THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1074/2017

In the matter between:

ODETTE BOTHA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Botha v The State* (1074/2017) ZASCA 149 (01 November 2018)

Coram: Tshiqi, Seriti, Zondi, and Schippers JJA and Mokgohloa AJA

Heard: 24 August 2018

Delivered: 01 November 2018

Summary: Criminal Law and procedure – unlawfulness – stab wound with a steak knife to upper chest area of the deceased penetrating chest through the muscles, lung and brachiocephalic vein – conviction of murder in the form of *dolus eventualis* set aside and substituted with culpable homicide. Sentence – 12 years' imprisonment for murder set aside and replaced with a sentence of three years' imprisonment for culpable homicide in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: the Gauteng Local Division, Johannesburg (per Ismail and Keightley JJ):

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

2 The conviction of murder, and the sentence of 12 years' imprisonment, are set aside.

3 The order of the Gauteng Local Division, Johannesburg is replaced with the following:

'The appellant is convicted of culpable homicide, and is sentenced to three years' imprisonment subject to the provisions of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977.'

JUDGMENT

Tshiqi JA (Seriti and Zondi JJA and Mokgohloa concurring):

[1] The appellant was charged and convicted in the regional court, Mogale City, Krugersdorp with murder read with s 51 of the Criminal Law Amendment Act 105 of 1997. The regional court magistrate, after finding no compelling and substantial circumstances meriting a deviation from the prescribed minimum sentence, imposed a sentence of 15 years and also declared the appellant, in terms of s 103(1) of the Firearms Control Act 60 of 2000, unfit to possess a firearm. She appealed to the full bench of the Gauteng Local Division, Johannesburg with its leave. Her appeal, in the court a quo, was partially successful in that her conviction of murder in the form of *dolus directus* was substituted as murder in the form of *dolus eventualis* and her sentence was reduced to a period of 12 years. She now appeals to this court, against the conviction and sentence with its leave (per Cachalia JA and Ploos Van Amstel AJA),

who also made an order granting her bail pending the outcome of the appeal in the amount of R5000.

[2] The appellant's conviction arose from an incident between her and the deceased at Dros restaurant, Krugersdorp on the afternoon of 27 July 2012. It is common cause that the deceased died as a result of complications flowing from a stab wound inflicted by the appellant to her anterior chest wall during the incident. At the time the deceased's husband and the appellant were involved in a love relationship and the incident concerned the deceased's husband. They had been sitting at the premises of the restaurant at an outside area, with their backs facing the entrance of the restaurant, when the deceased who was visibly angry arrived with her son, then aged approximately 9 years old. She approached her husband and the appellant from behind, assaulted the appellant and shouted and swore at her. She thereafter left and proceeded towards the parking area of the restaurant. Her husband followed, apparently in order to calm her down, but the appellant did not move from where she was sitting. The deceased picked up a stone and smashed the windscreen of her husband's motor vehicle. There was another altercation between the deceased and her husband around the parking area but she came back, leaving her husband next to his motor vehicle and approached the appellant, swore at her and assaulted her again.

[3] The version of the appellant on the nature and severity of this second attack is slightly different from that of the two eye witnesses who testified for the State. The first State witness, Mrs Louise Fourie, said that there was a fight between the appellant and the deceased during which she saw the deceased attacking the appellant, grabbing her and pulling her by her hair from behind whilst swearing and shouting at her. During the process a glass ashtray that had been on the table fell. At some stage she saw the appellant making a stabbing movement towards the back and saw blood coming out of the deceased's mouth. The deceased staggered a bit and sat on the chair. She also stated that the deceased was bigger than the appellant. During cross-examination she was asked whether the appellant had fallen down during the second attack and she said that she did not see her falling.

[4] The second State witness, Miss Melissa Fourie, the daughter of Mrs Fourie, confirmed her mother's version in many material respects but when questioned whether the appellant had fallen on the ground she said:

'Dit is hoe dit vir my gelyk het, want ek het nie heeltemaal gekyk nie. Ek het net uit die hoek van my oog uit [gesien].'

Later on she said that she was uncertain. During cross-examination she was referred to her earlier statement to the police where she stated that the appellant was on the ground whilst the deceased was still holding her. When this discrepancy was pointed out she said that is what it looked like. Miss Fourie also said that she did not witness the actual stabbing.

[5] The appellant's defence was that she stabbed the deceased in self-defence. She confirmed Mrs Fourie's version concerning the first attack by the deceased. Regarding the second attack she said that the deceased hit her with the ashtray on the head before it fell on the ground, moved in behind her, grabbed her and pulled her by her hair with both hands so hard that her feet lifted off the ground. The deceased then dragged her to the ground and pulled her on the ground by her hair. She felt a lot of pain, tried to remove the deceased's grip from her hair with one hand whilst she used the other hand to feel if there was something on the table she could use to ward off the attack. She admitted that she stabbed the deceased with the steak knife that was in front of her on the table, but said that at the time she was not aware that it was a knife because it was wrapped in a serviette. She only realised that she had stabbed the deceased when she saw her bleeding. During cross-examination she said that she just grabbed an object, did not rub it to feel it, and when asked by the court whether she felt the serviette, she said she did not.

[6] The medical evidence was not disputed. Dr Rowe, who performed the post-mortem, testified that the wound inflicted on the deceased was approximately 4 to 5 centimetres deep. It penetrated her chest through the anterior chest wall, through the muscles of the anterior chest wall, through the lung and into the brachiocephalic vein,

which is posterior. Both lungs partially collapsed and there was approximately 2 litres of blood in the chest cavity. According to Dr Rowe, when blood fills up the chest, it squashes the lungs. She said that a moderate amount of force was probably used to inflict the wound. When cross-examined on the entrance wound she stated that there was no bone where the knife entered and that it would have been easy for a sharp knife, like the one used to penetrate the area. She confirmed that the cause of death was respiratory failure and blood loss.

[7] The trial court accepted that the deceased was the aggressor but criticised the appellant for failing to move away from the scene after the first attack and at any available opportunity during the altercation. It also criticised her for failing to use other means to avert the attack. It then found that the appellant had exceeded the bounds of self-defence and convicted her of murder. On appeal the high court was satisfied that it was necessary for the appellant to avert the attack but held that her 'retaliatory conduct was excessive and disproportionate' and that it was 'not a reasonable response to the deceased's attack'. It then concluded that the appellant had the requisite intention to kill in the form of *dolus eventualis* and that her conviction of murder should stand.

[8] Before I deal with whether the appellant's defence should have been accepted, it is necessary to first determine whether the appellant was aware that she had taken a knife from the table in order to ward off the attack. At the hearing of the appeal, in this court the appellant's counsel, Ms Kolbe was asked to clarify whether the appellant's defence in this regard amounted to that of automatism. In response Ms Kolbe referred to the appellant's evidence during cross-examination, where the appellant said:

'Toe die oorledene u aan u hare gegryp het, wat was u reaksie, wat wou u doen? --- Jis ek het geskrik, ek kon regtig net – ek wou net gehad het sy moet my los en ry of iets.'

