

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A442/2007

DATE:

7 NOVEMBER 2008

5 In the matter between:

EDWARD SEPTEMBER

versus

THE STATE

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JUDGMENT

ERASMUS, J.:

15 The appellant was on 16 January 2002 convicted in the
Regional Court, Cape Town, on two counts:-

1. Murder of one Hennie Kemp, 31 December 1998.

20 2. The murder of Gert Samuels on 26 January 2000.

He was sentenced to 10 years imprisonment on the first count
and 15 years imprisonment on the second count. It was
ordered that five years of the 10 years imprisonment imposed
25 in respect of the first count be served concurrently with the 15

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years imposed in respect of count 2. The appellant accordingly has to serve an effective term of 20 years imprisonment.

5 On 7 May 2007 the appellant was granted leave to appeal against the conviction and the sentence in respect of count 1 From at least as early as 23 January 2003 the appellant tried to set proceedings in motion for lodging an application for leave to appeal. The appellant is illiterate and therefore dependent upon the assistance of others. The matter dragged on and on, though discussed by many people, including a representative of the office of the Director of Public Prosecutions. Eventually the matter landed on the desk of the Public Protector. In a letter dated 14 December 2006, the subject matter of which is "Final report alleged undue delay regarding appeal complaint, Mr M D September", it is stated *inter alia* that the record had got lost and an apology is given to Mr September for the delay and the inconvenience he suffered. One can only express the hope that improvement of the filing system at the Wynberg Regional Court has in fact been implemented. An apology for delay and inconvenience caused cannot compensate for the five years spent in jail awaiting an application for leave to appeal to be processed and determined. In the end, the delay does not materially affect the position of the appellant, he still has to serve a large

part of the sentence imposed in respect of the second count, leave to appeal against the conviction and sentence on that count having been refused. It might have been different, leave to appeal in respect of both counts might have been granted and the appeal against both counts might have been successful, after spending five years in prison.

The record which was eventually found is incomplete. The exhibits have apparently disappeared forever. The typed record is replete with the transcriber's comment "onduidelik" or "indistinct". This situation is aggravated by the tendency of the prosecutor to constantly interrupt the appellant during cross-examination. However, in view of the lengthy delay which has beset the matter, this appeal must now be dealt with on the record as it stands.

On appeal, Mr Theunissen, who appeared for the appellant, rightly submitted that the appeal turns on the question whether the appellant's contention that he had acted in self-defence or "noodweer" can be sustained.

It is common cause that the appellant and his companions on the night in question, 31 December 1998, drank wine and they all became intoxicated. They went to sleep in the open veld in the vicinity of Kromboom Road. During the course of the

night, the appellant woke up and went in search for more wine. An altercation ensued between the deceased, Hennie Kemp, and the appellant. Sophie Koeries witnessed the altercation. She saw the appellant being hit with a bottle, but she did not see the actual stabbing. Joseph Arnolds also witnessed the altercation. He also saw the deceased hitting the appellant with a bottle, but he did not see the stabbing. Sophie Koeries also saw the deceased throttling the appellant, and at one stage the deceased was on top of the appellant as they wrestled. While the two eye witnesses did not see any stabbing, the appellant admits to stabbing the deceased only once, while at the post-mortem two stab wounds were found on the body of the deceased. The trial magistrate held that the appellant was deliberately lying when he testified that he had stabbed only once.

Perhaps a somewhat more generous approach should be adopted in evaluating the evidence of the witnesses. It was at night, it was dark, they were intoxicated. Even a sober person who dispassionately observes the altercation would not be able to give an accurate, step by step description of the wrestling match. The appellant, moreover, was involved in that wrestling match, being hit with a bottle, being throttled, and at one stage of the wrestling having the deceased on top of him.

The appellant said in evidence that he does not know why the deceased was fighting with him, adding that he, the appellant:-

“Ek het seker te vinnig kwaad geraak”.

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Upon being asked what he thought when the deceased was throttling him, the appellant said:-

10 “Hy was besig om my seker dood te wil wurg, of so
aan, want ek het mos gestoei om hom af te kry en
ek kry hom nie van my af.”

And then the question was asked:-

15 “So u het gedink hy gaan vir u doodmaak?”

and he said:-

“Ja.”

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The following evidence on pages 72 to 73 of the record is important, and I quote from the record:-

25 “ U sê mos sy vrou was die een wat die aggressor
was, nie die oorledene nie, sy wou met u baklei, sy

wou u beseer het, hy het eintlik probeer om dit te stop, is dit reg so? --- Ja, maar toe het hy ook maar baklei met my, hy het geslaan en toe sit hy bo op my, dis toe wat ek hom gesteek het. Ek het mos nie bedoel om hom te steek nie.

