

SOUTH AFRICA / JUDGMENT

De Jager and Others v S (CA&R69/2012) [2016] ZAECHGC 92; 2016 (2) SACR 716 (ECG) (27 September 2016)

[2016] ZAECHGC 92

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NG Beshe, B Sandi

CASE / FILE NUMBER

CA&R69/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO.: CA&R69/2012

DATE:

27 SEPTEMBER 2016

In

the matter between:

RICARDO

JOHNNY DE

JAGER.....First

Appellant

KEITH

KORKEE.....Second

Appellant

WILLIE

LOUW.....Third

Appellant

And

THE

STATE.....Respo
ndent

JUDGMENT

BESHE J:

[1] The appellants were convicted of culpable homicide in the Uitenhage Regional Court. The basis for the conviction being that the death of the deceased in this matter, Bevan Breyten Deon Joseph on the 21 August 2010, came about as a result of appellants' negligent conduct. The court a quo then proceeded to sentence the appellants as follows:

First and third appellants were each sentenced to five (5) years imprisonment in terms of Section 276 (1) (i) of the Criminal Procedure Act 51 of 1977.

Second appellant was sentenced to seven (7) years imprisonment with two (2) years thereof conditionally suspended.

[2] The appellants are appealing against both the conviction and sentences. Leave to do so was granted upon petition to this court

after the Magistrate had refused leave to appeal against the conviction.

[3] The events leading to the death of the deceased as succinctly outlined by the appellants in their heads of argument seem to be common cause to a large degree. Those events are the following:

On the 21 August 2010, at the Uitenhage sports ground, the Progress Rugby Club hosted rugby matches between them and a visiting team being the Gardens. The supporters of both teams filled the pavilion – they were approximately between three to four thousand in number. Each group of supporters sat on its side of the pavilion. Towards the end of the last match, a fight broke out between players on the field. This was followed by the spectators on the pavilion throwing missiles (bottles) around. This in turn resulted in most of the spectators fleeing from the pavilion and running towards the exit points of the pavilion. One of the exits got so congested that the brick wall at the bottom of the pavilion collapsed and fell on top of a child who was on the ground beneath the brick wall. It is common cause that the child in question is the deceased in this matter who unfortunately died as a result of injuries sustained therein. There were scores of other people who fell from the pavilion after the wall gave in under the pressure and collapsed. Mr Visser, a state witness testified that “... .. die muur het meegegee en al die mense het geval, hulle was bo-op mekaar. hulle het bo-op mekaar gelê toe het ek maar begin help om die mense te help, maar dit was a baie moeilike situasie”.

It is at that stage that he observed the deceased underneath the rubble of the collapsed wall. He (Visser) stood there in shock thinking how it could easily have been his son who was lying beneath that rubble. This could have been so because his son together with the deceased and other boys always played rugby in that spot during matches. He testified that the boys were playing their own “matchie” even on this day – before the wall collapsed. (page 97 of the record).

- [4] Deceased's father, Mr Phillip Lionel Joseph, testified that he had attended the rugby matches together with his two sons – one of whom was the deceased. He testified that when trouble broke out at the stadium with missiles being thrown around, his sons were not with him. They had earlier been sitting a few rows behind him.
- [5] State witnesses suggested that the appellants, who were supporters of the loosing team, the Gardens, pelted supporters of the Progress team with mostly beer bottles. This resulted in spectators fleeing from the pavilion for their safety in large numbers.
- [6] One of the state witnesses Mr Nicolaas Toring, testified that at the stage when bottles were being thrown by the Gardens supporters, he was on the lower part of the pavilion with deceased approximately 1½ metres from him close to the wall. It was at that stage that accused number two threw a bottle at him (Toring). He ducked to avoid the bottle. The bottle hit the deceased on the head causing him to tumble over the retaining wall in front of the pavilion seats. This was before the retaining wall gave in due to the pressure of people who were trying to flee and collapsed.
- [7] None of the other witnesses witnessed this. It is not clear how Toring managed to see the missile that hit the deceased who was 1½ metres behind him. How he managed to see deceased tumble over the wall. Logic dictates that this must have happened very quickly – the bottle must have reached the deceased when Toring was still in the process of ducking or straightening up. It must be borne in mind that deceased was behind him at the time that Toring himself describes the situation as having been “deur mekaar”. It is also not clear what caused the deceased to tumble over the wall. Was it the blow to his head? Did he try to flee? Toring is adamant that deceased was not sitting or standing on the wall. He was standing on the pavilion in front of the wall. Toring continues and states “En na die bottel hom getref het, na die gestormery toe ons af beweeg het die paviljoen af, het ons oor the muur geval en die muur het in duie gestort en daar het nog van die ander mense wat van die paviljoen afgekom het ook oor die muur gegaan na die grasdeelte toe”.
- [8] First appellant admitted having thrown bottles but contended he did so to defend himself. Second and third appellants denied having thrown stones at anyone at the stadium on the day in question. It appears to be common cause that the three appellants were not the only ones who threw missiles on that day.
- [9] The appellants were charged with culpable homicide on the basis that they unlawfully and negligently caused the death of the deceased “by throwing bottles and causing or instigating a stampede of persons which led to collapse of a wall onto the deceased which contributed or caused his death”. (This is according to the charge sheet).
- [10] Having heard the evidence the Magistrate made the following remark regarding the question whether the appellants foresaw that their actions would result in the death of the deceased:

