IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A650/2006

DATE: 22 FEBRUARY 2008

In the matter between:

COLIN LOUW Appellant

and

THE STATE Respondent

JUDGMENT

MOTALA, J:

[1] Appellant was indicted in the Regional Court with one count of murder and one count of attempted murder. He pleaded not guilty on both counts. He was found guilty on both counts and was sentenced to 10 years' imprisonment for the murder and to five years' imprisonment for the attempted murder. He appeals against both the convictions and the sentences.

[2] It has been submitted by appellant's counsel that the appellant's constitutional rights were violated by the refusal of the trial magistrate at the end of the State case to grant an application in terms of section 174 of the Criminal Procedure Act for the appellant's discharge.

The submission is based on the evidence of John Hendricks, the complainant on the charge of attempted murder, towards the end of his cross-examination. Although some of his evidence was ambiguous, as was submitted by Advocate Tarental who appears for the State, there is no doubt that he said that appellant had defended himself. The issue is whether that concession obliged the trial magistrate to discharge the appellant. In my view, he was not so obliged.

[3] In the first place, the concession by the witness was an expression of opinion by a layman as to whether appellant was acting in self-defence. Such an opinion can carry little, if any, weight. It was for the trial magistrate to determine whether the appellant acted in self-defence.

[4] Secondly, the evidence relied upon cannot be looked at in isolation. The witness's other evidence must obviously be taken into account. The witness stated that while he and the appellant were wrestling with each other, the appellant took a knife out of his trousers' pocket and repeatedly stabbed him. He himself was unarmed. Thirdly, the evidence relied upon was quite insufficient in the light of the other evidence to even suggest that the

appellant was in danger of sustaining any significant injury.

[5] In my view, the evidence of the complainant, looked at as a whole, was sufficient to justify the refusal to discharge the appellant on the count of attempted murder.

[6] On the charge of murder, Hendricks testified that he lost consciousness after he was stabbed. He said that the last thing he remembers was the deceased separating him and the appellant after he had been stabbed. He said that the deceased was not armed with a knife. He did not see the deceased being stabbed.

[7] I will assume in favour of the appellant that that evidence considered alone obliged the trial magistrate to discharge the appellant on the count of murder. But that evidence cannot be considered in isolation. As part of his plea explanation the appellant made certain formal admissions in terms of section 220 of the Criminal Procedure Act. He admitted, *inter alia*, that the deceased died as a result of a stab wound inflicted by the appellant. Accordingly the trial magistrate had before him proof in terms of section 220 that the deceased died as a result of a stab wound inflicted by the appellant and, according

to Hendricks, that the appellant was not armed with a knife or any other weapon. In my view, the application for discharge was correctly refused on the count of murder.

[8] No other submissions have been made as regards the conviction of the appellant. In my view, he was correctly convicted on both counts.

[9] I turn now to the appeal against sentence. In sentencing the appellant, the magistrate has not, in my view, over-emphasised the seriousness of the offence or the interests of the community. At a time when there is a wave of violent crime sweeping the country it is hardly possible to do so. However, in my view, he has not given sufficient weight to certain mitigating factors. As the magistrate correctly found, the deceased and Hendricks initiated the incident. Indeed, they had accosted the appellant more than once earlier that day and the appellant had walked away. They had humiliated him in public. Appellant was angry and his anger was caused by the deceased and Hendricks.

[10] In convicting the appellant, the magistrate relied on appellant's version of what happened, that the deceased

had a knife, that appellant succeeded in disarming the deceased and then stabbed him. Clearly the finding that the deceased had a knife must substantially mitigate the gravity of appellant's conduct.

[11] Appellant testified that he was under the influence of alcohol. That evidence was not challenged materially by the State. It seems more than likely that he was under the influence of alcohol which, coupled with the provocation he endured, must count as a mitigating factor. Appellant expressed his remorse before he was sentenced. It appears to be genuine.

[12] In the light of those mitigating factors, the cumulative effect of the sentences must be considered. In my view, an effective sentence of 15 years' imprisonment is disturbingly inappropriate. However, a substantial period of imprisonment is the only appropriate sentence.

[13] I would dismiss the appeal against the convictions. I would uphold the appeal against the sentence, set aside the sentences imposed and substitute the following therefor:

"On count 1 the accused is sentenced to seven years' imprisonment.

On count 2 the accused is sentenced to three years' imprisonment".

BOTHA, AJ: I agree.

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BOTHA, AJ

MOTALA, J: It is so ordered.

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MOTALA, J