Ms Kolbe submitted that this clearly shows a conscious reaction by the appellant, but qualified this and submitted that although the appellant wanted to stop the attack, one does not think clearly when faced with a crisis. Ms Kolbe submitted that the deceased was not asked whether she looked at the table before the attack to check what was placed before her. She submitted that the appellant's evidence cannot be understood to

suggest that she knew that the knife was there. In this regard she highlighted the following evidence by the appellant during cross-examination:

'En in die proses terwyl sy aan my hare opgetel het, het ek met my een hand aan haar hand gevat en haar prober wegkry, en terwyl my kop agter op, ek weet nie hoe se mens nou, soos terwyl sy my hare agteruit getrek het, het ek op die tafel gevoel wat, is daar iets waarmee ek, ek wil haar net wegkry van my af.'

[9] The above evidence shows that the appellant was conscious of what she was doing when she took the steak knife from the table, and that she was aware of what was going on in her surroundings when she retaliated. Whilst I accept that that the deceased had pulled her backwards so hard that her feet got lifted off the ground, she herself had a clear recollection of what had happened and was able to describe in detail to the court how she reacted. She could tell the court how the deceased held her hair, how she used her hand to remove the deceased's grip from her hair whilst she used her other hand to look for the weapon on the table. It is improbable that she would be fully aware of all these other movements but not realise the kind of weapon she had grabbed from the table. As the trial court reasoned, the appellant had been sitting at the restaurant for approximately 15 minutes, the knife was all along on top of the table and she must have seen it. The trial court was therefore correct in rejecting the appellant's evidence that she was not aware that she had a knife in her possession when she retaliated. Having found that the appellant knew that she had grabbed a knife from the table, the next question is whether the elements of self-defence were satisfied.

[10] In order to successfully raise self-defence, an accused must show the following: (a) that it was necessary to avert the attack; (b) that the means used were a reasonable response to the attack; and (c) that they were directed at the attacker. (See Jonathan Burchell *Principles of Criminal Law* 5 ed (2016) at 125.) The third enquiry is not contentious in this matter. I will thus deal with the first and second one.

Was it necessary for the appellant to avert the attack

[11] The trial court criticised the appellant for failing to move away from the scene after the first attack. This criticism was unwarranted. The appellant's explanation that she did not think that the deceased would come back and that when she did come back, a lot of things went through her mind such that she eventually did not move away, is reasonable and cannot be rejected outright. She said that she thought she should perhaps go inside but did not know what would have happened if she was attacked inside the restaurant. She could not run away because she did not use her own motor vehicle to travel to the restaurant and she could not call for help as her cellphone battery was flat. According to the appellant, everything happened so fast that she had no time to reflect on options open to her. There is also no reason to reject her evidence that during the attack she was in pain, frightened and wanted to relieve herself of the pain. All of this suggests that the appellant was attacked unexpectedly by the deceased on the second occasion and that she could not think rationally. I also accept, as the court a quo did, that the assault was such that she could not reasonably be expected to fold her hands and do nothing in order to avert the attack. It must follow therefore that the appellant managed to show that it was necessary for her to avert the attack under the circumstances.

Was the use of a knife in averting the attack reasonable in the circumstances

[12] This enquiry is in practice more a question of fact than of law. (See *S v Trainor* 2003 (1) SACR 35 (SCA) para 12). In C R Snyman *Criminal Law* 6 ed (2014) at 110-111, the learned author says:

'[T]here should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. In order to decide whether there was such a reasonable relationship between the attack and defence, the relative strength of the parties, their sex and age, the means they have at their disposal, the nature of the threat, the value of the interest threatened, and the persistence of the attack are all factors (among others) which must be taken into consideration. One must consider the possible means or methods which the defending party had at her disposal at the crucial moment. If she could have averted the attack by resorting to conduct which was less harmful than that actually employed by her, and if she inflicted injury or harm to the attacker which was unnecessary to overcome the threat, her conduct does not comply with this requirement for private defence.'

(See also *S v Ntuli* 1975 (1) SA 429 (A), *S v Ngomane* 1979 (3) SA 859 (A) at 863A-C), *Grigor v S* [2012] ZASCA 95.)

[13] I am not persuaded that it was reasonable for the appellant to direct a stabbing movement with a steak knife towards the deceased who was standing behind her, pressed against her back, grabbing her hair, with her upper body close to hers. There were other alternatives the appellant could have explored. She could have aimed at the lower body or used any other means short of directing the stabbing movement towards the deceased's upper body. It is also significant that the appellant testified that she never felt that her life was in danger during the attack. The deceased, also a woman and although bigger than the appellant, was not carrying any weapon. It follows that while the appellant was clearly faced with a situation in which she was being assaulted and had to retaliate in order to protect herself, she must have foreseen the possibility that by directing the knife towards the deceased's upper body, this might injure or kill the deceased.

Was the court a quo correct in its finding that murder in the form of dolus eventualis was proved

[14] In *S v Humphreys* [2013] ZASCA 20; 2015 (1) SA 491 (SCA) paras 12-17 this court considered whether murder in the form of *dolus eventualis* had been proved and said:

'In accordance with trite principles, the test for *dolus eventualis* form is twofold: (a) did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and (b) did he reconcile himself with that possibility . . . .

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…

…
This brings me to the second element of *dolus eventualis*, namely that of reconciliation with the foreseen possibility. The importance of this element was explained by Jansen JA in *S v Ngubane* 1985 (3) SA 677 (A) (*Ngubane*) at 685A-F in the following way:
'A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, eg by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility . . . . The concept of conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers'.

Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain"…
...
The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.'

[15] I now consider whether the two elements of *dolus eventualis* were proven in this matter. Regarding the first element, I accept, as stated above, that the appellant subjectively foresaw the risk or the possibility that a stab wound to the chest area might result in the death of the deceased. Regarding the second element, I am not persuaded that having foreseen this possibility, the appellant reconciled herself with the occurrence of death or disregarded the consequences of it occurring. There is no evidence that the appellant deliberately or purposefully aimed a firm thrust at the deceased. On the contrary, the evidence shows that she simply turned around whilst sitting, and directed a stabbing movement towards the deceased's upper body. This suggests that the appellant's conduct was an impulsive reaction to the attack which was being inflicted on her. I am fortified in this reasoning by her responses when cross-examined on her state of mind during the retaliatory action. She said:

'[Aanklaer]: Nou, het u op 'n stadium gedink hoe bedreig dit nou u lewe, daardie? Het u nou gedink sy gaan u hare uit u kopvel ruk dan bloei u vir u dood? --- Ek het nie gedink my lewe is bedreig op daardie stadium nie, ek het net seer gekry.
[Aanklaer]: Maar desnieteenstande loop n risiko om enige voorwerp wat daar is wat u nou in die hande kan kry, om haar mee weg te kry soos wat u nou sal sé en u maak hierdie steekbeweging.
[Botha]: Ek het in my lewe nooit gedink dat so iets kan veroorsaak dat iemand doodgaan nie, regtig.
[Aanklaer]: Wat het u gedink, wat is hierdie so iets, dat so iets kan veroorsaak dat iemand doodgaan nie, wat se iets?
[Botha]: Wel, die feit dat ek haar toe nou met die mes mos nou gesteek het wat ek na die tyd verneem het. Ek het nie gedink, in elk geval het ek nie gedink dat iemand so, ek het al baie stories gehoor van mense wat mekaar aanval van messe en tien, twintig keer steek met messe en dan lewe die person nog, so dit is vir my, dit gaan my verstand te bowe dat een steekwond wat nou op die nadoodse verslag is, dat dit iemand se lewe kon, ek kan nie verstaan nie.'

