

SOUTH AFRICA / JUDGMENT

Gysman v S (A17/24) [2024] ZAWCHC 227 (28 August 2024) [2024] ZAWCHC 227

COURT

Western Cape High Court, Cape Town

BEFORE

Slingers, Montzinger

CASE / FILE NUMBER

A147/24

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IN THE HIGH COURT OF
SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN

Appeal Case No.:

A147/24

Lower Court Case No.:

OSH164/19

In the appeal between:

CONRAD GYSMAN

Appellant

and

THE STATE

Coram: Slingers, J

et Montzinger, AJ

Heard: 23 August

2024

Delivered

electronically: 28 August 2024

JUDGMENT

Montzinger AJ:

Summary Introduction

1. This is an appeal against the appellant's murder conviction by the regional court sitting at Oudtshoorn.
2. The appellant was convicted and sentenced to 15 years' direct imprisonment[1]. He applied in the trial court for leave to appeal against his conviction and sentence, which was refused. On petition to this court the appellant was granted leave to appeal, only against his conviction.
3. The circumstances that led to his conviction relate to an event that happened on the afternoon of 7 May 2019 in Calitzdorp, Western Cape. The appellant fatally stabbed the 19-year-old Ms Sonia Saaiman (the "deceased") in the neck. While the State and the appellant disagreed on the events leading to the fatal stabbing, it was not disputed that the appellant performed the fatal stab that caused the deceased's death.
4. The evidence before the trial court consisted of the testimony of a single eyewitness, Mr. Phillipus Fortuin ("Fortuin"), who testified that on the day of the incident, he was approached by the deceased, who requested that he accompany her to the appellant's

house to collect money. Upon arrival at the appellant's house, they found the deceased's mother already there, knocking on the door. The deceased joined her mother in trying to get the appellant's attention and even went around the house to knock on the window. The appellant eventually unlocked and opened the door, leading to a heated argument between himself, the deceased and her mother[2].

5. Fortuin further testified that while the deceased and her mother stood in front of the door facing the appellant the argument increasingly

escalated. At this point the appellant asked the deceased mother, "are you taking me for a fool", turned around and when he turned back towards them had something in his hand. It was at this moment, Fortuin further testified, that the deceased pushed her mother and was stabbed in the neck by the appellant[3].

6. The State also presented and relied on an uncontested postmortem report that confirmed the deceased's cause of death was '...a stab wound to the neck...' that was described in the report as follows:

"A stab wound with an elliptical shape, 24 x 3 mm, was placed on the left lateral neck, 55mm below and 3mm in front of the left external

ear canal..."

7. While the appellant did not dispute that he had stabbed the deceased, his version of events differed significantly from the State's. The appellant claimed he was sleeping after consuming too much alcohol and was abruptly awakened by a noise, which he believed was caused by an intruder attempting to enter his home through the window. Startled and fearful, he grabbed a knife and stabbed blindly through the towel that covered the window, without realising that he had struck a person. A few moments later he learned

that it was the deceased that he stabbed.

8. Before the trial court it was argued on the appellant's behalf that the State's case was unreliable, as it relied on the testimony of a single witness. It was further contended that the State had failed to prove that the appellant had the requisite intent to kill the deceased. Despite these arguments, the trial court, based on the totality of the evidence[4], rejected the appellant's version of events, as it was so improbable that it could not be reasonably possibly true[5]. The trial court found that the State had proven beyond a reasonable doubt that the appellant committed murder.
9. We briefly restate the approach followed by a Court of Appeal and then move on to an evaluation of the grounds of appeal.

