THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 680/2015

In the matter between:

JACOBUS VAN SCHALKWYK **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Van Schalkwyk v The State* (680/15) [2016] ZASCA 49 (31 March 2016)

Coram: Lewis, Tshiqi and Willis JJA and Plasket and Baartman AJJA

Heard: 10 March 2016

Delivered: 31 March 2016

Summary: Criminal Law and Procedure – mens rea – evidence – assault with hay hook across the chest of the deceased – piercing heart and severing rib – conviction of murder with intention in the form of dolus eventualis not correct.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Tlaletsi AJP and Phatshoane J sitting as court of appeal):

1 The appeal is upheld to the extent set out below.

2 The conviction of murder, and the sentence of eight years' imprisonment, are set aside.

3 The order of the Northern Cape Division of the High Court is replaced with the following:

'The appellant is convicted of culpable homicide, and is sentenced to six years' imprisonment, dated back to 14 February 2014, three years of which are suspended for a period of five years on condition that the appellant is not convicted of any crime, of which violence is an element, committed during the period of suspension.'

JUDGMENT

Baartman AJA (dissenting, Willis JA concurring with her)

[1] The sole issue before us is whether in the circumstances of this matter the appellant was guilty of murder with intent in the form of dolus eventualis or of culpable homicide.

[2] On 6 October 2013, the regional magistrate at Upington convicted the appellant, Mr Jacobus van Schalkwyk, a farmer at Bertiesdraai Farm in Groblershoop, Northern Cape of murder with intent in the form of dolus eventualis (count 1), and attempting to defeat or obstruct the ends of justice (count 2). On 11 February 2014, that court sentenced the appellant to eight years' imprisonment on count 1 of which two years were suspended on certain conditions, and to twelve

months' imprisonment on count 2, ordered to run concurrently with the sentence imposed in respect of count 1. The trial court refused the appellant leave to appeal. On petition to the Northern Cape Division of the High Court, leave to appeal was limited as follows:

'Did the respondent prove beyond reasonable doubt that the petitioner intentionally caused the death of the deceased, i.e. intent in the form of *dolus eventualis*.'

On 27 February 2015, the court below confirmed the conviction of murder with intent in the form of dolus eventualis despite finding that the regional magistrate had applied the wrong test.[1] That court refused leave to appeal against the conviction. The appeal to this court lies with its leave.

The circumstances of the offence

[3] The deceased, Mr Jan Klaaste, was a farm worker employed by the appellant at the time of his death on 14 February 2014. The appellant had instructed the deceased to feed the cattle over the weekend of 12 to 13 February 2014. The deceased failed to do so. In addition, the deceased reported for duty on Monday, 14 February 2014, with a blood alcohol content of 0.26g/100ml blood, and was obstructive and unresponsive. The appellant was annoyed by the deceased's failure to have fed the cattle over the weekend.

[4] It was harvest time and the appellant's seasonal workers were already in the vineyard ready to harvest the grapes, but the crates for packing them were not in the vineyard. The appellant instructed Mr Erin Kalanie, another farm worker, to fetch the tractor and a second trailer, load the crates and deliver them to the workers in the vineyard. When Kalanie returned with the trailer, the deceased was standing on it holding two iron hay hooks, apparently intending to do the work he had neglected to do over the weekend. The appellant, standing on the ground next to the trailer, instructed the deceased to leave the hooks and get off the trailer. The deceased remained unresponsive, standing on the trailer holding the two iron hay hooks. All this was common cause.

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[1] Regrettably for the acting regional court magistrate, he concluded as follows:
'By striking the deceased with the hook on the left side of the chest [the] accused ought to have foreseen that death may occur. [The] [a]ccused reconciled himself with the eventuality.'

[5] The State's version, as told by Kalanie and Mr Samuel Persoon, another farm worker, was that the appellant grabbed the hooks from the deceased and hit him with one of the hooks on the left side of his chest. It was common cause that the iron hay hook pierced ten centimetres into his heart and in the process also severed his fifth rib; he died pursuant to that injury. This version was accepted by both the trial court and the court below, sitting as court of appeal. There were discrepancies between Kalanie's and Persoon's versions that both courts acknowledged and found immaterial. I agree.

[6] The appellant denied striking the deceased with the hook. Instead, he admitted grabbing the hooks from the deceased, at which point the deceased moved backwards and turned his chest to the left before immediately moving forward towards the hooks and falling to his knees. The appellant said that after he had seized the hook, he threw it to the floor and reached for the other hook, which he realised had become hooked onto the deceased's overalls. The appellant allegedly unhooked it and threw it to the ground. Following this incident, the deceased got up, got off the trailer, and walked off.