[16] The above evidence shows that although the appellant foresaw the possibility of death, she thought it would not happen. The fact that the appellant did not direct the stabbing movement towards a specific part of the upper chest area does not save the appellant from a conviction on culpable homicide. I accept the general principle that for the purposes of culpable homicide it is essential that the reasonable man would have foreseen the possibility of death and not just some injury, nor even serious injury. (See R J L Milton *South African Criminal Law and Procedure: Common Law Crimes* 3 ed vol 11 at 377.) But as Holmes JA said in *S v Bernardus* 1965 (3) SA 287 at 307 (A):
'[t]he possibility of serious injury being reasonably foreseeable, the appellant ought also to have foreseen the possibility of death hovering in attendance: the two are sombrely familiar as cause and effect in the walks of human experience. . . .
I do not think that the appellant is rescued by the fact that the injury was an unusual one and happened in a curious way – the end of a fairly thick stick penetrated the side of the head. It is the general possibility of resultant injury which must reasonably be foreseeable, and not the specific manner and nature thereof. The facets of vulnerability of the human body are legion, and death may come to mortals through a variety of corporeal hurts and derangements.'

[17] Dr Rowe described the injury as a deep penetrating wound, approximately 4-5 centimetres and she said that it penetrated the second intercostal muscles, through the lung and into the vein. This is not a superficial injury. Dr Rowe said that moderate force must have been applied in order for the knife to go through the muscle and into the chest. The appellant ought to have foreseen that this kind of attack in retaliation might kill the deceased. I say so because at the time she made the stabbing movement towards the deceased, she was aware that the deceased was so close that she held the deceased's hand with her other hand whilst trying to release the deceased's grip from her hair. She ought to have foreseen that if she directed stabbing movement with a steak knife, with what Dr Rowe described as a moderate amount of force, towards the upper chest of the deceased, whom she knew was so close to her, this might puncture any of the deceased's vital organs, thus causing her death.

[18] The next question that then arises is what the appellant should have done, once she realised that the weapon in her hand was a steak knife and once she foresaw the possibility that it might kill the deceased. Put differently, what steps should she have taken to guard against the foreseeable possibility or to guard against it occurring. In this enquiry, it is helpful to keep in mind that even a slightest deviation from the norm of a reasonable man suffices. Unlike English Law, a serious deviation is not required, for gross negligence is not essential. (See R J L Milton *South African Criminal Law and Procedure: Common Law Crimes* at 379). In *S v Ngomane* 1979 (3) SA 859 (A), the appellant was alone in his hut with a woman at night. The deceased asked him to open the door and when the appellant refused to do so, the former threatened to kill the latter by burning the hut down. The appellant believed that the deceased would carry out his threat and formed an intention to escape from the hut. As he opened the door the draught extinguished the light from the paraffin lamp he was carrying, leaving the interior of the house in darkness. As the deceased was entering the hut, the appellant stabbed him once with an assegai, which was five foot long with a blade of about 18 inches. The blade severed the deceased's jugular vein in his neck and penetrated his heart causing his death. He was charged and convicted of murder. On appeal this court accepted that he was acting in self-defence, set aside his conviction on murder and

substituted it with culpable homicide. In making a firm finding that it was culpable homicide the court said at 863F-H:

'In those circumstances, and making due allowance for the darkness, I think that the reasonable man in appellant's situation, before stabbing the deceased, would first have waited to ascertain what the deceased wanted or was going to do, either by a further enquiry of him or from his ensuing conduct, and would first have warned him that he was armed with the assegai. Appellant did nothing of that kind. He immediately stabbed the deceased blindly after he had opened the door and was entering the hut. Alternatively, as appellant's purpose was to effect his (and possibly Sarah's) immediate escape through the door which the deceased was then barring, he could have done that by striking the deceased with the flat side of the blade or the handle of the assegai thereby either felling him or driving him away from the door. It was unnecessary to stab him. . . .

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

[19] In *Ngomane* the appellant stabbed the deceased blindly in the dark. There was a greater chance that he could miss the deceased. In this matter the appellant was aware that the deceased was standing right behind her, it was during the day and she directed the stabbing movement towards the upper chest area with the sharp end of the steak knife. The appellant should have adopted less riskier or fatal measures, once she saw the possibility that death might occur. This was not a case of life and death. The appellant testified that she did not fear that her life was in danger at the time she was wrestling with the deceased. The deceased was not carrying any weapon. The worst kind of bodily harm the deceased inflicted on the appellant was the continuous pain to her head as she was being pulled by her hair. There is no evidence that if the attack continued any form of serious injury would have occurred. She could have tried hitting the deceased with the handle of the steak knife, could have warned the deceased first before stabbing her or could have aimed at lower parts of the body. The appellant failed to adopt any of these or other measures and thus failed to guard against the possibility

of death occurring. Death in fact occurred and the appellant is thus guilty of culpable homicide.

[20] For the aforementioned reasons, I am not persuaded that the State proved all the elements of murder in the form of *dolus eventualis*. The conviction falls to be set aside and substituted with one of culpable homicide.

Sentence

[21] The appellant is a first offender. She was 27 years old at the date of the offence. She has one child, who is aged approximately 12 years at the moment. She was gainfully employed. Throughout her testimony the appellant expressed remorse for her conduct and stated that she did not intend to kill the deceased. She specifically said that she did not think that a single stab wound would result in the death of the deceased. It is significant that the appellant's retaliatory conduct, although excessive, took place after she had been repeatedly insulted and attacked by the deceased in a public place in full view of the other patrons of the restaurant. It is also significant that she did not react immediately, but did so after being repeatedly assaulted and insulted and in order to avert what she described as a painful attack by the deceased. These facts portray the appellant as a rather calm person who ultimately reacted because she was pushed too far. She cannot be held to be a danger to society. However, although the appellant was justified in taking action to ward off the attack, she has to be punished for her excessive impulsive reaction which caused the death of a human being. I consider a sentence of three years' imprisonment subject to the provisions of s 276(1)*(i)* appropriate in the circumstances.

[22] It is accordingly ordered:

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

2 The conviction of murder, and the sentence of 12 years' imprisonment, are set aside.

3 The order of the, Gauteng Local Division, Johannesburg is replaced with the following:

‘The appellant is convicted of culpable homicide, and is sentenced to three years’ imprisonment subject to the provisions of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977.’

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Z L L Tshiqi

Judge of Appeal

Schippers JA:

[23] I have had the benefit of reading the judgment of the majority prepared by my colleague Tshiqi JA. I do not agree that in the particular circumstances of this case, the appellant acted unreasonably in defending herself against the unlawful attack on her by the deceased,[1] or that she ought reasonably to have foreseen that she might exceed the bounds of self-defence and kill the aggressor.[2] In my view, the State failed to prove both unlawfulness and *mens rea* on the part of the appellant.

[24] Two preliminary points are required to be made at the outset. The first is trite: the guilt of an accused must be established beyond reasonable doubt in the light of *all* the evidence.[3] As is shown below, on the totality of the evidence, it cannot be said that the appellant's guilt was so established, or that her version was not reasonably possibly true. The second is that in a case such as this where the appellant relies on self-defence, the court must 'beware of being an arm-chair critic, and must take into account the exigencies of the occasion'.[4] As Innes JA put it:

'Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstance of their position.'[5]

[25] Unlike the vast majority of self-defence cases that reach the courts, this is a case where a blameworthy aggressor launched a sudden, unexpected and unlawful attack on an unsuspecting victim. Indeed, this is common ground. The appellant and the deceased's husband were involved in an extramarital affair. On the day in question they were sitting outside at a table (which has a bench with no backrest affixed to it on either side) at the Dros restaurant in Krugersdorp. It was broad daylight. The State witnesses,

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[1] Judgment para 13.
[2] Judgment para 17.
[3] *S v Van der Meyden* 1999 (2) SA 79 (W) at 82C-D, approved in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) para 8; *S v Heslop* 2007 (4) SA 38 (SCA) para 11.
[4] *R v Patel* 1959 (3) SA 121 (A) at 123C-D.
[5] *Union Government (Minister of Railways & Harbours) v Buur* 1914 AD 273 at 286, affirmed in *Patel* fn 4 at 123D.