“Ek dink die vraag is eintlik nodeloos om gestel te word. Wat kan ‘n mens verwag waneer daar bottels na ‘n skare mense gegooi word? Die logiese is dat die mense of vlug sal slaan. Waneer 3 of 4 duisend mense na een ingang hardloop dan is dit mos onvermydelik dat mense in die proses beseer gaan word. Wat die vraag betref of daar kon en moes voorsien gewees het, dan is die antwoord onvermydelik “ja”. Die gevolg die intrude van die dood van die oorledene is voorsienbaar en die beskuldigdes moes daarvolgens opgetree het.”

The Magistrate came to the conclusion that:

“... daar is by die Hof geen twyfel van watter aard ook al dat die beskuldigdes benoort uitgewys is as die persone wat, onder ander, bottels na toeskouers gegooi het wat uiteindelik gelei het daartoe dat die skare of loop gesit het, dat hulle ‘n vertrapping veroorsaak het, dat ‘n muur ongeval het end at die oorledene as gevolg daarvan dood is.”

- [11] The judgment of the Magistrate in the court a quo is assailed on the basis that it did not address the question whether the appellants should have foreseen that the wall would collapse and kill the deceased. It was argued on behalf of the appellants that a reasonable person in the position of the appellants would not have foreseen that the brick wall would collapse and kill the deceased. It was further argued that even in the case of second appellant in respect of whom one witness testified he struck the deceased with a bottle on the head, there is no evidence that that blow contributed to the death of the deceased. It was argued that the falling of the wall was a novus actus interveniens that resulted in a freak accident that unfortunately brought about deceased death.
- [12] In my view, the conviction of appellants could only follow upon it being proved that a reasonable person in the place of the appellants would have foreseen that by throwing bottles at spectators of the rival club people would flee towards the exit points of the pavilion and a result of the pressure from the fleeing hordes of people the retaining wall would collapse, fall on top of the deceased and kill him. See the headnote in *S v Van As* 1976 (2) SA 921 where the following appears:

“In criminal law, when death follows upon an unlawful assault, it must be proved, before there can be a finding of culpable homicide, that the accused could and must reasonably have foreseen that death could intervene as a result of the assault.”

- [13] In the circumstances of the present case, could a reasonable man have foreseen that the throwing of bottles at spectators would cause them to flee? The answer should in all probability be yes. Could a reasonable person have foreseen that the spectators, would, in search of safety run towards the exit points of the pavilion? The answer to this question should be a resounding yes. Could a reasonable man in the shoes of the appellants have foreseen that as a result of the pressure from the fleeing throngs the brick wall would give in and fall on top of the deceased killing him? I am unable to find that this eventuality could and should have been foreseen by the appellants or a reasonable man in the shoes of the appellants. There is no way that they could have foreseen that. The collapse of the retaining wall was in my view, a novus actus interveniens and therefore could not have been foreseen

by the appellants. The appellants would in addition be required to have been aware of the young boys playing below the wall. Unfortunately, besides saying there was nothing inherently wrong with Toring's evidence regarding how deceased was struck on his head by accused number two with a bottle, the Magistrate in the court a quo did not deal with this evidence in any length. He did not deal with the nexus between the striking with the bottle, the falling and the falling of the wall. In his judgment, the learned Magistrate seems to impute guilt on the appellants on the basis that logic dictates that if three to four thousand people flee from being pelted with missiles to a single exit point they will be injured – suggesting that their guilt stems from their action of throwing bottles. There is no evidence that all the spectators ran towards one exit. He seems to accept that the death of the deceased was brought about by the wall falling on top of the deceased.

[14] I have already expressed my misgivings about the veracity of Toring's account of what happened to the deceased or what caused him to end up on the spot below the retaining wall of the pavilion. In my view, there is no sufficient causal connection between the throwing of bottles at spectators and the collapse of the wall and subsequent death of the deceased that it can be said that the appellants could have foreseen that eventuality. The collapse of the wall was far removed from the throwing of bottles. No reasonable man in the shoes of the appellants would have foreseen that the wall would collapse and deceased would be playing in the grass area in front of the pavilion.

[15] I am of the view that the Magistrate in the court a quo misdirected himself by finding that the state had proved the guilt of the appellants beyond reasonable doubt. That the death of the deceased was foreseeable in the circumstances.

[16] I therefore propose the following order:

The appeal is upheld.

The convictions in respect of all three appellants are set aside.

The sentences against the three appellants are set aside.

NG BESHE

JUDGE OF THE HIGH COURT

SANDI J

I agree, it is so ordered.

B SANDI

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Date Heard : 13 August 2014

Date Reserved : 13 August 2014

Date Delivered : 27 September 2016

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Prepared on 11 October 2026 · Esheria