[7] The post-mortem findings, were as follows: 'Stab wound of 1 x 1cm below the nipple, with abrasions around the edges, 10 cm deep, entering the chest between ribs 4 and 5 with transection of rib 5, passing through the front wall of the right ventricle of the heart. (A). Superficial abrasions of the left eyebrow and cheek. (B)'.

[8] Dr Leon Wagner, a forensic pathologist, testified for the defence in support of the appellant's version. He concluded that the deceased had been of slender build and therefore did not have a strong skeleton, meaning his rib would have fractured with minimal force, thereby supporting the appellant's version of how the deceased had sustained his injuries. Dr Wagner did not examine the corpse but relied on information contained in the post-mortem report. He was reluctant to make any concession which might adversely affect the appellant's version. At the hearing before us, counsel for the appellant, Mr Katz SC, accepted the finding that the appellant had hit the deceased. The trial court said the following about Dr Wagner's evidence: 'I am not persuaded by the reasoning behind Dr Wagner which excludes

that the deceased could have sustained the injuries in circumstances described by Auron Kalanie and Sameul Persoon'. It follows that once the appellant had conceded that he hit the deceased, Dr Wagner's evidence was of no assistance to the court and correctly found wanting.

[9] Both the trial court and the court below rejected the appellant's version and accepted the State's version that the deceased had been standing on a trailer, with a blood alcohol content of 0.26g/100ml blood, when the appellant, who faced him, struck him on the upper part of his body causing the injuries recorded in the post-mortem.

[10] Dr G A Isaacs, who conducted the post-mortem in his capacity as a forensic medical officer in the Department of Health, testified that the position of the wound suggested that the weapon used must have moved from the deceased's left to his right across his chest penetrating his heart. Supporting the version of the State witnesses that the appellant was in front of the deceased when he struck him. Dr Isaacs was familiar with a hay hook and, having seen the hook involved in this incident, said that it did not have a knife-like sharp edge. He therefore concluded that force had been necessary to pierce the deceased's heart ten centimetres deep and sever his rib. The trial court and the court below accepted Dr Isaacs' reasoning. I cannot fault that conclusion. This court has seen a photograph depicting the hook which the court below described as '. . . a metal hook with [an] elongated shaft and a handle almost ellipse-shaped'. I agree with the description.

[11] I now turn to enquire whether the appellant was correctly convicted of murder with intent in the form of dolus eventualis.

[12] Mr Katz and counsel for the respondent, Mr Rosenberg, referred us to *S v Sigwahla*[2] where Holmes JA said the following relevant to the present enquiry:[3]

'1. The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of

[2] *S v Sigwahla* 1967 (4) SA 566 (A).
[3] At 570B-E.

such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*.

2. The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide.

3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.

See *S v Malinga and Others*, 1963 (1) SA 692 (AD) at p. 694 G–H; and *S v Nkombani and Another*, 1963 (4) SA 877 (AD) at pp. 883 A–C, 890B, 895F.'

[13] Against this background of legal principle, the facts in *Sigwahla* are striking. Having set out the law, Holmes JA, continued to outline the essential facts as follows:[4]

'…[T]he appellant was armed with a long knife which he held in his hand; that he advanced upon the approaching deceased; that as he came up to him he jumped forward and raised his arm and stabbed him in the left front of the chest; that the force of the blow was sufficient to cause penetration for four inches and to injure his heart; and that there is nothing in the case to suggest subjective ignorance or stupidity or unawareness on the part of the appellant in regard to the danger of a knife thrust in the upper part of the body. In my opinion the only reasonable inference from those facts is that the appellant did subjectively appreciate the possibility of such a stab being fatal.

In other words I hold that there exists no reasonable possibility that it never occurred to him that his action might have fatal consequences, as he was advancing on the deceased with the knife in his hand and as he was raising his arm to strike and as he was aiming a firm thrust in the general direction of the upper part of his body . . . .'

Holmes JA concluded: 'In the result the State proved the required legal intention to kill (*dolus eventualis*); and the conviction was justified'.

[4] At 570G-H.

[14] Recently, this court, in *Director of Public Prosecutions, Gauteng v Pistorius* said the following:[5]

'. . . [A] person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore "gambling" as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act "reckless as to the consequences" (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been "reconciled" with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. *It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent*.' (My emphasis.)

[15] In this case, the State had to prove beyond a reasonable doubt that (a) the appellant had had the subjective foresight of the possibility that striking the deceased on the upper part of his body with the hay hook could have fatal consequences; and (b) the appellant had 'a disregard of that consequence'; put differently, he had reconciled himself with the foreseen possibility. The two legs are not considered in isolation. Brand JA in *S v Humphreys* described the test as follows:

'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 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.'[6]

[16] The appellant disarmed the deceased who was standing in front of him. The appellant had 40 years' experience as a farmer and was familiar with hay hooks. In

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[5] *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204; [2016] 1 All SA 346 (SCA) para 26.