Mrs Fourie and her daughter, Melissa, sat opposite them. Melissa sat with her back to the appellant and the deceased's husband.

[26] Mrs Fourie testified that the deceased arrived with her nine year old son, walked up to the appellant, screamed and swore at her, and slapped her. The appellant did not retaliate and remained seated at the table. The deceased, who was violently angry, walked across the road to where her husband's car was parked. She picked up a rock (Melissa described it as a 'groterige klip') and smashed the windscreen. In the road, the deceased's husband tried to calm her down to no avail. He pushed her causing her to fall to the ground and then he helped her up. She returned to the table where the appellant was still seated. Then the deceased, who was larger in stature than the appellant, with both hands grabbed the appellant by her hair and pulled her off the bench. The appellant was bent over backwards as she was being pulled by her hair, when Mrs Fourie saw her making a backward movement, as high as her shoulder, with her right hand. She did not see what the appellant had in her hand. Immediately thereafter she saw a knife still wrapped in a serviette on the floor; and blood coming from the mouth of the deceased, who went to sit on a bench.

[27] Prior to this, Mrs Fourie said, it appeared to her that there was a struggle ('stoeiery') between the deceased and the appellant during which there was slapping, and an ashtray fell off the table and broke. In Mrs Fourie's words: 'It looked to me as if only slaps were being dished out' (my translation).[6] When asked who had slapped whom, Mrs Fourie replied that the deceased had hit the appellant. She said that the deceased was unarmed when she attacked the appellant the second time, and was the sole aggressor. The deceased died on the scene.

[28] Melissa said that when she arrived, the deceased shouted and swore at her husband and the appellant, and that she slapped the appellant. However, Melissa could not say whether the deceased slapped her more than once. The deceased's husband tried to calm her down at which point Melissa looked away. When she saw the

[6] Mrs Fourie said: 'Dit [het] vir my gelyk of daar net klappe uitgedeel is'.

deceased again she was lying in the road on the ground with her legs in the air. She returned to the table where the appellant was sitting, slapped her and pulled her by her hair from behind. Melissa testified that it appeared that the appellant was on the ground, but she was not sure about this. Mrs Fourie told Melissa that she thought that the deceased had been stabbed. The deceased's husband went to her and held his hand under her mouth to stop the bleeding. He asked the appellant what she had done. The latter replied that it was self-defence.

[29] Melissa confirmed that the deceased was bigger than the appellant; that she was angry; and that the appellant did not retaliate when she was slapped during both the first and second attacks. She did not see the deceased hit the appellant with an ashtray against the head, which fell to the ground and broke. Melissa's statement to the police that the appellant was on the ground and that the deceased held her by her hair was put to her, to which she replied that that was how it looked to her. The deceased was behind the appellant when she suddenly stood back. Mrs Fourie then said to Melissa, 'I think she was stabbed or something'.

[30] Dr Rowe, who did the post-mortem examination, concluded that the cause of death was a penetrating incised wound (1.5 cm wide) to the right upper chest with resultant blood loss and respiratory failure. Determining the depth of the wound, she said, was guesswork, but she estimated that it was probably not less than four to five centimetres deep. The direction of the wound was downwards, and penetrated the second intercostal space through the lung and punctured the brachiocelaphic vein. Dr Rowe testified that a moderate amount of force was required to inflict that type of wound. She was referred to a photograph of the knife and said that a sharp knife of that kind could easily penetrate the (chest) area, since there was no bone where it had entered, and the flesh was soft. Dr Rowe in effect conceded that if the appellant had been pulled back by the deceased and in that motion made a backward stabbing movement, that that would be consistent with her post-mortem finding.

[31] The appellant testified in her defence. She was at the table with the deceased's husband when she felt somebody hitting her on the head from behind, more than once.

She did not see from where the deceased had come. She also did not see how the deceased had smashed the windscreen of her husband's vehicle, but heard the commotion. What she did see was the deceased lying on the road and her husband holding her hands, whilst she was biting his hands and legs. She was extremely angry. The appellant said that she decided to remain at the table after the first attack because she did not know how to handle the situation, and there were more people inside the restaurant where the deceased would have humiliated her. She could not leave the scene because she had travelled with the deceased's husband, and her cell phone battery was flat and therefore she could not call anybody. And she did not think that the deceased would return to the table. She sent the deceased's son into the restaurant when she noticed him sitting next to her.

[32] The appellant said that the deceased returned to the table and scolded and swore at her. She hit the appellant against her head with an ashtray that was on the table, which fell to the ground and broke. (In my opinion, nothing turns on the fact that Mrs Fourie did not see this. The fact is that the ashtray broke, which, contrary to Mrs Fourie's evidence, did not happen during a struggle – there was none. In any event, it was the events thereafter that necessitated the defensive act.) The appellant went on to say that after she was hit with the ashtray, the deceased moved behind her, grabbed her by her hair and literally pulled her up by her hair. At this point to the appellant stated that she was very frightened, since she did not know what the deceased was capable of. The appellant said:

'I tried to get anything to get her off me because she was hurting me so at that stage . . . I did not realise that I was taking a knife, I just tried anything, I only wanted to get her away from me and she was much bigger than me.'[7]

[33] The appellant demonstrated that the deceased stood behind her, pulled her upwards and then backwards with both hands by her hair from the bench, and dragged her on the ground. The appellant said that she did not know what she had grabbed from

[7] The appellant's evidence reads:
'… ek het net enigiets probeer kry om haar van my af te kry, omdat sy my so seermaak op daardie stadium. … Ek het nie besef ek vat 'n mes nie, ek het net enigiets probeer, ek wou haar net wegkry van my af en sy is baie groter as ek gewees.'

the table; that she did not think about what was in her hand; and that she made a hitting movement (slaanbeweging) to the back over her shoulder and used the object because she just wanted to get the deceased away from her. She realised that she had stabbed the deceased only when the latter walked around the table, was gasping for breath and blood was coming from her mouth. The appellant said that she did not intend to stab the deceased in her chest or cause her death; and that she did not foresee that her act could have caused the death of the deceased.

Unlawfulness

[34] With that outline of the evidence I turn to consider whether the State proved unlawfulness. As Snyman points out,[8] the enquiry into unlawfulness is in fact an enquiry aimed at establishing whether there is an absence of a ground of justification: in this case, private defence. The requirements for private defence are well-settled. The attack upon the person acting in private defence must be unlawful; it must be directed at an interest which legally deserves to be protected; and be imminent but not yet completed.[9] The defence must be directed at the attacker; it must be necessary in order to protect the interest threatened; there must be a reasonable relationship between the attack and the defensive act; and the person attacked must be aware of the fact that she is acting in private defence.[10]

[35] It is beyond question that the deceased launched an unlawful attack on the appellant; that the attack was directed at the appellant's right to bodily integrity which is constitutionally protected;[11] and that the attack was not yet completed when the appellant resorted to the defensive act, which was aimed at the deceased. In fact, the magistrate found that these requirements were met. It is also not in dispute that the appellant was aware that she was acting in private defence. What remains then, is whether the defensive act was necessary to protect the appellant's right to bodily

[8] C R Snyman *Criminal Law* 6 ed at 96-97; *S v Steyn* 2010 (1) SACR 411 (SCA) para 16.
[9] Snyman fn 8 at 103-106.
[10] Snyman fn 8 at 106-112.
[11] Section 12(2) of the Constitution provides that everyone has the right to bodily and psychological integrity which includes the right to security in and control over their body.

integrity; and whether there was a reasonable relationship between the attack and the defensive act.

