THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 105/09

In the matter between:

ANN ELIZABETH STEYN **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Steyn v The State* (105/2009) [2009] ZASCA 152 (27 November 2009).

Coram: Mthiyane JA, Leach et Wallis AJJA

Heard: 17 November 2009

Delivered: 27 November 2009

Summary: Criminal law – private defence – appellant shooting deceased who was about to assault her with a knife – shooting not unlawful.

ORDER

On appeal from: High Court, Port Elizabeth (Nepgen J sitting as court of first instance).

The following order is made:

The appeal succeeds and the appellant's conviction and sentence are set aside.

JUDGMENT

LEACH AJA (MTHIYANE JA and WALLIS AJA CONCURRING):

[1] On the evening of 9 February 2007, the appellant shot and killed her former husband, a man who for years had abused her, both mentally and physically, and who had assaulted her earlier that evening. Pursuant to this incident, the appellant was charged with murder in the High Court, Port Elizabeth. Her plea that she had acted lawfully in self-defence was rejected and she was convicted of culpable homicide. In the light of the weighty mitigating circumstances which were present, the appellant was sentenced to three years imprisonment, wholly suspended on certain conditions. With leave of the court a quo, she appeals now to this court solely against her conviction.

[2] The appellant, who was 53 years of age at the time of the fatal incident, had married the deceased in 1971, shortly after she had matriculated from the Assumption Convent in Grahamstown. After her marriage, she and the deceased lived in various towns in the Eastern Cape before they moved to Port Elizabeth in 1985 and took up residence at 6 Breda Street in the suburb of Vikingvale, the

scene of the fatal incident. By then, their relationship had substantially deteriorated. The deceased, who was employed on the railways, worked long hours and was often impatient with the children when he came home. This led to great tension in the home, as did the fact that the deceased was extremely jealous of the appellant and often accused her of forming relationships with other men. But more significantly, the deceased drank heavily and continuously abused the appellant, both mentally and physically. He often told her that he would slit her throat with a smile on his face. He also regularly locked her in her bedroom, at times for extended periods. So often did this occur that she took to keeping food in her room to sustain her should she be imprisoned in this way. On one occasion she was locked in her bedroom for an entire weekend.

[3] Eventually the appellant felt she could take no more and, in August 2002, she divorced the deceased. After the divorce, the appellant was admitted to the Lamprecht Clinic in George where she was treated for depression. Although the appellant and the deceased were the joint owners of the former matrimonial home, and it had been their intention to convert a section of the house into a ‘granny flat’ in which she would reside, the appellant was advised by a psychiatrist not to return to the house. Consequently, after returning from George she took up residence in a flat for which the deceased undertook to pay the rent.

[4] Unfortunately, financial restraints forced the appellant to give up this arrangement and after two months she moved back to the former matrimonial home where, although she no longer shared a bedroom with the deceased, her life with him returned to what it had been before. The deceased continued to abuse her mentally and physically and she did all the domestic duties expected of a housewife. She often fled to her bedroom, which became both her sanctuary and her prison. At times she locked herself in to prevent the deceased from assaulting her while, on other occasions, the deceased ordered her to her room or himself locked her in.

[5] The appellant was not in good health. She had required surgery to her back after sustaining an injury but had continued to experience back and body pain for which she took anti-inflammatory medication. She had also undergone a resection of her colon which resulted in her being obliged to eat small amounts of food regularly throughout the day. In addition, not only did she require medication for an ulcer which had to be taken after food but she was also on medication for high blood pressure and cholesterol.

[6] During the period December 2006 to January 2007 the deceased took leave, and spent a great deal of his spare time drinking with his friends. This resulted in the appellant becoming wracked with anxiety caused by her not knowing when, in what condition or in what mood he would return home. Although her doctor prescribed anti-anxiety medication for her, she felt it would be best to escape from her domestic situation and to obtain professional treatment. She therefore contacted her medical aid fund and ascertained that it would be prepared to pay for another course of treatment for her at the Lamprecht Clinic in George.