[6] *S v Humphreys* (424/2012) [2013] ZASCA 20; 2013 (2) SACR 1 (SCA); 2015 (1) SA 491 (SCA) para 13.

my view, the weapon used, the appellant's knowledge of the weapon and the wounded part of the body all lead to the inescapable inference that he subjectively foresaw 'the risk of death occurring'. To infer otherwise would be comparable to a denial of foreseeing the possibility that a stab wound in the chest may be fatal'.[7] It follows that the first leg of the enquiry has been proved.

[17] I turn to the second leg of the enquiry. It is necessary to deal with the facts in *Humphreys*. Humphreys, a minibus driver who operated a shuttle service for school children, had on numerous occasions successfully crossed the railway line against the warning signals, red lights and booms. On those occasions his actions were reckless, calculated and put his life and those of his passengers in great danger. On the day of the great tragedy, Humphreys, the chancer (waaghals), was hoping for the happy ending he had previously had. Instead he collided with an oncoming train killing some of his passengers and injuring others. It is important to bear in mind that *Humphreys* involved conscious negligence.[8] Therefore, the second question posed by Brand JA was answered in the negative. Humphreys' exaggerated confidence in his ability to continue to successfully execute the life threatening manoeuvre distinguishes his actions from those associated with 'foresight, derived from common human experience'.

[18] The appellant's conduct differed materially from that of Humphreys. As an experienced farmer of approximately 40 years, he, like Dr Isaacs, was no doubt familiar with a hay hook and knew the hook would move like a pendulum.[9] Therefore when the appellant hit the deceased across the chest, the appellant foresaw that the hook would penetrate the deceased's upper body and cause the injury sustained.

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[7] *Humphreys* para 15 where the court stated: 'To deny this foresight would in my view be comparable to a denial of foreseeing the possibility that a stab wound in the chest may be fatal'.

[8] F Lareau 'The Difference Between Negligent Homicide and Reckless Homicide when Both of them Involve Consciousness of the Risk' (1987) vol 1 *Criminal Law Forum.*

[9] Dr Isaacs said: 'Ek kan miskien byvoeg en ek het op 'n plaas groot geword en ek het baie gesien hoe die wapen gebruik word of die instrument gebruik word. Wat gewoonlik was om lusern bale te beweeg te skuif. En die klasieke aksie was altyd om beide te hê in beide hande heen en dan in te kap. Dit begin wel bo maar dit kap dan lateraal in om die baal dan in te kap en dan op te lig. So iemand wat gewoond was om die tipe instrument te gebruik het 'n natuurlike aksie ontwikkel en hy kon baie vinnig met die werk in daardie spesifieke beweging om bale te verskuif.'

The appellant, who had been a good employer, had reason to be annoyed with the deceased, although, the appellant described his mood as no more than upset. While the deceased was a good employee, the best driver on the farm at the time, there was urgency to get the crates to the seasonal workers waiting in the vineyard. The relationship between the offender and the victim, however, is irrelevant to this enquiry. The appellant testified that he had taken the hooks from the deceased to avoid the deceased getting off the trailer, intending for him to remain on the trailer and pack the crates.

[19] In those circumstances, the only reasonable inference is that the appellant struck the deceased to vent his anger. It would also explain the wound inflicted, ten centimetres into the heart severing a rib. Common sense dictates that force would have been necessary to inflict such an injury. After the deceased got off the trailer (jumped or staggered) the appellant saw him collapse. This is evident from Kalanie's evidence: 'Accused came and told me that he saw Lucky [deceased] and he fell there'. The appellant later drove with Kalanie to where he had earlier seen the deceased collapse. Mr Edeling, who appeared on behalf of the appellant at the trial, put the following to the appellant: 'Goed en ons weet toe wat later gebeur het en toe u hom gesien inmekaar sak en val en die res is geskiedenis . . .' The appellant agreed. It is so that when the appellant realised that he had in fact fatally wounded the deceased, he showed immediate remorse. This is, however, not to be confused with his initial indifference to the consequences of his actions: the appellant had driven off, only returning to where the deceased had fallen later on. I agree with the trial court's assessment of the remorse shown: '…[T]here is a chasm between remorse and regret, remorse is a gnawing pain of conscience for the plight of another; whether the offender was sincerely remorseful or not simply feeling sorry for himself at having been caught was a factual question . . .'