[36] In considering the means that the appellant had at her disposal at the crucial moment, the magistrate found that 'it was clear' that the appellant could have removed herself from the dangerous situation in which she was. Stated differently, she should have avoided using any force at all by taking a safe opportunity to escape. According to the magistrate, the appellant could have asked anybody for help, fled to inside the restaurant, or got up and walked away. The magistrate rejected her explanation that she did not want to be further humiliated by the deceased; and said that no right-thinking manager or owner would have allowed a fight of any nature on his property and not come to the aid of one of the parties.

[37] Then the magistrate said:

'And the court wonders if it is not possibly the case that the accused was at that stage just tired of the deceased who had humiliated her so, who swore at her and who physically attacked her. That she possibly sat there and decided that enough was enough. That she was not going to be humiliated further and then stabbed the deceased.' (My translation.)[12]

This statement by the magistrate, counsel for the State rightly conceded, influenced the finding – incorrect and unjustifiable on the evidence – that the appellant had the requisite intention to kill the deceased. And the statement was directly against the evidence – the appellant testified that she did not think of grabbing any specific object to hurt the deceased.

[38] The magistrate's finding that the appellant should have fled, in the particular circumstances of this case, is in any event untenable in light of the evidence. The appellant had been subjected to a sudden and unprovoked attack by the deceased when the latter arrived at the restaurant. Nobody came to her defence, not even the

[12] The magistrate said:
'En die hof wonder of dit moontlik nie die geval is dat die beskuldigde net op daardie stadium net moeg was vir of met hierdie oorledene wat haar so verneder het, wat haar gevloek het en wat haar te lyf gegaan het. Dat sy nie net moontlik daar gesit het en besluit het genoeg is genoeg. Dat sy nie verder verneder gaan word nie, en die oorledene toe gesteek het.'

deceased's husband. Further, the appellant explained why she remained at the table after the first attack; and crucially, stated that she did not think that the deceased (who was the aggressor all the time) would return to the table. That evidence was never challenged, nor contradicted.

[39] On the level of the law, Snyman's view is that there is no duty on the attacked party to flee, since private defence concerns defence of the legal order ie, the upholding of justice. Fleeing is no defence, but capitulation to injustice. Just as there is no duty on a police officer to run away from the criminal, there is no duty on an attacked person to flee from the aggressor where the police are not present to protect her. According to Snyman, our legal system, that expects subjects to respect and promote the rule of law, cannot simultaneously expect them to flee from an unlawful attack, as that is tantamount to expecting them to turn their backs on the rule of law so that injustice may carry the day.[13] On the other hand, there is the view that if a safe opportunity for escape exists, any force used in private defence is unnecessary, as injury to the attacked person and the aggressor can be avoided entirely by retreating. It is not necessary to decide this question. Suffice it to say that the possibility of safe retreat is a factor to be taken into account in deciding whether the force used in private defence was reasonable.[14]

[40] The finding that the appellant knew that she had grabbed a knife from the table, is simply unsustainable on the evidence. Her testimony that she realised that she had stabbed the deceased with a knife only after the latter was gasping for breath, was never contradicted. In this regard she testified as follows:

'[Prosecutor] . . . Why do you tell the court that you assumed later that it was a knife --- because after the entire events she walked around the table and began gasping for breath, and with this when I looked, her husband was back at the table. I don't know when he came back. I was not aware of when precisely he came back. *And he said to me 'what is wrong with her?' And then when I looked around, I saw the knife lying there. I then said I think I stabbed her with a knife*.

[13] Snyman fn 8 at 108.
[14] *R v Zikalala* 1953 (2) SA 568 (A) at 571D-572B.

Mrs Botha, are you telling this court that you did not know what you picked up, what object? --- I did not know at that stage.
Let us try again --- you don't know what object you picked up? --- I did not know what object I had picked up.
You could not feel that it was a knife? --- At that stage my only thought was, I just want to get her away from me. I did not think about what I was feeling in my hand. I could not see because as I have said, my head was in a backward movement as she was pulling my hair.
Court: You could not feel that it was a knife, what is your answer Madam? --- Yes I said I could not feel that it was a knife and I also could not see it.' (My translation.)[15]

[41] It was immediately after this testimony that the prosecutor put forward the theory that the appellant had been sitting at the table for at least 15 minutes with the deceased's husband, and suggested that she knew what was on the table. As the following excerpt from the record shows, the appellant's evidence throughout was consistent:
'Prosecutor: You see, Mrs Botha, you sat at that table with the deceased's husband for at least 15 minutes before she arrived there. Thereafter all the events took place with the vehicle etc after which she came back to you. Do you honestly want to tell this Court you do not know what was on that table, where you had been sitting for at least 15 minutes, without all the other events? You did not know what was on that table? --- Well, as I said, at that stage when the events took place, I did not think of grabbing any specific object to hurt her.
Can you tell the court how is it possible, because certainly if a person takes something and puts it in your hands, then you have an idea what is in your hands, not so? What did you feel? Explain that to the Court, What did you feel? --- The entire event was like two seconds, there was not even time for me to feel physically what you have in your hand, what you are busy with, what is happening. The only thing that I could think of was that I just wanted to get her away from me because she was hurting me.'

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[15] Emphasis added. The appellant's evidence reads:
'[Aanklaer] Hoekom se u vir die Hof verneem later dit is 'n mes? Want na die hele gebeure het sy om die tafel geloop en begin hyg na haar asem, en met die toe ek kyk, toe was haar man toe nou terug by die tafel. Ek weet nie wanneer het hy teruggekom. Ek was nie bewus van wanneer hy presies teruggekom het nie. En hy het vir my gesé "wat is fout met haar", en toe ek so omkyk, toe sien ek daar lé die mes, toe sé ek, ek dink ek het haar met 'n mes gesteek. [Aanklaer] Mev Botha, sé u nou vir hierdie Hof dat u weet nie wat u optel nie, watter voorwerp? Ek het nie geweet op daardie stadium. [Aanklaer] Kom ons probeer weer. U weet nie watter voorwerp tel u op nie? Ek het nie geweet watter voorwerp ek opgetel het nie. [Aanklaer] U kon nie voel dit is 'n mes nie? Op daardie stadium was my enigste gedagte, ek wil haar net van my af weg kry. Ek het nie gedink wat ek in my hand voel. Ek kon dit ook nie sien nie'

I see. I'm going to put it to you, Mrs Botha that it is highly improbable, if not impossible, that a person cannot know what you have in your hand, at least what type of object it is. You are busy misleading this Court. --- No, absolutely not. The object also had a serviette around, so I could not feel that it had any curves or anything else.
Well exactly, Mrs Botha, if it has a serviette around it, what is it? What is kept in a serviette in a restaurant, Mrs Botha? --- It could just as well have been a fork or spoon.' (My translation.)[16]

[42] The magistrate then asked the appellant whether she felt a serviette when she took the object, to which she replied that she did not feel that it was a knife because there was a serviette wrapped around it; that she did not rub or feel the object; that she simply took it; and that she did not notice what it was that she had taken. The magistrate found that the appellant contradicted herself regarding the question whether the object she had taken from the table was wrapped in a serviette, and criticised her for referring to a serviette in the first place. The magistrate missed the point. There was no contradiction: Mrs Fourie testified that the knife was still wrapped in a serviette after the deceased had been wounded.

