

SOUTH AFRICA / JUDGMENT

Peterson v S (CA&R196/2015) [2015] ZAE CGHC 130 (29 October 2015)

[2015] ZAE CGHC 130

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, N Beshe

CASE / FILE NUMBER

CA&R196/2015

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO CA&R 196/2015

DATE HEARD: 14/10/2015

DATE DELIVERED: 29/10/2015

In the matter between

MICHALLETTE PETERSON

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

ROBERSON J:-

[1] The appellant was convicted of murder by the Regional Court sitting at Cradock, and sentenced to ten years' imprisonment.

This appeal is against the conviction only, leave having been granted by the trial court. In convicting the appellant, the trial court found that the appellant had the required intention in the form of *dolus eventualis*. It was contended on behalf of the appellant that she should instead have been convicted of culpable homicide.

- [2] The evidence was largely common cause. On 3 August 2014 in the afternoon the appellant and two companions, Sindiswa Qotle and Ntomboxolo Xondile, were sitting on the grass outside the home of Xondile, situated on Riverina Farm where they all lived. The deceased, Jumarius Olkers, joined them and lay down on the grass and slept. He was moderately under the influence of alcohol. Qotle picked up an Okapi knife which had fallen from the deceased's pocket and placed it next to her on the grass. The

appellant shook the deceased awake and told him to lie in the shade. The deceased stood up and swore at her ("jou ma se poes" and "jou poes"). The appellant said to him that he should not swear at her, that she was not his wife and that she did not sleep with him. The deceased pushed the appellant with open hands on her chest, causing her to move backwards. The deceased continued to swear at her. The appellant moved towards him, picked up the knife, and stabbed him once with the knife on his left side. According to Qotle the deceased did nothing else to the appellant other than push her and did not intend to assault her. Qotle did not see the deceased approaching the appellant when the appellant had possession of the knife. Xondile said that it was untrue that the deceased had moved towards the appellant and said that he was standing when the appellant stabbed him. According to the appellant as she moved towards the deceased, he moved towards her. After the appellant stabbed the deceased he fell on the grass. The appellant threw the knife down and telephoned the owner of the farm and informed him of what she had done. The owner arrived and seeing that the deceased was dead, called the police.

- [3] According to the post mortem report the cause of death was "stab wound left kidney and left renal artery". Under the heading "External appearance of the body and condition of the limbs appeared the following:

"2cm wound left lower ribmargin; wound is in anterior axillary line and 20 cm below left axilla; tract of wound goes downwards towards back and toward midline; it goes between 9th and 10th ribs left lateral to enter peritoneal cavity; it injures some of the mesenterial blood vessels before it goes retroperitoneal; it goes through right kidney and left renal blood vessels; large haemorrhage left retroperitoneal."

(The reference to the right kidney should be to the left kidney.)

Under the heading "Kidneys and Ureters" the following was recorded:

"Wound through left kidney

Renal blood vessels injured

Large haemorrhage around kidney"

- [4] The appellant testified that she stabbed the deceased because she was afraid he would assault her further. After moving backwards when he pushed her, she moved towards him and he continued to swear at her. His swearing caused her to be angry and insulted. She saw the knife lying next to Qotle, picked up the knife and stabbed the deceased. She initially testified that as he continued to swear at her he was standing still. However when asked

again by her attorney about moving towards the deceased she added that he had moved towards her as she moved towards him. She knew that the knife was a dangerous weapon but just wanted to frighten the deceased. When asked why she did not just threaten him and why she had stabbed him she said that she did not mean to (“ek het dit nie bedoel nie”), and that she did not think that he would die. She agreed that she foresaw that he would be injured. She was unable to explain why she had not just run away. Eventually she agreed that she had not stabbed him because he wanted to assault her, but because he did not stop swearing at her.

[5] As appears above, there was a dispute about whether or not the deceased had moved towards the appellant as she moved towards him. The magistrate did not make a specific finding on this aspect. However it is apparent from a reading of the record that Qotle and Xondile were very fair and impartial witnesses. The impression I gained was that they were certain that the deceased had not moved towards the appellant and other than initially pushing her, was not a threat to her. The appellant’s evidence that the deceased had moved towards her appeared to be an afterthought, in order to accord with her evidence that she thought the deceased would assault her again. I am of the view that the evidence of Qotle and Xondile should be accepted on this aspect. During their cross-examination it was put to them that the appellant feared for her life and stabbed the deceased to prevent a further assault. Cross-examination of the appellant revealed that this was not the case. She did not fear an assault and stabbed the deceased because he continued to swear at her.

[6] In *S v Humphreys* 2013 (2) SACR 1 (SCA) Brand JA at paras 12 and 13 had the following to say about the test for *dolus eventualis*:

“In accordance with trite principles, the test for dolus eventualis is twofold:

- (a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and
- (b) did he reconcile himself with that possibility (see eg *S v De Oliveira* 1993 (2) SACR 59 (A) at 65i – j)?

Sometimes the element in (b) is described as 'recklessness' as to whether or not the subjectively foreseen possibility ensues (see eg *S v Sigwahla* 1967 (4) SA 566 (A) at 570). I shall return to this alternative terminology, which sometimes gives rise to confusion.

For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a

consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the

consequences, it can be concluded that he did. That would conflate the different tests for dolus and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense

dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience,

the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general

population.”

[7] I now consider the circumstances of the present case. The appellant said that she did not mean to stab the deceased and that she did not think that he would die. That of course is not the only evidence from which to decide whether subjective foresight was present. There are other important factors. The appellant was 23 years old. There was no evidence that she was under the influence of alcohol and no suggestion that she was not of normal intelligence. She was angry and insulted because the deceased swore at her and continued to swear at her. She saw the knife on the ground and consciously

decided to pick it up. She did not fear an assault by the accused. She was not stabbing blindly at the deceased in order to ward off an attack. The deceased was not advancing on her. She knew that the knife was a dangerous weapon and could cause an injury. If she only intended to frighten the deceased she had time to decide where she wanted to inflict the wound or she had time merely to threaten him with the knife. She made a decision to stab the deceased. The wound was inflicted in a vulnerable part of the deceased's body and penetrated his kidney. A person of normal intelligence would, “in accordance with common human experience”, foresee that stabbing a person in that part of the body with an okapi knife could possibly result in the death of that person. There was no reason to think that the appellant did not share this foresight. The appellant acted consciously and, even though she was angry, deliberately. Her initial evidence that she feared the deceased would assault her when she stabbed him, turned out not to be true. This factor adversely affected the appellant's credibility and hence her evidence of what her state of mind was at the time.

[8] In my view, and despite the appellant's evidence of her state of mind, the only reasonable inference that can be drawn from these factors is that the appellant subjectively foresaw the possibility of death resulting from her decision to stab the deceased. Having made that decision and having foreseen the possibility of death resulting, she chose to carry out her decision and reconciled herself with the subjectively foreseen consequence.

[9] It follows that the appellant was correctly convicted of murder.

[10] The appeal is dismissed.

J M ROBERSON

JUDGE OF THE HIGH COURT

BESHE J:-

I agree

N BESHE

Appearances;

For the Appellant: Adv D Geldenhuys, instructed by Grahamstown Justice Centre

For the Respondent: Adv S Hendricks, Director of Public Prosecutions, Grahamstown

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Prepared on 14 October 2026 · Esheria