[7] I turn now to the events of Friday 9 February 2007. During the course of the day, the deceased telephoned the appellant and told her to take meat out of the freezer for him to braai that evening. She did so, and also prepared potatoes to accompany the meal. The deceased arrived home after dark. He had clearly been drinking and was not in a good mood. He went to light a fire on which to cook the meat. Adjacent to the kitchen and the garage of the house was an enclosed outside area, paved and roofed and referred to in evidence as being the ‘braai room’. On an external wall there was a fireplace for the making of braaivleis fires and the cooking of meat. The floor level was lower than that in the house, with access being gained through a door leading from the kitchen down two steps to the lower level. The braai room was furnished with a wooden picnic table and benches, and padded benches against two walls.

[8] The appellant poured the deceased a drink, took it to him and then seated herself on one of the padded benches. She eventually plucked up sufficient courage to tell the deceased that she had contacted her medical aid to ascertain if it would pay for treatment for her anxiety at the clinic in George. On hearing this, the deceased erupted. He verbally abused her in foul and offensive terms, telling her that she had been born mad and would die mad. He then jumped up from where he was sitting, grabbed her by the throat and began to hit her. When the appellant's pet German Shepherd dog jumped up, it drew the deceased's attention away from the appellant, and he released her in order to chase it out of the room. She seized the moment to make her escape, and ran to her bedroom where she locked herself in. The deceased shouted after her that she was to stay in her room and that she would get nothing to eat that night.

[9] At some stage thereafter, the appellant prepared for bed and dressed herself in a nightie. But she urgently needed to take her prescribed medication and needed to have something to eat before doing so. Unfortunately she did not have any food in her room that night and, in desperation, decided for the first time to ignore an instruction from the deceased to remain in her room and go and fetch one of the cooked potatoes she had earlier left in the kitchen. Scared and upset as a result of the earlier assault, she armed herself with her .38 revolver which she hoped would dissuade the deceased from attacking her again.

[10] Having armed herself in this way, the appellant unlocked her bedroom door and set off down the passage, heading for the kitchen. When she reached the open door leading into the braai room, she saw the deceased seated at the picnic table eating his supper. He had the pot of potatoes on the table alongside him. She hesitated and the deceased then looked up. On seeing her standing in the doorway at the top of the stairs leading into the room, his reaction was both immediate and violent. He screamed that he had told her to stay in her room and that he had already told her that she would get nothing to eat. Holding the steak knife that he had been using, he jumped to his feet and rushed at her, shouting

that he was going to kill her, a threat which appeared to be deadly serious. Fearing for her life, she instinctively raised her revolver and fired a single shot at the deceased before turning and fleeing back to her room where she locked herself in. She then telephoned a friend of hers, a policewoman, who rushed to the house to assist her. It was then ascertained that the deceased had been fatally injured, the bullet having passed through his hand (which had presumably been held up in front of him) before entering the body through the right upper anterior chest wall some 9,5 cm below the right clavicle, passing through the right lung and exiting the right chest posteriorly about 15 cm above the sacral bone. The bullet caused a right-sided haemothorax and the collapse of the right lung. From the position where he had been shot in the braai room, the deceased managed to get into the kitchen before he collapsed and died from loss of blood.

[11] This version of events was given by the appellant when she testified. The trial court found her to be a wholly satisfactory witness who there was no reason to disbelieve. It therefore concluded that her version could reasonably possibly be true and that her guilt or otherwise had to be determined on her own version.

[12] The court a quo recorded in its judgment that counsel for the state had conceded at the trial that the appellant's version could reasonably possibly be true. However, in this court the state argued that there had been a misunderstanding in that respect and, although it conceded that most of the appellant's evidence could reasonably possibly be true, it argued that her description of how she had shot the deceased could not be accepted. This argument was largely based on the presence of blood on the floor alongside the bench on which the deceased had been sitting at the table facing the door from which the fatal shot was fired, and the opinion of a police forensic scientist, Superintendent Kock, who concluded that such blood had come from the wound to the deceased's left hand and that the deceased must therefore have still been behind the table at the time he was shot. On the strength of this, the state argued that the deceased could not have moved out from behind the table and been

rushing at the appellant when the fatal shot was fired; that the appellant's version of the shooting could thus not be accepted; that the court quo had consequently erred in doing so; and that the appellant must have shot the deceased at a time when he was no threat to her.