[43] This is but one example where the magistrate, in my view, disregarded *the evidence* and instead arrived at conclusions – unsustainable on the evidence – based on propositions put to the appellant that were in any event completely answered, and inferences inconsistent with the proven facts, as is shown below. For example, there was no evidence that the appellant had decided not to remove herself from a dangerous situation; that she executed a 'stabbing movement' towards the deceased'; and that the appellant intentionally ('met mening') wounded the deceased. The State evidence that

[16] The evidence reads:
'Aanklaer: U sien mev Botha, u het ten minste vyftien minute by daardie tafel gesit saam met die oorledene se man voordat sy daar opgedaag het. Daarna speel al die gebeure af met die bakkie ensovoorts en daarna kom sy terug na u toe. Wil u nou eerlikwaar vir hierdie Hof kom vertel u weet nie wat is op daardie tafel nie, wat u ten minste vyftien minute by gesit het nie, sonder al die ander gebeure? U weet nie wat op daardie tafel is nie? Wel, soos ek gesé het, op daardie stadium wat die gebeure plaasgevind het, het ek regtig nie gedink om enige voorwerp spesifiek te gryp om haar seer te maak nie. [Aanklaer] Kan u vir die Hof vertel hoe is dit moontlik, want seer-sekerlik as 'n mens aan iets vat en jy sit dit in jou hande, dan het jy 'n idee wat in jou hande is, nie waar nie? Wat het u gevoel? Verduidelik dit dan vir fie Hof, wat het u gevoel? ... Die hele gebeure was soos twee sekondes, daar was nie eers tyd vir my om te voel fisies wat het jy in jou hand, waarmee is jy besig, wat gaan aan nie. Die enigste ding wat ek kon aan dink is ek wil haar net van my wegkry, want sy maak my seer.'

the appellant was pulled backwards and virtually off the bench by her hair was disregarded. So too, the fact that the deceased was bigger than the appellant; and Melissa's evidence confirming the appellant's version that she was on the ground while the deceased was still holding the appellant by her hair. Indeed, Mrs Fourie testified that she could not dispute that the appellant was on the ground.

[44] The theory that the appellant knew that there was a knife on the table because she had been sitting there for 15 minutes was just that: a theory, unsustainable on the evidence for the following reasons. First, there was no evidence that the appellant knew that what she had grabbed from the table was a knife. Neither Mrs Fourie nor Melissa said that they saw her grabbing a knife. On the contrary, Mrs Fourie said that she did not see what was in the appellant's hand. Indeed, Mrs Fourie supported the appellant's evidence quoted above in three crucial respects: (1) The defensive act took place in seconds – neither Mrs Fourie nor Melissa saw the appellant grabbing an object, let alone a knife from the table, or that the deceased had been stabbed with a knife; (2) Mrs Fourie testified that the appellant was bent over backwards when she executed a backward movement – she did not refer to this as a *stabbing movement*. So the appellant could not have seen what she had grabbed from the table. And (3) after Mrs Fourie saw blood coming from the mouth of the deceased, she saw the knife lying on the ground with a serviette around it. That is entirely consistent with the appellant's version – both Mrs Fourie and the appellant did not know that the deceased had been stabbed until they saw the knife lying in the serviette on the ground.

[45] Second, apart from the fact that there was no evidence to that effect, there was no reason at all for the appellant to have surveyed what was on the table – she and the deceased's husband had gone outside where they had drinks and smoked at the table. In fact, when asked whether they were eating (which would have focused the appellant's attention on the knife), Mrs Fourie replied negatively and said that the appellant and the deceased's husband were just sitting at the table. And the appellant did not have prophetic foresight that the deceased was going to attack her in the first place, nor that the deceased was going to return to the table after she had smashed the

windscreen of her husband's vehicle. Here again, the evidence points the other way: the appellant's unchallenged evidence was that she remained seated at the table because she thought that the deceased was not going to return after the first attack. How it could even be suggested that the appellant, by sitting at the table, or on the assumption that it was not the first time that she went to a restaurant, somehow knew that there was a knife on it which she could use in case of an attack on her (which she could never have foreseen), is beyond me.

[46] Third, it likewise cannot be suggested that the inquiry by the deceased's husband as to what was wrong, and the appellant's response that at that point she realised that she had stabbed the deceased with a knife, was a fabrication, let alone that it was not reasonably possibly true. As already stated, Mrs Fourie's evidence underscores this. It is further underscored by the common cause facts: the appellant grabbed an object from the table in split seconds, did not have time to think, and her sole intention was to stop the attack and get the deceased away from her. The majority, rightly in my view, concludes that the deceased had pulled the appellant backwards so hard that her feet lifted off the ground;[17] that there is no reason to reject the appellant's evidence that during the attack she was in pain, frightened and wanted to relieve herself of the pain; and that she could not think rationally because the attack was unexpected.[18]

[47] Despite this, it is said that 'the appellant was conscious of what she was doing when she took the steak knife from the table and … was aware of what was going on in her surroundings when she retaliated'. Then it is said that she had a 'clear recollection of what had happened' and could tell the court how she had 'used her … hand to look for the weapon on the table'.[19] These conclusions are not only contrary to the evidence, but also run counter to the rule that when considering the question of self-defence, a court must place itself in the position in which the accused was.[20]

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[17] Judgment para 9.
[18] Judgment para 11.
[19] *Ibid*.
[20] *Zikalala* fn 14 at 572B.

[48] The appellant did not look for a 'weapon' on the table. She consistently said that she was looking for something to get the deceased away from her, as is clear from her evidence:

[Prosecutor] And now you were feeling on the table for what? What were you looking for on the table? --- A menu or an ashtray.

Yes, and what did you want to do with it? --- I only wanted to like get her away from me. I did not at that stage think, I did not think of a way to hurt her or anything in that line, just wanted to get her away from me. I did not know how.

Now while you are testifying you are making a movement, opening a hand behind your back, is that correct? --- Say again.

As you are now testifying and saying you looked for a menu or an ashtray or something so that you just could get her away? --- Yes, something so that I could just get her away, because she was standing right behind me.

Yes, you are making a hitting movement backwards. --- Yes.

Good, and what happened next. You now feel here on the table and what happens? --- Well, I then, what I later found out, it was the knife, I found out only afterwards, I had the object in my hand and I made a movement backwards, which in any event did not help.

Court: … Yes a movement towards the back --- Yes, and in the process she had me off the bench by my hair, and still with both her hands dragged me on the ground.'[21] (My translation.)