[20] The appellant's behaviour subsequent to the death of the deceased was calculated to conceal his criminal deed. Once the appellant realised that the deceased had died, he set about influencing the potential State witnesses in an attempt to avoid prosecution. He kept up that lie during the trial and presented expert evidence, probably at great cost, to support his fabricated version. I am prepared to

assume in the appellant's favour that he had remorse; however, neither remorse nor regret is an element of this offence. In the circumstances of this matter, I cannot fault the finding that the appellant committed murder with intent in the form of dolus eventualis. As Holmes JA confirmed the conviction of murder in *Sigwahla,* I am fortified in my view that the correct verdict in this case is one of murder.

Conclusion

[21] In the result I would dismiss the appeal.

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E D Baartman

Acting Judge of Appeal

Willis JA (Baartman AJA concurring):

[22] I have read the judgments prepared by Lewis JA and Baartman AJA. I shall deal first with that by Lewis JA. In my opinion, it matters not at all that there were discrepancies in the version of the eyewitnesses. Both courts below found these discrepancies to have been immaterial. What matters, as a matter of objective fact, is that the appellant stabbed the deceased in the chest with a hay hook and that the stab wound penetrated ten cm into the chest cavity of the deceased, severing one of his ribs. What also matters is that the appellant's version that the deceased accidentally fell on the hay hook was abandoned by his counsel in this court. Against the weight of evidence, it was false. That the appellant did not give a version that could be believed operates against him and not in his favour. Lewis JA says: 'We do not know what he would have said about the way in which he had struck the deceased'. It is my opinion that this operates against him.

[23] It also matters not that a hay hook is not a weapon made to kill. An ice-pick similarly is not. So too, is an antique marble bust, used to hit someone on the head. Hammers, chisels, screwdrivers, garden rakes, bricks, stones, rocks and broken

glass bottles – none of which is designed or made to kill – have been used as instruments of murder. Typically, one works a hay hook such as the one in question by jabbing bales of hay and in doing so is able to lift a considerable weight. It is a formidable weapon if used as one.

[24] I do not consider that the differences in size and weight of the appellant and the deceased is of any relevance. In my opinion, the converse is true. Imagine if his victim had been a child or a woman. Would the consequence of death really have been less foreseeable? I do not think so.

[25] Lewis JA asks 'What facts?' The relevant facts, in my opinion, are that a defenceless, intoxicated farm worker was stabbed in the chest with a hay hook, the force of which was strong enough to penetrate ten cm into his chest cavity and sever one of his ribs. These facts, it seems to me, speak for themselves. This kind of injury does not occur negligently. I have not conflated the tests for negligence and dolus.

[26] I also disagree with Lewis JA's finding in favour of the appellant on the facts that he showed remorse, that he protested that he had not intended to kill the deceased and that the appellant was a good employer with no history of abusing his workers. As the court below correctly noted: '…the ex post facto melancholic reaction by a perpetrator can in most cases be expected'. After all, husbands have been known to murder their darling wives in a fit of pique or rage. I turn now to deal with Baartman AJA's judgment.

[27] I agree with Baartman AJA. There are, however, some additional observations which I wish to make. In *S v Dladla en andere*,[10] Botha AJA examined the Dutch writers in order to help one better understand 'opset by moontlikheidsbewussyn' (intention in regard to an awareness of possibility) and quotes Van Hattum as saying:

'De wilstheorie stelt de vraag anders, nl in deze vorm: wat zou de dader liever hebben gewild, het verwezenlijken van het door hem beoogde gevolg te zamen met het niet beoogde gevolg of het achterwege laten van zijn handeling (en dus afzien ook van het beoogde gevolg)? Komt men tot de conclusie dat er den dader zoveel aangelegen was het beoogde gevolg te bereiken, dat dit hem liever was, zelfs tezamen met het niet beoogde gevolg, dan

[10] *S v Dladla en andere* 1980 (1) SA 1 (A).

het afzien van zijn daad, dan besluit men daaruit dat de dader ook het mogelijke (eventuele) gevolg in zijn wil heeft opgenomen. Er is dus *dolus (eventualis)*. . . '[11]

This may be translated as follows:

'The reasoning concerning the question of intention puts the question differently,[12] namely in this way: what would the perpetrator rather have intended, the realisation of that which accompanies his intended act together with that which had been intended or the abandonment of his act (and therefore the setting of his face against that which he had intended)? If one comes to the conclusion that the perpetrator was so focused on achieving that which he had intended that he would rather continue with his intended act, despite its unintended consequences, rather than set his face against it, then one deduces therefrom that the perpetrator *brought into* his intention even that emergent possibility. That is then *dolus (eventualis)*' (My translation and my emphasis).