[13] This argument cannot be accepted. The value of an expert's opinion is largely dependent upon the reliability of the proven facts upon which it is based. In the present case, the precise movements of the deceased and the appellant and the position in which they were in relation to each other as the material events unfolded, are incapable of being accurately determined. The opinion relating to the source of the relatively small quantity of blood found on the floor alongside the table where the deceased had been seated is, in my view, largely speculative, as is the opinion that it must have fallen to the ground at the instant the deceased was shot in the hand. It must be remembered that the deceased clearly moved about the room after he had been fatally injured, as is borne out by the fact that he ultimately collapsed in another section of the house, and the blood alongside the table which formed such an important foundation of Kock's opinion could well have come to be deposited there at any stage.

[14] It is unnecessary to subject the evidence on this aspect and Kock's opinion to much greater scrutiny. What we do know is that the fatal bullet passed right through the body of the deceased before exiting at his back. If the deceased was still seated or was even rising to his feet at the time he was shot, one would have expected there to have been blood behind the table or on the seat where he had been sitting. But there was none there, a fact which leads to the logical inference that the deceased was probably not behind the table when he was shot. The absence of blood behind the table is certainly consistent with the appellant's version of the incident, and the presence of blood on the floor alongside the table, which could been a result of his having been shot while he moved towards the appellant, is no reason to reject her evidence as not being reasonably possibly true.

[15] Importantly, the trial court formed a good impression of the appellant and found her to have been a reliable witness. For the reasons already given, the position of the blood on the floor is no reason to conclude that her description of the shooting is unacceptable. She was the sole eye-witness to the incident and there is no reason for this court to conclude that the trial court erred in deciding the question of her guilt by having regard to her evidence of the events in question as described above.

[16] I therefore turn to consider whether the court quo was correct in concluding that, on her own evidence, the appellant had acted unlawfully. In denying her guilt, the appellant relied on a plea of so-called 'private defence' (commonly referred to in circumstances such as the present as 'self-defence') which goes to negative unlawfulness and recognises that persons may lawfully use such force as may be necessary to repel unlawful attacks upon them which have either commenced or are imminent and which threaten their lives or bodily integrity.[1]

[17] The court a quo held that when she left her bedroom in order to fetch a potato from the kitchen, a reasonable person in the appellant's position would have foreseen the possibility that the deceased, in the condition and mood he was in, might attempt to attack her. It held that a reasonable person would therefore not have proceeded to place herself in a position of danger where she might be forced to use her pistol to defend herself. Accordingly it concluded that the appellant had acted unreasonably and that the fatal incident could have been avoided if she had telephoned for help and waited for assistance before she left her room. The reasoning of the court was therefore that the appellant had acted negligently and was guilty of culpable homicide.

[18] Counsel for the appellant argued that the court a quo had misdirected itself in this regard by confusing the question of unlawfulness with the test of

[1] See C R Snyman *Criminal Law* 5 ed at 103-107.

negligence or *culpa*, and submitted that the issue of whether the appellant was guilty of negligence or *culpa* would only arise once it had first decided that her conduct was unlawful. This argument is not without substance. It is indeed so that when an accused raises a plea of private defence, the court's initial inquiry is to determine the lawfulness or otherwise of the accused's conduct and that, if found to be lawful, an acquittal should follow.[2] At the same time, however, it is clear from its judgment that the court a quo specifically turned its attention to the question of the lawfulness of the appellant's conduct and, in considering that issue, the courts often do measure the conduct of the alleged offender against that of a reasonable person on the basis that reasonable conduct is usually acceptable in the eyes of society and, consequently, lawful.[3] In the light of the circumstances of the present case where the facts are known, it is unnecessary to decide whether the court a quo misdirected itself in the manner suggested as this court can itself determine the lawfulness of the appellant's conduct on those facts.

[19] Every case must be determined in the light of its own particular circumstances and it is impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relies upon private defence. However, there should be a reasonable balance between the attack and the defensive act as 'one may not shoot to kill another who attacks you with a flyswatter'.[4] As Prof J Burchell has correctly explained '. . . modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether, taking all the factors into account, the defender acted *reasonably* in the manner in which he defended himself or his property'.[5] Factors relevant to the decision in this regard include the following (the list is by no means exhaustive):

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[2] J Burchell *Principles of Criminal Law* 3 ed at 243.
[3] Snyman op cit at 113-114.
[4] Snyman op cit at 109.
[5] Burchell op cit at 241.