[49] In *Patel*,[22] this court restated the rule that a court should not become an arm-chair critic, and approved the following passage in *Gardiner and Lansdown*,[23] which it said, 'is sound common sense':

'The danger may in truth not have been great, but the jury must consider whether a reasonable man, in the circumstances in which the accused was placed, would have thought that he was in

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[21] The record reads:
'En nou voel u op die tafel vir wat? Wat soek u op die tafel? Was dit 'n "menu", was dit nog 'n asbakkie. Ja, en wat wil u doen met dit? Ek wil haar net soos wegkry van my af. Ek het op daardie stadium nie gedink, ek het nie aan 'n manier gedink om haar seer te maak of enige iets in daardie lyn nie, ek wou haar net wegkry van my af. Ek het nie geweet hoe nie. Nou terwyl u getuig maak u 'n beweging, slaan 'n hand oop, agter u rug, is dit korrek? Sé weer. Terwyl u nou getuig en sé u soek 'n menu of 'n askakkie of iets sodat u haar net kan wegkry? Ja, iets wat ek haar net kan wegkry, want sy het reg agter my gestaan. Ja, u maak 'n slaanbeweging na agter. Ja. Goed, en wat gebeur toe nou. U voel nou hier op die tafel, en wat gebeur? Wel, toe het ek toe nou, wat ek later verneem het dat die mes was, ek het dit eers na die tyd verneem, het ek die voorwerp in my hand en ek het 'n beweging na agter gemaak, wat in elk geval nie gehelp het nie.'

[22] *Patel* fn 4 at 123H.

[23] Gardiner and Lansdown *Criminal Law and Procedure* 6 ed vol 2 at 1547.

great danger. A weapon less dangerous than the one used may have been at hand which would have sufficed to ward off the threatened assault but the jury must not expect too nice a discrimination or too careful a choice of weapons from a man called upon in a sudden emergency to act promptly and without opportunity for reflection.'

[50] There is nothing on record to gainsay the appellant's evidence that she had no time to think; that she had to act promptly; and that her only thought was to get the deceased away from her and stop the assault. So, nothing turns on the fact that the deceased was unarmed; or the appellant's statement that her life was not in danger as she was only being pulled off the bench by her hair and suffering pain as a result of the deceased's assault. Had the knife struck the deceased in her arm or shoulder, there would have been no debate that the appellant would have acted in self-defence. Logically, why should the position be any different because the same defensive act (which was not 'a stabbing movement directed towards the deceased's upper body')[24] unfortunately penetrated soft tissue that caused death? This, *a fortiori*, when the appellant did not know that what she had in her hand was a knife. Self-defence may arise in a range of circumstances where no death has resulted. In my opinion, the test as to its rejection or validity must be the same in a case where death has resulted.

[51] As regards the attacker being unarmed, Snyman says:

'There are certain circumstances where the defender may defend himself or herself with a knife against an attacker *who does not have a knife*. An example would be where the defender is physically weak whereas the attacker is strongly built and furthermore also has an accomplice or two at hand to assist in the attack, if necessary. It follows therefore that a physically weaker defender may in certain circumstances use more dangerous means than those at the disposal of the attacker.'[25]

And

'. . . . it must be emphasised that it is not the attacked party who should carry the risk of injuries or death by employing insufficient defensive measures. *It is the attacking party who bears the risk for the consequences of his or her action.* This is an important principle of private defence.

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[24] Judgment para 13.

[25] C R Snyman 'The two reasons for the existence of private defence and their effect on the rules relating to the defence in South Africa' (2004) *SACJ* 178 at 190-191. Emphasis in the original.

The law cannot recognise a set of rules regarding private defence amounting to the attacked party bearing the risk of harm arising from possible reasonable mistakes that may be made in the course of the defensive action. It is the attacker who must bear the risk, because it is he or she who initiated the whole set of events by resorting to unlawful aggression or threats of aggression against the defender.'[26] (My emphasis.)

[52] The deceased, who was bigger and physically stronger than the appellant, initiated the whole chain of events and plainly demonstrated violent and unpredictable behaviour. She assaulted the appellant not once, but twice. During the second assault, as the appellant was being pulled backwards from the bench with both hands by the deceased, she instinctively and with no time for reflection, reached for an object with which to ward off the attack. She executed a single defensive act backwards – where the attacker was. Unfortunately, the object the appellant used in defence was a knife with a sharp point which, as Dr Rowe testified, easily penetrated soft tissue which resulted in the death of the deceased.

[53] This brings me to the requirement of proportionality: whether there was a reasonable relationship between the attack and the defensive act. In my view, it cannot be said that in the circumstances, the defensive act was an unreasonable and excessive response to the deceased's attack. On the assumption that the appellant knew that she had grabbed a knife from the table, I asked counsel for the State what she was supposed to have done when she realised that she had a knife in her hand. The reply was that she had to drop it. The submission needs merely to be stated to be rejected. There is no doubt that the assault would have continued and the appellant would have had to tolerate it. But that is not the law, whether self-defence is grounded on the individual-protection theory (where the emphasis is on the individual who has the right to defend herself against an unlawful attack); or the upholding of justice theory (persons acting in private defence perform acts which assist in upholding the legal order, and private defence is meant to prevent justice from yielding to injustice).[27] Worse, had the appellant dropped the knife, there was a real possibility that the

[26] *Ibid*.
[27] Snyman fn 24 at 181.

deceased would have stabbed her with it, given the deceased's violent conduct and what had gone before.

[54] The magistrate however found that the appellant exceeded the bounds of self-defence and adopted the view that she could have: hit the deceased with her fist; knocked her with an elbow; tried to get back on her feet (this, after the magistrate found that it was highly improbable that the appellant had been lifted off the ground by her hair, given the build and weight of the deceased); and tried injuring the deceased on another part of her body, by stabbing the deceased in her arm or leg. The majority says that the appellant should have tried hitting the deceased with the handle of the knife; that she could have warned the deceased before stabbing; or that she could have aimed at the lower parts of the deceased's body.[28]

[55] Here again, the evidence was disregarded. When considered in its totality, there is really no difference between the versions of the State and the defence. Indeed, the following facts were common cause. Throughout the deceased was the sole aggressor. The second attack took place in an instant and the appellant could not weigh to a nicety the exact measure of her necessary defensive action. The deceased had grabbed the appellant with both hands by her hair, lifted her from the ground and pulled her head backwards. The appellant did not execute a stabbing movement, but instead instinctively grabbed an object and executed a single defensive act to get the deceased away from her, which stopped the unlawful attack. Therefore, the appellant's conduct was reasonable in the circumstances. I can put the point no better than the court in *Cele*[29] did, more than 70 years ago:

'In all these cases one has to bear in mind the human aspect of the attack. It is all very well for the person who sits in an easy chair and tries to analyse the various incidents that took place in order to produce a picture of what actually happened, and then, *ex post facto*, to say he ought to have done this and he ought to have done that as a reasonable man.'

[28] Judgment para 19.
[29] *Cele v Rex* 1945 NPD 173 at 176.

[56] It follows that the State failed to prove unlawfulness. The appellant's conduct in defending herself against the deceased's unlawful attack constituted a ground of justification. On this basis alone, in my view, the appeal should succeed.

Mens rea

[57] The magistrate concluded that having regard to where the wound was inflicted, and the stabbing movement executed by the deceased coupled with the amount of force when inflicting the stab wound, the appellant formed the requisite intention to kill in the form of *dolus directus* or *dolus eventualis*. Yet again, this conclusion was insupportable on the evidence.

[58] The court went further. When imposing the minimum prescribed sentence of 15 years' imprisonment for murder on the appellant, the magistrate said:

'What appeared to the court clearly during the trial and during the commission of the offence, was that the accused was involved in an extramarital affair with the deceased's husband.