[28] It is this concept of 'bringing into' one's intention an emergent possibility that explains why the presence of dolus eventualis as an element of the crime results in a conviction. Murder is an intentional act. So too, the concept of 'afzien' (setting one's face against something, abandoning it) is important. It is the failure to do so, once one has foreseen the possibility of the consequence ensuing, that is critical. This, in my opinion, is what is meant by the requirement of nevertheless proceeding 'recklessly', which has been recognised in this court as being part of our law since at least *R v Valachia.*[13]

[29] In *S v Swanepoel*[14] this court referred, with approval, to Snyman's *Strafreg* in which it was said that, in addition to the requirement of subjective foresight, the perpetrator must 'versoen hom met hierdie moontlikheid'.[15] Snyman, however, subtly reinterpreted a negative obligation – to refrain or abstain from doing something into a positive requirement that the perpetrator must 'versoen' himself with the possibility of it occurring.

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[11] At 4E.
[12] From culpa.
[13] *R v Valachia & another* 1945 AD 826 at 831.
[14] *S v Swanepoel* 1983 (1) SA 434 (A).
[15] At 456H.

[30] Apparently influenced by *Swanepoel*, in *S v Ngubane*[16] this court began using terminology like ‘taking a conscious risk’, ‘consenting', ‘reconciling’, ‘taking into the bargain’ in addition to ‘nevertheless persisting in his conduct’ in order to describe this so-called ‘volitional element’ in dolus eventualis.[17] In his article ‘Dolus eventualis reconsidered’[18] Professor Andrew Paizes gives a useful outline of the conceptual evolution of this volitional element.[19]

[31] Ordinarily, ‘versoen’ translates into English as ‘be reconciled with’. Something is, however, lost in translation in the process. ‘To be reconciled’ has connotations of mature and considered intellectual and moral reflection, an introspection and self-examination, often over a period of time. This is not what is required before a conviction based on dolus eventualis can ensue. Nuances of translation may explain some of the difficulties that appear to have been associated with the term ‘be reconciled with’ in regard to this volitional element. ‘Versoen’ derives from the root word ‘soen’ - a kiss.

[32] The ordinary, everyday idiomatic expressions in the English language such as ‘do not flirt with death’, ‘do not court death’, ‘do not play with death’ and ‘do not dance with death’ capture better, in my opinion, what the law demands, rather than an abstract conceptualisation as to what it means to be ‘reconciled with’ the possibility of death occurring.

[33] As was noted in *S v Dougherty*[20] the law requires that the prohibited act must have been committed *dolo malo*, that is with a bad, evil or wicked intention. A value judgment has to be made concerning this volitional element – as to whether or not the accused should ‘afzien’ at the critical moment.

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[16] *S v Ngubane* 1985 (3) SA 677 (A).
[17] At 685D-686A.
[18] A Paizes ‘Dolus eventualis reconsidered’ (1988) 105 *SALJ* 636. See also P Smith ‘Recklessness in *Dolus Eventualis*’ (1979) 96 *SALJ* 81.
[19] See also *S v Humphreys* (424/2012) [2013] ZASCA 20*;* 2013 (2) SACR 1 (SCA) para 17 and *Director of Public Prosecutions, Gauteng v Pistorius* (961/2015) [2015] ZASCA 204; [2016] 1 All SA 346 (SCA) paras 26 and 51.
[20] *S v Dougherty* 2003 (4) SA 229 (W).

[34] It is helpful to refer to another article by Paizes, '*Dolus eventualis* revisited: *S v Humphreys* 2013 (2) SACR 1 (SCA)'[21] – a sequel to his earlier one on the topic – in which he refers to an article by Professor Roger Whiting[22] to underscore the point that the type of activity involved may be critical in determining whether dolus eventualis was present and that, for example, even though the foresight of the possibility of death and a person's being reconciled thereto may be present in everyday activities such as driving or mining, deaths that result from such activities ordinarily do not result in a conviction of murder. Dolus eventualis is a tainted intention. As Paizes said in his earlier article on the subject, 'when all is said and done', a moral judgment has to be formed to determine whether dolus eventualis is present. In his later article Paizes argues that factors such as callousness and the purpose of exposing the victim to the risk of death all weigh in the equation to determine whether dolus eventualis was present.

[35] *S v Humphreys*[23] makes it clear that ordinarily a denial of foreseeing that a stab wound in the chest may be fatal is not credible.[24] The inference is irresistible that when the accused was about to strike the deceased with a hay hook, he foresaw the possibility that death might ensue even though that may not have been what he wanted to happen. He should have stopped himself there and then. He did not do so. He flirted with death. He did not 'afzien' from his intended act. Having gone ahead, despite having foreseen such a well-known risk and of which he, as a farmer, must have been acutely conscious, the accused is confronted with a moral judgment of the community that is one of deep opprobrium. He is therefore guilty of murder.