- the relationship between the parties
- their respective ages, gender and physical strengths
- the location of the incident
- the nature, severity and persistence of the attack
- the nature of any weapon used in the attack
- the nature and severity of any injury or harm likely to be sustained in the attack
- the means available to avert the attack
- the nature of the means used to offer defence
- the nature and extent of the harm likely to be caused by the defence.[6]

[20] Counsel for the state submitted that the appellant had not acted reasonably in warding off the deceased's attack. First, she argued that the appellant was a police reservist trained in the use of firearms and conflict resolution and could therefore either have persuaded the deceased not to attack her or, at the very least, fired a warning shot to deter him. Secondly, it was argued that the appellant could have fled to her bedroom and thus avoided being assaulted without the necessity of shooting at the deceased.

[21] Whether a person is obliged to flee from an unlawful attack rather than entitled to offer forceful resistance, is a somewhat vexed question.[7] But in the light of the facts in this case, it is unnecessary to consider the issue in any detail. It could not have been expected of the appellant to gamble with her life by turning her back on the deceased, who was extremely close to her and about to attack her with a knife, in the hope that he would not stab her in the back.[8] She would have had to turn around in order to return to her bedroom, by which time the deceased would have been upon her and flight would have been futile. The appellant testified that the deceased would probably have caught her before she

[6] *S v Trainor* 2003 (1) SACR 35 (SCA) at [13]; Snyman op cit at 111-112 and Burchell op cit at 241.
[7] See eg Snyman op cit at 107-109.
[8] In this regard I endorse the view of Snyman op cit at 108.

reached her room, and that appears to be a reasonable assumption. That being so, the appellant cannot be faulted for offering resistance to the deceased rather than attempting to flee from him.

[22] Turning to the relevance of the appellant's training as a police reservist, her training in respect of both the use of her firearm and conflict management appears to have been elementary, to say the least. The appellant was no expert in the use of a firearm. Several years previously she had been given a single lesson on how to strip and clean a weapon. This was followed by a single session of firing a pistol on a range. That was the only firearm training she had ever received, and she was certainly not well versed in the use of a handgun. Indeed, she had never previously fired the revolver she used to shoot the deceased. Her conflict resolution training was no more advanced. It consisted of no more than a debate in which she and a colleague had advanced contrary standpoints on an issue. This had happened on a single occasion and the appellant can hardly be considered an expert in conflict management.

[23] Far more important is the fact that the history of the relationship between the appellant and the deceased was such that she had never been able to resist him or his unlawful assaults during the many years that she had been the subject of his abuse. This shows that her training in conflict management had been of no use to her in her daily life. The appellant must therefore be judged in the light of the fact that she was a woman who had previously been unable to resist the deceased's physical abuse and was both scared of him and thoroughly dominated by him. On the night in question, she urgently needed to get some food in order to take the medication she required. She was frightened and in an emotional state as a result of having been assaulted by the deceased. She was entitled to leave her bedroom, in her own home, and go to the kitchen to get a potato. There was nothing unlawful in her action in doing so, and it cannot have been expected of her to telephone for assistance every time she needed to do something in her own home. She then came face to face with the deceased and

it was he, and not she, who acted unlawfully by attempting to attack her with a knife.

[24] In considering the lawfulness of the appellant's conduct, it is necessary to keep in mind that she was obliged to act in circumstances of stress in which her physical integrity and indeed her life itself were under threat. It is necessary in such circumstances to 'adopt a robust approach, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence'.[9] Adopting that approach, the appellant in my view did not act unlawfully. She found herself in a position of great danger in which her life was under direct threat. There can be no doubt that in these circumstances she was entitled to use deadly force to defend herself. Had she not done so, it might well have cost her her life. In these circumstances her instinctive reaction, as she described it, of shooting at the deceased, who was seemingly hell-bent on killing her, was reasonable and the court a quo erred in finding otherwise.

[25] For the above reasons, the appellant's plea of 'self-defence' ought to have been upheld. The appeal succeeds and the conviction and sentence are set aside.

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L E LEACH

ACTING JUDGE OF APPEAL

[9] Per Holmes JA in *S v Ntuli* 1975 (1) SA 429 (A) at 437.

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