The approach of a Court of Appeal

10. As a general rule, an appeal is a comprehensive rehearing, conducted without the introduction of new evidence, where both the factual and legal conclusions of the trial court can be challenged based on the evidence presented during the trial[6]. This means a Court of Appeal's power to interfere with the findings of a trial court is limited. As confirmed in judgments like *S v Francis*[7], there is a presumption that the trial court's evaluation of the evidence is correct and will only be disregarded if it is clearly wrong.
11. However, this does not mean that the presumption in favour of a trial court is immune from interference. As the Supreme Court of Appeal stated in *S v Mafaladiso*[8], the presumption against interference serves only as a guideline and is not a legal rule. This means that if an appeal court is satisfied that the trial court has made a wrong finding of fact, it must rectify it[9].
12. As the appeal court, and as noted in both *S v Francis* and *S v Horn*[10], we must assess whether the evidence presented at trial was sufficient to support the conviction and the trial court's findings, and whether there was any misdirection that warrants our interference.
13. At the outset, although certain grounds were no longer pursued on appeal, we find no difficulty in endorsing the trial court's decision to accept the evidence of the single witness. The trial court was empowered to do so in terms of s 208 of the Criminal Procedure Act that expressly provides that: "Conviction may follow on evidence of single witness".
14. In addition to the credible and consistent nature of Fortuin's evidence, his version gained further prominence when it was

considered against the improbable version tendered by the appellant[11].

15. Since we are satisfied that the trial court was justified in rejecting the appellant's version and correct in accepting the evidence of Fortuin, we now turn to evaluate the primary ground that the appellant persisted with on appeal.

Evaluation

16. During argument, Ms. Adams represented the appellant, while Ms. Van Wyk appeared for the respondent. The focus of the appeal shifted to the narrow issue of the appellant's intention at the time of the fatal stabbing.
17. Ms Adams conceded that for the court to consider the appellant's proposition regarding intent (dolus), the appeal must be determined based on the facts as proven by the State. Considering this concession we had regard thereto that murder is defined as the unlawful and intentional killing of another person. To secure a conviction for murder, the State must prove that the accused committed the act that resulted in the deceased's death with the required intent (dolus). Since it is not disputed that the appellant knew his actions were unlawful, the issue is whether he had the intent to kill the

deceased.

18. Intention can take various forms[12]: dolus directus[13], dolus indirectus[14] and dolus eventualis[15]. Mere negligence, (culpa) is insufficient to establish guilt for murder. In evaluating the intention of a perpetrator, we heed the caution of the Supreme Court of Appeal in S v Humphreys[16] that:

"[10] By its very nature, only the accused person can give direct evidence as to his or her level of consciousness at the relevant time. However, if the mere say-so of the accused person, that the act was unconsciously committed, were to be accepted without circumspection, it would tend to bring the criminal justice system into disrepute. After all, an accused person who has no other defence is likely to resort to this one in a last attempt to escape the consequences of his or her criminal behaviour..."

19. Furthermore, we recognise that the State is seldom able to offer direct evidence of the accused's state of mind at the time of committing the crime and must rely on inferences drawn from the circumstances of the assault, the nature and duration thereof, the weapon used, and the extent of the injuries inflicted. All relevant facts that bear on the accused's state of mind must be cumulatively assessed to determine whether it can be inferred beyond a reasonable doubt that the accused considered it a reasonable possibility that the deceased could die from the assault but, reckless as to that possibility, persisted with the assault[17].
20. In this case, the appellant, who alone was aware of his state of mind, presented a fictitious and improbable version of the events to justify his conduct. Although he testified, he persisted with his version and provided no insight into his state of mind when he stabbed at the two women in front of him.