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N P Willis

Judge of Appeal

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[21] Paizes '*Dolus eventualis* revisited: *S v Humphreys* 2013 (2) SACR 1 (SCA)' (2013) 1 *Criminal Justice Review*.
[22] R Whiting 'Thoughts on dolus eventualis' (1988) 3 *SACJ* 440.
[23] *S v Humphreys* footnote 6.
[24] Paragraph 14.

Lewis JA (Tshiqi JA and Plasket AJA concurring)

[36] I have read the judgments of my colleagues Baartman AJA and Willis JA. I do not agree with their conclusion, and thus write separately.

[37] Neither judgment deals with the fact that the State's case was far from clear. The State witnesses' accounts of how the appellant struck the deceased with the hay hook were different, and the appellant's version, which he no longer advances, was also different. The only thing that is clear from the record is that the appellant struck the deceased with the hay hook using some force. The experts to whom Baartman AJA refers differed in regard to the degree of force used, but nothing turns on that. The appellant in this court accepted that he was causally responsible for the death of the deceased, and that he should have foreseen that striking the deceased with the hay hook might have the consequence that the deceased would die. He was, his counsel argued, guilty of culpable homicide.

[38] The first question to be asked is whether the State proved, beyond reasonable doubt, that the appellant had actual foresight of the possibility of his conduct causing the death of the deceased.

[39] As the regional magistrate said, 'by striking the deceased with the hook on the left side of the chest the accused ought to have foreseen that death may occur. The accused reconciled himself with the eventuality'. The test, as noted by the full bench, was incorrectly stated by the magistrate. But it appeared not to worry the full bench since it found on the facts that the appellant had had actual foresight of the death of the deceased. No such finding was made by the magistrate, however, and it is far from clear to me how the full bench reached that conclusion.

[40] Baartman AJA has set out the factual background. What she does not do, however, is consider the inconsistent versions of the two eyewitnesses, Persoon and Kalanie. Kalanie's evidence is somewhat difficult to follow because the transcript of

the evidence was for some unexplained reason not available. It was reconstructed from the magistrate's notes, and those of the prosecutor and the appellant's attorney.

[41] It is not disputed that the deceased was intoxicated the morning that he was killed – the post-mortem report revealed that. It is also not disputed that the appellant had confronted the deceased about his failure to tend to the cattle on the farm over the weekend, and that he had instructed the farm workers, including Kalanie and Persoon, to load crates onto two trailers that were hooked to a tractor.

[42] Kalanie said that before the incident, the deceased had stood on top of one of the trailers hooked to the tractor. He was holding a hay hook in each hand. The appellant told him to get off the trailer but the deceased ignored him. The appellant had been angry, and had pulled the hooks out of the deceased's hands. He then struck him with one of the hooks, held in the appellant's right hand, on the left side of the deceased's chest. He hit him only once, and then pulled the deceased towards him with the hook.

[43] He said that the deceased had staggered to the other side of the trailer and then fallen off. He got up and ran to the other side of the storeroom. The appellant had then driven away. He later told Kalanie that the deceased had fallen behind the storeroom. They drove to the spot together and the appellant asked Kalanie to turn him over and look to see where he had been struck. Kalanie had opened the deceased's overall jacket and saw that he had been struck in the chest. He was still alive at that stage, but stopped breathing as they stood there. The appellant had then taken off his hat and said he had not meant to kill the deceased. He also told Kalanie that he must not tell anyone that he had hit the deceased, but must say that he fell on the hook.

[44] The appellant's counsel asked Kalanie to demonstrate how the hay hook had been used to strike the deceased. The court observed, after the demonstration, that: 'he hold hook with right hand 90 degree above head with the sharp edge of the hook

facing forward and swing it 180 degrees half a circle wide forward towards the target in front of his arm in extend to his back with 90 degree bent in the elbow and from there hooks was above head'. Kalanie then said that the appellant had hit with great force forward.

[45] Persoon's account was somewhat different, which the full bench acknowledged. When Persoon's version was put to Kalanie, he said that it was not correct, notably that people were in different locations, and that the deceased had not moved forward before the appellant struck him. He also said that he did not hear the appellant swearing at the deceased. Persoon, on the other hand, heard the appellant using vulgar and abusive language.

[46] Persoon's demonstration of how the appellant had struck the deceased was different. The hay hooks, he said, were held with the curved end upwards and the handles downwards, which was quite different from Kalanie's demonstration.

