

## REPUBLIC OF SOUTH AFRICA



## IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO/ <del>YES</del>
(2)	OF INTEREST TO OTHER JUDGES: NO/ <del>YES</del>
25/08/2016	
DATE	SIGNATURE

CASE NO: A21/2016

25/8/2016

In the matter between:

MICHAEL JACKSON BOOI

APPELLANT

and

STATE

RESPONDENT

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**J U D G M E N T**


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YACOUB, AJ:

1. The appellant was convicted of the murder of Moses Mpostoli Magagula ("the deceased") and sentenced to 8 years imprisonment, in the Magistrate's Court, Evander. He appeals both conviction and sentence with the leave of the High Court.
2. The versions of the State and the appellant are, in the main, consistent with one another. There is very little on which they differ.

3. The appellant was born on 11 April 1940 and is a trained security guard. He is ordinarily resident in the Eastern Cape. On 12 September 2011 he was working as a security guard, apparently standing in for his son-in-law, at a Chinese shop in Embalenhle, in Mpumalanga. However, he was not unfamiliar with the area, having worked in the area before.
4. The deceased was known in the area as someone who was mentally unstable, and who begged. Before the incident, and on the same day, the appellant had asked the deceased not to bother the customers of the Chinese shop at which the appellant worked. The deceased went away, but later came back. The appellant and the deceased appeared to be arguing. The appellant's version is that he was telling the deceased to stay away from the area near the shop, as he was bothering customers. The deceased became aggressive. He threatened the appellant, reaching for a weapon in his pocket.
5. It is at this point that the versions of the State and the appellant differ from one another. The State witness, whose evidence was found to be reliable by the magistrate, testified that the deceased pulled a slingshot out of his pocket, pointed it at the appellant, and said that he would shoot the appellant. The appellant then drew his firearm and pointed it at the deceased, who retreated a little. Thereafter, the appellant shot him in the head.
6. The appellant's version is that the deceased first said that he would shoot him, then reached for his weapon. The appellant was afraid for his life, and drew his firearm and shot the deceased immediately. It was only after that that the appellant saw that the weapon drawn by the deceased was a slingshot.
7. It is this court's view that, if allowance is made for difference in perception, and for the undisputed and clear fact that the appellant felt himself threatened, there is no real difference between the versions. Even if the deceased had pulled out his slingshot and pointed it at the appellant before the appellant shot him, it is reasonably possibly true that the appellant, in his state of fear, did not notice it until it was too late. He thought the deceased had a gun, and reacted before he realised that this was not the case.

8. The appellant's *bona fides* are borne out by the fact that he immediately turned himself in for the shooting, and did not attempt to run away, hide, or otherwise avoid responsibility. However, he pleaded not guilty to the murder, invoking "private defence" as his defence.
9. In *S v Oliveira* 1993 (2) SA 59 (A) the Appellate Division (as it then was) held that

*"The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way (S v Ntuli 1975 (1) SA 429 (A) at 436E). In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude dolus in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide."*

10. This court accepts that the appellant considered himself under threat, and acted to protect or defend himself from that threat. However, objectively considered, the threat was not as great as the appellant considered. Similarly, the means used by the appellant were disproportionate and therefore unreasonable. As a matter of fact the threat was only a slingshot, the deceased was known in the area and there was no evidence that he was known to have been violent, and the accused, on his own version, shot the deceased between the eyes before he noticed what the deceased's weapon was.
11. For these reasons, his plea of "private defence" cannot succeed.

12. However, as pointed out in *Oliveira*, his erroneous belief that his life was in danger excludes *dolus*. What the appellant may rely on is putative private defence. At worst for him he may be convicted of culpable homicide.
13. It appears from the evidence of the accused and the fact that there is no dispute about whether the accused felt himself to be under threat and was protecting himself from that threat, that the accused did not have the intention to kill. He was threatened, and his only intention was to protect himself from that threat. In fact, he testified that he cried immediately he realised what he had done, "because that was not my intention".
14. The respondent's counsel argued that the question of intention had not been raised in the magistrate's court, but that a direct intention could be inferred from the fact that the appellant had shot the deceased in the head at close range.
15. Although it may be possible to infer a direct intention in certain circumstances, this case is not one of them. All the circumstances other than the fact of the shooting of the deceased in the head at close range support a conclusion that there was no intention on the appellant's part to kill, only an intention to protect himself.
16. It must not be forgotten that the events described by the appellant and the witness occurred very quickly. There was no time in which the appellant could calmly consider his options. The fact of the shooting in the head is not sufficient in all the circumstances to infer *dolus*. See in this regard *Joshua v S* 2003 (1) SACR 1 (SCA) at [30]
17. The appellant's erroneous belief that his life was in danger excludes *dolus*. Culpable homicide is therefore a competent verdict. See in this regard *Oliveira* and *Joshua* (above).
18. A verdict of culpable homicide means that as far as sentence is concerned, this Court is considering very different factors than the trial court. Rather than examining whether there are exceptional circumstances which justify deviation from a minimum sentence, this court must simply consider what sentence is appropriate in the circumstances.


19. The relevant circumstances are that the appellant was 71 years old when the incident occurred. He had one previous conviction, in 1995, for assault. He is now 76 years old. He has 8 children, the youngest of whom is now 21. Before he was convicted and sentenced, he supported himself, his wife and his youngest child on his old age pension. His wife was 62 years old at the time of sentence, and lived in Mpumalanga. The appellant at the time intended to go back to Mpumalanga to take care of her. In addition, the appellant gave himself up to the police after the incident, and has expressed remorse, both explicitly and in his actions.

20. The deceased was mentally unwell and well known in the community. He had four children. His family was severely affected by his death.

21. In these circumstances it is appropriate to sentence the appellant to five years' imprisonment, two of which are suspended for five years.

22. I order as follows:

- a. The appeal against both conviction and sentence is upheld.
- b. The conviction and sentence are set aside and substituted with the following:
  - i. the appellant is found guilty of culpable homicide and sentenced to five years' imprisonment, two of which are suspended for five years on condition that he not be found guilty of a similar offence during the period of suspension.
  - ii. The sentence is antedated to run from 10 April 2013.

  
S. JACOB

ACTING JUDGE OF THE HIGH COURT

I concur and it is so ordered



**R.G TOLMAY**

**JUDGE OF THE HIGH COURT**

**Appearances:**

On behalf of the appellant:

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