis of the heart, and cirrhosis of the liver.

10. Appellant's version was put to Mosia that the deceased grabbed her and so she could not move. When the deceased refused to let her go, appellant bit the deceased on the left cheek. During this struggle, the deceased fell down. Appellant does not know how he fell. It was further put to Mosia, that he had connived with the deceased's ex-wife to concoct his evidence. Mosia denied this version and was adamant about the fact that appellant had beaten the deceased. He testified that later the same day appellant told him that the deceased

had been very ill. Appellant tried to get Mosia to lie by stating that the deceased had simply fallen down.

11. The deceased's son, Michael Mkwanazi, testified that on the day in question, he was approached by Thapelo who asked Mkwanazi to accompany him to Evaton. On the way to the house, they came across the car in which the deceased was being transported. Appellant was with the deceased and she told them that she was taking him to the clinic. Mkwanazi noticed that the deceased was motionless and he concluded that the deceased had died.

12. Dr. Sydney Kajaai testified that he had conducted the postmortem examination on the deceased on 9 July 2017. His findings were recorded in a report, that was handed in (without objection by appellant's counsel) as Exhibit A, and Kajaai's affidavit in terms of section 212 of the Criminal Procedure Act, 1977, as Exhibit B.[2]

13. Kajaai recorded a number of injuries, mostly to the head of the deceased. Upon examining the head internally, Kajaai found a subdural haemorrhage on the right hand side of the brain, covering the temporal, parietal, occipital and frontal lobes. His finding was that the deceased had died of blunt force trauma to the head.

14. Under cross-examination it was put to Kajaai that on the day in

[2] *Pages 204 and 208 respectively.*

question the deceased fell, and that the haemorrhage might have been caused by the fall. He did not dispute that that was a possibility. Largely, the cross-examination of Kajaai focused on the deceased's illnesses with a view to determining whether his pre-existing conditions had any causal link to his death. Kajaai could only state that as a result of his health, the deceased was more susceptible to these type of injuries, but he was adamant that the cause of death was blunt force trauma to the head.

15. Appellant testified that she had a very tranquil relationship with the deceased, and that they had never fought. She stated that the deceased had disappeared on 30 June 2014. She only located him on 5 July 2014 when she quite fortuitously saw his vehicle in Evaton. When she found the deceased at Mpho's house, she asked for the keys to the car and told the deceased to come with her. The deceased slapped her and grabbed her, putting his arms around her. She bit him on the cheek, at which point the deceased fell. She did not know how he fell down, but she knows that he fell hard.

16. During her evidence appellant suddenly denied that there had been any incision on the deceased's head after the postmortem examination, and on that basis she denied that a subdural haemorrhage could have been found. None of this was put to Dr. Kajaai in cross-examination.

17. Appellant denied ever assaulting the deceased with a blunt object, or of having any weapon in her possession.

18. On behalf of appellant, her sister Johanna Mothapa testified. She stated that on the day in question appellant telephoned her and told her that she had beaten the deceased and that he had fallen. She rushed to the scene and found the deceased already in the car, and on the way to the clinic. She entered the car and saw Thapelo trying to resuscitate the deceased. At the clinic they were told that the deceased was dead, and to take him back to where they had come from.

19. Mosia told her on the same day that deceased and appellant had fought and that he had fallen down. He never mentioned a stick or other object.

20. It must be mentioned that the affidavit of Thabo Kobokoane a mortuary assistant was admitted in evidence. He states that he received the body of the deceased from Mothapo. There is no suggestion that the deceased suffered post-mortem injuries.

EVALUATION

21. The evidence of Mosia, the only eyewitness to the events leading to the deceased's death, was accepted by the trial court. His evidence revealed minor discrepancies. However, the principal issue in his evidence was whether he was truthful when he said that appellant had beaten the deceased, causing him to fall to the ground. As far as this issue is concerned, his evidence was consistent throughout.

22. More importantly, Mosia's evidence in this regard is substantiated by two other facts:

a. Dr Kajaai reported finding at least five wounds on the deceased's face, in various locations, and on both sides of his face. It is highly unlikely that a person falling down onto the floor would sustain so many and such widespread injuries. The nature of the injuries are more consistent with Mosia's version that the deceased was beaten;

b. Appellant's witness, her sister Johanna Mothapo, testified that appellant telephoned her and told her that she (appellant) had beaten Mkwanazi and that he had fallen. This evidence is uncontroverted, and the disclosure was made to Motapo by appellant shortly after the incident.

23. Appellant's counsel submitted that the deceased's fall might have caused his death. He was questioned on the fact that deceased had sustained a number of different injuries to his head, which are consistent with a beating as described by Mosia, but inconsistent with a fall. Appellant's counsel was unable to suggest an explanation for these injuries.

24. Appellant's counsel also tried to cast doubt on the competence of Dr Kajaai. Counsel suggested that he (counsel) was qualified in forensic pathology, and that he could express an opinion regarding Kajaai's findings. This was never raised during the trial and the fact that Kajaai was an expert forensic pathologist was accepted without being disputed.

25. The Court is of the view that the magistrate correctly accepted the evidence of Mosia, and Dr. Kajaai's findings, and correctly rejected Appellant's version.

26. What remains then is to determine whether the State has proved the elements of murder. In order to prove murder the State has to prove, beyond a reasonable doubt, that the appellant had intent to kill the deceased, in one of the recognised forms. In this case the State would either have to prove direct intent, in the form of *dolus directus*,

or *dolus eventualis*.