21. Having justifiably rejected the appellant's version, the only inference that could be drawn from the cumulative circumstances—such as the duration of the assault, the use of a knife, the position of the deceased and her mother in front of the appellant, and the location of the wound in the deceased's neck—is that the appellant considered it a reasonable possibility that the deceased or her mother could die from the assault but, reckless as to that possibility, continued with it.
22. The trial court was thus correct in finding that the appellant had *dolus directus* as he acted with the aim of bringing about an unlawful consequence, even if that decision was made in the heat of the moment[18]. *Dolus directus* does not require planning or premeditation[19]. Similar to the sentiments expressed in *Raath*, we find that deliberate, goal-directed conduct does not necessarily have to be planned. This case is an example of such conduct, where the evidence shows that the appellant acted in the spur of the moment but with the clear intent to kill. Whether his target was the deceased, or her mother is of little consequence in determining his intent to murder.
23. We are thus satisfied that the evidence conclusively proved the appellant's intent to murder and fully concur with the trial court's findings. There is nothing in the record to suggest otherwise or to cast doubt on the appellant's intent.
24. The appeal must also fail because, even if the trial court misdirected itself on whether the appellant had *dolus directus* to kill the deceased, the evidence still overwhelmingly supports a conviction on the basis of *dolus eventualis*. In the context of murder, *dolus eventualis* is present where the accused subjectively foresaw the possibility of his conduct causing the deceased's death and was reckless as to that outcome[20].
25. In this case, the appellant's actions—stabbing the deceased in the neck, a vulnerable area of the body—demonstrate a clear foresight of the potential for causing fatal harm. The fact that he proceeded to stab, despite this foreseeable outcome, satisfies the requirements for *dolus eventualis* as well[21].
26. Consequently, even if the trial court had misdirected itself in assessing the appellant's direct intent, which we do not find, the conviction for murder remains sustainable and justified as intent can also be proven in the form of *dolus eventualis*. Ironically, even on the appellant's improbable version of the events that led to the deceased's death, he would have had the necessary intent to commit murder under any of the legally recognised forms of intent.

Conclusion

27. We are therefore satisfied that the trial court's findings cannot be vitiated on the basis of a material misdirection, nor does the record show that its findings of fact or law were wrong. We therefore have no basis to interfere with the reasoning and conclusions of the trial court.
28. Therefore, I would make the following order:

The appeal against the appellant's conviction is dismissed.

A MONTZINGER

Acting Judge of the High Court

I agree. It is so ordered

H SLINGERS

Judge of the High Court

Appearances:

Appellant's counsel:

Ms L Adams (Legal-Aid)

Respondent's counsel:

Ms E Van Wyk (State Advocate)

[1] In terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997

[2] Record: p 31 ln 20

[3] Record: p 33 ln 10-15

[4] S v Van Aswegen [2001]

(2) SACR (SCA) and S v Mbuli 2003

(1) SACR 97 (SCA) par 57

[5] S v Shackell 2001 (2) SACR (SCA) 194 g – I

[6] Director of Public Prosecutions, Gauteng v Pistorius [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA) (“DPP v Pistorius”) – par 21

[7] [1991] 2 All SA 9 (C); 1991 (1) SACR 198 (A)

[8] 2003

(1) SACR 583 (SCA) 595 b-d

[9] S v Mkohle 1990

(1) SACR 95 (A)

[10] 2020

(2) SACR 280 (ECG) at para 75

[11] S v Van Aardt (179/08)

[2008] ZASCA 169; 2009 (1) SACR 648 (SCA); [2009] 2 All SA 184 (SCA) par 11

[12] Burchell J “Principles of Criminal Law” 5th edition 2016 (“Burchell”) – p 348 - 350

[13] This form of intent is where the accused meant to perpetrate the prohibited conduct or bring about the criminal consequence.

[14] This form of intent exists where the accused foresaw the unlawful conduct or consequence as certain, or as substantially certain or virtually certain, even though the unlawful conduct was not the accused’s main aim and object.

[15] See par 27 – 28 *infra*

[16] *S v Humphreys* 2015 (10 SA 491 (SCA) (“Humphreys”)

[17] See *Van Aardt* – par 39

[18] Similar views were expressed in *Raath v S* 2009

(2) SACR 46 (C) (“Raath”) para 16, although within the context of planned and premeditated conduct in terms of the minimum sentencing legislation.

[19] Burchell J, *Principles of Criminal Law*, sixth edition used the finding in the *Raath*

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to come to this conclusion when discussing *dolus directus* as a form of intend. We align ourselves with his view.

[20] *S v Luke and Others* (SS16/10)

[2012] ZAWCHC 9 (16 February 2012) at par 49 and *Van Aardt* 2009

(1) SACR 648 (SCA) 570 B - E

[21] *S v Humphreys* *supra* p 497 par A – B; *S v De Oliveira* 1993

(2) SACR 59 (A) at 65 i – j. For a more recent exposition on *dolus* see *Director of Public Prosecutions, Gauteng v Pistorius* [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA) (“DPP v Pistorius”)

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