[47] Given that the appellant has abandoned the version he maintained at the trial (that the deceased fell on the one hay hook), we do not know what he would have said about the way in which he had struck the deceased. And so the facts that would give rise to an inference (the only reasonable inference to be drawn) that the appellant had actual foresight that the blow that he struck might kill the deceased, are far from clear. They do not emerge from the evidence of the State witnesses. And they do not emerge from the evidence of the doctors. That evidence related purely to the nature of the wound inflicted and the degree of force used by the appellant. The evidence of Dr Isaacs as to how the blow was probably struck does not accord with either of the demonstrations of Kalanie or Persoon.

[48] The onus is on the State to prove that the appellant had actual foresight of the possibility of death. The evidence it adduced is such that no reasonable inference of actual foresight, let alone of accepting the consequences of his conduct, can be drawn. On the contrary, the appellant's reaction immediately after the deceased died

was that he had not meant to kill the man. This was not just an expression of remorse: it was a clear indication that he had not actually foreseen death as a possibility.

[49] This is not a case where an accused, armed with a weapon used to injure, like a knife or a dagger, stabs another, having intended to injure and having foreseen the possibility of death, but carries on regardless. A hay hook is not a weapon: it is an implement used to move bales of hay. Although it tapers to a point, is is not a particularly sharp one. The appellant seized the hay hooks from the deceased because he wanted the deceased to get off the trailer and start taking crates to the seasonal workers on the farm. He was either angry or frustrated and struck out at the deceased. But that does not justify the finding of the full bench that:

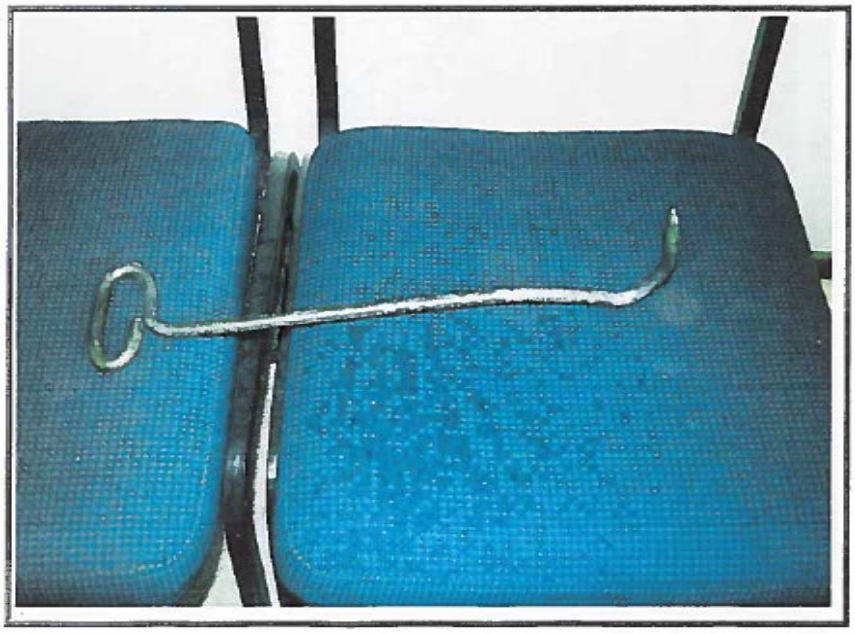
‘Regard being had to the nature of the weapon used the possibility of the consequences that ensued would have been apparent to any person of normal intelligence. *On the facts*, the only reasonable and inexorable inference to be drawn is that when he gave vent to his ire it was immaterial to the appellant whether the consequences would flow from his action; put differently, he proceeded nevertheless or persisted with his conduct indifferent to the fatal consequence of his action.’ (My emphasis.)

[50] The question that springs to mind is ‘What facts?’ since there is so much uncertainty as to how the wound was inflicted and what the state of mind of the appellant was. In *S v Humphreys* [2013] ZASCA 20; 2013 (2) SACR 1 (SCA) Brand JA said (para 13):

‘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.’

[51] In my view, that is precisely what the full bench did and my colleagues would do now. They have inferred from the fact that a hay hook has a relatively sharp end, that the reasonable person would have foreseen that the impulsive striking out at a person in the position of the deceased might result in the death of the deceased, and that the appellant thus did foresee the possibility of death ensuing. That is to conflate the tests for negligence and dolus.

[52] The hay hook in question, a picture of which appears below, is not like a long knife with a sharp end that would inevitably inflict a serious or fatal wound. It was a farm implement used for a different purpose, not inflicting harm on a person. And there is nothing to suggest that the only inference to be drawn from the fact that the appellant struck the deceased with it is that he actually foresaw the possibility of death ensuing.