27. There is no evidence that appellant set out with the direct intention to kill the deceased. Much was made of the deceased's relationship with a prophet, and that he had spent substantial amounts of money to pay for healing services. This, and the deceased's unexplained absence for some days had no doubt angered the appellant, and it is doubted that she went to fetch the deceased solely to bring him home to be medicated.

28. However, the mere fact that she was angry with the deceased does not mean that she had the direct intention to kill him, even if she did come armed with a weapon.

29. A more difficult question is to determine whether appellant is guilty by way of *dolus eventualis*. The test for *dolus eventualis* was extensively canvassed by the SCA in **Director of Public Prosecutions, Gauteng v Pistorius**[3]. The principle to be applied is whether she had foreseen the possible death of the person and had reconciled herself with that result.

30. A second aspect to be borne in mind is that the inference sought to be drawn, (that appellant had foreseen that the deceased may die

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[3] *2016 (1) SACR 431 (SCA)*

and had reconciled herself thereto), should be consistent with all the established facts.

31. Obviously one cannot enter into the head of the appellant. The court must determine whether an inference can be drawn that, given common human experience, the consequences which ensued would have been obvious to a person of normal intelligence.[4]

32. The relevant facts in this matter are the following:

a. There is no doubt that appellant was angry with the deceased on the day in question, and that she armed herself with a meter long branch from a tree.

b. Appellant stormed into the house and accosted the deceased by first grabbing him by the neck, and then by beating him repeatedly over the head and body.

c. At some stage appellant inflicted the bite wound to the deceased's face.

d. The blows to the head were severe enough to cause a subdural haemorrhage to large parts of the head, covering a substantial portion of the brain, and causing the deceased to fall to the ground.

e. The deceased was, to the appellant's knowledge, a sickly person who was, by all accounts, unable to defend himself. She

[4] *S v Humphreys 2015 (1) SA 491 (SCA)*

must have known that by beating such a vulnerable person, she was putting his life at risk.

33. Appellant's counsel sought to argue that one cannot draw an inference that appellant had the subjective realisation that beating the deceased about the head with a meter long branch from a tree might cause his death. This submission is rejected. The beating administered by appellant was severe enough to cause extensive bleeding over a substantial portion of the brain. It is inconceivable that a person who is administering such a beating does not foresee that the beating might result in death, especially given the medical condition of the deceased.

34. From all the evidence at hand, it is apparent that the only inference that may reasonably be drawn is that appellant foresaw the possibility of the blows leading to the death of the deceased. Despite this realisation, and reckless of the consequences, appellant inflicted the beating to the deceased.

35. Appellant's conduct after the incident also leaves a number of questions unanswered. Appellant must have realised that the deceased was severely injured. It was apparent to Mosia that he was dead. Nonetheless, appellant made no attempt to call for an ambulance or for other medical assistance. She cleaned his face, it

seems, to hide the blood from the bite wound. Appellant telephoned her family, instead of emergency services, to come to her aid.

36. Appellant's conduct after the fact suggests that she did not place much value on the deceased's life. There is no evidence that she was unduly upset. Instead, she seems to have tried to cover up the events by asking Mosia to lie for her.

37. Much was made of the fact that the deceased's state of health was such that he was inevitably going to die, and furthermore, that his state of health made him more vulnerable to die from a beating. Firstly, every person on this planet is going to die, but if a person's demise is hastened by another, that perpetrator is guilty of an offence. Secondly, a perpetrator takes his victim as he finds him, and cannot later complain that the victim's health put him at greater risk of death.

38. Therefore we are satisfied that the State proved the appellant's guilt in respect of the charge of murder by way of *dolus eventualis* beyond a reasonable doubt.

39. Finally, we find it necessary to remind appellant's counsel of the intention of heads of argument as stated in the matter of **Caterham**

Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and another:

> *"There also appears to be a misconception about the function and form of heads of argument. The rules of this Court require the filing of main heads of argument. The operative words are "main", "heads" and "argument". "Main" refers to the most important part of the argument. "Heads" means "points", not a dissertation. Lastly, "argument" involves a process of reasoning which must be set out in the heads. A recital of the facts and quotations from authorities do not amount to argument."*[5]

40. We were faced in this matter with heads of argument for appellant, comprising of 131 paragraphs, including a substantial portion on the sentence, which was irrelevant to these proceedings. Counsel would do well to heed the above quotation.

41. In our view the court *a quo* did not misdirect himself in respect of the evidence. He correctly rejected the appellant's version as false beyond a reasonable doubt. The court *a quo* also correctly found that the appellant had intent to kill the deceased, in the form of *dolus eventualis*.

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[5] *1998 (3) SA 938 (SCA)*

42. In the result, we make the following order:

The appeal against conviction is dismissed.

C SWANEPOEL

Acting Judge of the High Court

I AGREE AND IT IS SO ORDERED

D S MOLEFE

Judge of the High Court

APPEARANCES:

For the Appellant	:	**Adv. D Selala**
Instructed by	:	**Justice Centre of Legal Aid SA, Pretoria**
For the Respondent	:	**Adv. G Maritz**
Instructed by	:	**Director of Public Prosecutions, Gauteng, Pretoria**
Date Heard	:	**31 July 2017**
Date Delivered	:	**08 August 2017**