Maar u weet mos nou as u iemand steek, dan kan 'n mens doodsteek, is dit reg so? --- Dit is so, ja.

U het gesien dit is ook die gevolge van u steek die aand, die man is oorlede as gevolg van u stekery? --- Dit is so, ja.

Maar u het mos geweet op daardie stadium dat u vir hom steek dat hy kan doodgaan. U sê dan nou vir die Hof u was so kwaad gewees want hulle is mos nou daar weg met die drank sonder u toestemming? --- Dit is so, ja."

If I may interpose here, this is a typical example of a double-barrelled question which leaves an answer which is neither here nor there. It is also a feature of the cross-examination.

The record continues:-

" So u het geweet, ek stel dit aan u, u het dit geweet en u gaan nou die storie stop en u gaan hom nou wys, 'n les leer, en dit is hoekom u vir hom gesteek het, nie een keer nie, twee keer, so u het

bedoel om hom daar, om hom dood te maak?"

Again a question containing many elements. The answer is:-

5 "Nee, ek weet net van een hou af wat ek hom
gesteek het.

U kan nie vir die Hof verduidelik waar die ander
hou vandaan kom nie?"

10 The answer:-

"Nee, ek kan nie die hou verduidelik nie, ek weet ek
het hom net een hou in die bors..."

15 And then he is interrupted by the prosecutor and the question
remains in the air and they don't return to it. This is also a
most unsatisfactory aspect of the cross-examination.

Mr Maartens, who appeared for the State, with reference to the
20 passage I have read, submitted in the heads that:-

"Op die keper beskou daar nie eintlik sprake van 'n
noodweer situasie was nie."

25 And that the appellant in that passage conceded that "opset by

moontlikheid bewussyn aanwesig was.”

In evaluating the situation, sight should not be lost of the fact that there was a fight and that the appellant was not the original aggressor. In the course of the fight, the deceased was on top of the appellant and throttling him. In my view it cannot be said that there was not a “noodweer situasie”. It is, however, clear that the appellant exceeded the limits of private defence by twice stabbing the deceased. Snyman, Criminal

10 Law, Fifth Edition at page 114 says that:-

“The test to be applied when the limits of private defence are exceeded is now the same as the ordinary test for culpability for murder and culpable homicide.”

The words of the appellant, if construed within the context of the events of that night, point to the conclusion that the appellant while stabbing the deceased ought reasonably to have foreseen that he might exceed the bounds of private defence and he might kill the deceased. In that case, he is guilty of culpable homicide. In this regard I might refer to a passage in the case of S v Ngomane, 1979(3) SA 859 (A) at

863H:-

"Was he guilty of culpable homicide? I think so. For although he acted in self-defence he ought reasonably to have realised that he was acting precipitately and using excessive force, and that by stabbing the deceased with such a lethal weapon on the upper part of his body he might unnecessarily kill him."

There follows a reference to the leading case of S v Ntuli,
10 1975(1) SALR 429 (A) at 437.

The fact that in my view the conviction of murder should be altered to a conviction of culpable homicide should be reflected in the sentence that is imposed. The sentence in
15 respect of the first count must be reduced to reflect the conviction on a lesser charge.

Having regard to all relevant circumstances as reflected in the record an appropriate sentence in respect of the altered
20 conviction on the first count will be FIVE (5) YEARS IMPRISONMENT. I make the following order:-

1. On count 1 the conviction of murder is SET ASIDE AND REPLACED BY A CONVICTION OF CULPABLE
25 HOMICIDE.

2. The sentence of ten years imprisonment imposed in respect of count 1 is SET ASIDE AND REPLACED BY A SENTENCE OF FIVE (5) YEARS IMPRISONMENT.

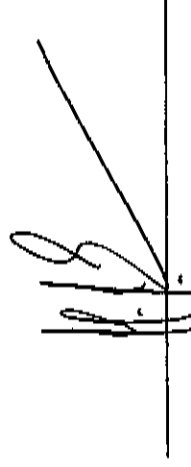
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3. It is ordered that HALF, (2½ YEARS) OF THE SENTENCE IMPOSED ON COUNT 1 BE SERVED CONCURRENTLY WITH THE SENTENCE OF 15 YEARS IMPRISONMENT WHICH WAS IMPOSED IN RESPECT OF COUNT 2.

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4. It is ordered that THE ALTERATION OF THE CONVICTION AND SENTENCE AS SET OUT IN PARAGRAPHS 2 AND 3 ABOVE, BE DATED BACK AND BE EFFECTIVE AS FROM 16 JANUARY 2002.

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ERASMUS, J

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I agree.

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DICKER, A J

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