[53] There is even less to suggest that he continued regardless, reconciling himself to that possibility. While Baartman AJA concludes that, as a farmer with experience in using hay hooks for moving bales of hay, the appellant would have known what the consequences of hitting a person with one would be, it can hardly be said that the common experience of farmers hitting people with hay hooks is that they will be seriously, even fatally, wounded. Hay hooks are designed for moving bales of hay.

They are not weapons used to inflict harm on a person. And there is absolutely no evidence that the appellant had any experience of hitting a person with a hay hook himself, or seeing anyone else do it.

[54] Given the circumstances, and the nature of the implement used to strike at the deceased, the case is to be distinguished from that described by Holmes JA in *S v Sigwahla* 1967 (4) SA 566 (A) at 570F-H (referred to by Baartman AJA, but worth repeating to demonstrate the differences in circumstances):

'In the present case the salient facts are that the appellant was armed with a long knife which he held in his hand; that he advanced upon the approaching deceased; that as he came up to him he jumped forward and raised his arm and stabbed him in the left front of the chest; that the force of the blow was sufficient to cause penetration for four inches and to injure his heart; and that there is nothing in the case to suggest subjective ignorance or stupidity or unawareness on the part of the appellant in regard to the danger of a knife thrust in the upper part of the body. In my opinion the only reasonable inference from those facts is that the appellant did subjectively appreciate the possibility of such a stab being fatal. In other words I hold that there exists no reasonable possibility that it never occurred to him that his action might have fatal consequences, as he was advancing on the deceased with the knife in his hand and as he was raising his arm to strike and as he was aiming a firm thrust in the general direction of the upper part of his body.'

[55] Baartman AJA states that 'the only reasonable inference is that the appellant struck the deceased to vent his anger'. That may be so. But it does not give rise to the next necessary inference, which is that he actually foresaw that the deceased might be killed by his conduct. As Leach JA said in *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; [2016] 1 All SA 346 (SCA) para 34:

'As this court has pointed out, while the subjective state of mind of an accused person in a case such as this is an issue of fact that can often only be inferred from the circumstances surrounding the infliction of the fatal injury, the inference to be properly drawn must be consistent with all the proved facts.'

[56] The only proven facts in this matter are that the appellant struck the deceased with a hay hook, which penetrated his heart and fractured a rib. The deceased was slight and thin, the appellant was much bigger and heavier, and the reasonable man would have foreseen that the hook might penetrate the body if he hit a person with it. Given that we do not know how the hook penetrated the body, and what degree of force was used, we cannot infer that the appellant actually foresaw the death of the appellant and struck him regardless of the consequences. There is also no dispute that, immediately after discovering the death of the deceased, he said in the presence of his employees that he had not intended to kill him. The inference to be drawn from that is that he did not foresee that death would result from his hitting the deceased with the hay hook. At the very least this is one reasonable inference that may be drawn from the facts, assuming that there may be others.

[57] The full bench thus erred in finding that the appellant actually foresaw the possibility of death. There is accordingly no need to consider whether he had reconciled himself to the possibility of death occurring. In the circumstances, I conclude that the appellant is not guilty of murder, but is guilty of culpable homicide.

[58] The appellant and the State agree that this court is in as good a position as the trial court would be to determine the appropriate sentence to be imposed for culpable homicide. There has already been considerable delay in the finalization of this matter, which is not in the interests of justice. The appellant has been in prison since the conviction by the trial court on 11 February 2014.

[59] The evidence of both Persoon and Kalanie was that he was a good employer, who had no history of abusing his workers. On the morning of the incident, he was provoked by the deceased who had not fed the animals on the farm and was drunk on a Monday morning. He lashed out impulsively. That does not mean that he should not be punished. He has caused the death of another person and must suffer the consequences. Society should not tolerate crimes of violence and especially those against employees on farms.

[60] The appellant's incarceration has led to many people being deprived of employment. His family is dependent on him. He is at this stage a man in his sixties. The trial court had before it the evidence of a probation officer and a social worker for the appellant. They reported that the appellant had serious health problems.

[61] I consider that a sentence of six years' imprisonment, three of which should be suspended on the usual conditions, is appropriate.

[62] It is accordingly ordered that:

1 The appeal is upheld to the extent set out below.

2 The conviction of murder, and the sentence of eight years' imprisonment, are set aside.

3 The order of the Northern Cape Division of the High Court is replaced with the following:

'The appellant is convicted of culpable homicide, and is sentenced to six years' imprisonment, dated back to 14 February 2014, three years of which are suspended for a period of five years on condition that the appellant is not convicted of any crime, of which violence is an element, committed during the period of suspension.'

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C H Lewis

Judge of Appeal

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