That at the time of the incident she knew this, realised this. *That when the deceased approached the accused and her husband at the Dros, and confronted them about this relationship, the accused before the court then stabbed her with a knife that caused the death of this deceased.* That the accused went as far when she testified to even justify this extramarital affair.'[30] (My translation.)

There was no evidence that the appellant 'stabbed' the deceased when confronted about the extramarital relationship.

[59] The court a quo held that the appellant had the requisite intention in the form of *dolus eventualis* and upheld the murder conviction. It reasoned that the appellant not only foresaw the possibility that stabbing the deceased in the chest with a knife might

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[30] Emphasis added. The record reads:

'Wat vir die hof dan baie duidelik voorgekom het tydens die verhoor en tydens die pleging van hierdie misdryf, dat die beskuldigde betrokke was in 'n buite egtelike verhouding met die oorledene se man. Dat sy ten tye van hierdie voorval dit geweet het, besef het. Dat toe die oorledene vir die beskuldigde en die oorledene se man genader het by die Dros, en hulle aangespreek het oor hierdie verhouding, het die beskuldigde voor die hof haar toe met 'n mes gesteek wat die dood veroorsaak het van hiedie oorledene. Dat die beskuldigde sover gegaan het toe sy wel getuig het om selfs hierdie buite egtelike verhouding te regverdig.'

lead to her death, but also reconciled herself with that consequence by stabbing the deceased nonetheless.

[60] Both the magistrate and the court a quo erred. The appellant did not evince any direct intention to kill the deceased. Neither did she act with *dolus eventualis* because the defensive act was lawful. Further, she did not subjectively foresee the possibility that death would ensue, and did not reconcile herself with that possibility.[31] That much is clear from the appellant's evidence quoted above: all she could think of was to get the deceased away from her as she was suffering pain. Again, the evidence speaks for itself:

'[Prosecutor] And certainly the court can safely accept that if you for example, if one person strikes another person with a sharp object in the chest, that that person possibly could die because there are important organs that could be struck, not so? --- Yes, that is so.

Court: Important organs that could …

Prosecutor: that could be struck, that person could die.

Court: What is your answer, Madam? --- Yes.

Prosecutor: But you did not at that stage surely think about that, or what, according to your version? --- Well, as I said, I was not aware that I had a knife, so I did not think that I was going to stab at all.'[32] (My translation.)

[61] That the appellant did not have the requisite intention to kill, and that in the particular circumstances of this case she did not foresee, and could not have foreseen death as a consequence of her defensive act, is even clearer from this evidence:

'[Prosecutor] Now at the stage when you stabbed her and she still had you by the hair and you are now feet in the air, she was not strangling you . . . she was just for all practical purposes, pulling your hair, correct? --- Yes.

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[31] Snyman fn 24 at 178; *S v De Oliveira* 1993 (2) SACR 59 (A) at 65i-j.

[32] The record reads:

'En seer sekerlik kan die Hof veilig aanvaar dat as u nou byvoorbeeld, as een person 'n ander persoon met 'n skerp voorwerp tref in die bors dat daardie persoon moontlik kan doodgaan, want daar is belangrike organe wat kan raak gesteek word, nie waar nie? Ja, dit is so. HOF: Belangrike organe wat kan> AANKLAER: Wat kan raak gesteek word, daardie persoon kan doodgaan. HOF: Wat is u antwoord, mevrou? Ja. AANKLAER: Maar u het nie op daardie stadium seker daaraan gedink nie, of hoe, volgens u weergawe? Wel, soos ek gesé het, was ek nie bewus dat ek 'n mes gehad het nie, so ek het nie gedink dat ek enigsins gaan steek nie.'

Now did you at some stage think how that threatened your life? Did you think that she was going to pull your hair out of the skin of your head and you would then bleed to death? --- I did not think my life was threatened at that stage, I was just hurting.

But that notwithstanding you took the risk of taking any object that was there, that you could get, to get her away, as you now say and you executed this stabbing movement. --- I did not ever think that something like this could result in the death of someone, really.

What did you think, what was this something . . . that could not result in the death of someone . . . ? --- Well, the fact that I had stabbed her with the knife which I found out afterwards. I did not think . . . that someone . . . I heard many stories of persons who attacked each other with knives and stabbed ten, 20 times and then the person still lived. So for me, it is beyond me that one stab wound, [referred to] in the post-mortem report, could [end] someone's life. I cannot understand it.

So you think that if one stabs a person just once then he at least . . . [unclear]. --- No, that is not what I am saying. What I do say is that I cannot understand that something like this could have happened, that the incident could have taken place.

I am going to put it to you, Mrs Botha, the reason why it happened, Mrs Botha, is because you knew that there was a knife, you took the knife, Mrs Botha, you stabbed her in her chest, Mrs Botha, and into her lung, Mrs Botha, and that is why she died, that is how it happened. --- I could not really see behind me where to stab. I think it is humanly impossible to strike an artery behind your back . . . even if you studied science or the human skeleton or whatever.'[33] (My translation.)

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[33] The record reads:

Nou op die stadium wat u toe nou vir haar steek het sy vir u nog steeds aan die hare beet en u is nou voete in die lug, sy is nie besig om vir u te wurg nie, sy is nie besig om, sy het net, sy is net besig om vir alle praktiese doeleindes, u hare te trek, korrek? Ja. Nou, het u op 'n stadium gedink hoe bedreig dit nou u lewe daardie? Het u nou gedink sy gaan u hare uit u kopvel ruk dan bloei u vir u dood? Ek het nie gedink my lewe is bedreig op daardie stadium nie, ek het net seer gekry. Maar desnieteenstaande loop u die risiko om enige voorwerp wat daar is wat u nou in die hande kan kry, om haar mee weg te kry, soos wat u nous al sé en u maak hierdie steekbeweging. Ek het in my lewe nooit gedink dat so iets kan veroorsaak dat iemand doodgaan nie, regtig. Wat het u gedink, wat is hierdie so iets, dat so iets kan veroorsaak dat iemand doodgaan nie, wat se iets? Wel, die feit dat ek haar toe nou met die mes mos nou gesteek het wat ek na die tyd verneem het. Ek het nie gedink, in elk geval het ek nie gedink dat iemand so, ek het al baie stories gehoor van mense wat mekaar aanval met messe en tien, twintig keer steek met messe end an lewe die persoon nog, so dit is vir my, dit gaan my verstand te bowed at een steekwond wat nou op die nadoodse verslag is, dat dit iemand se lewe kon, ek kan dit nie verstaan nie. So u dink as 'n mens 'n persoon net een keer steek dan behoort hy darem . . . [onduidelik] Nee, dit is nie wat ek sé nie, wat ek net sé is, ek kan nie verstaan dat so iets kon gebeur nie, dat die geval kon gebeur nie. Ek gaan dit aan u stel, mev Botha, die rede hoekom dit gebeur het, mev Botha, is want u het geweet dat daar 'n mes is, u het die mes gevat, mev Botha, u het haar gesteek in haar borskas, mev Botha, en in haar long in, mev Botha, end it is hoekom sy dood is, dit is hoe dit gebeur het. Ek kon nie regtig agter my sien waar om

[62] Only two points need to be made here. First, on the analysis of the evidence above, the appellant's conduct in my view, does not begin to meet the test for negligence: that a reasonable person in the same position in which the appellant found herself when she was attacked, would have foreseen that the deceased would die as a result of her defensive act; that the reasonable person would have taken steps to guard against such a possibility; and that the appellant failed to take such steps.[34] Second, having regard to the evidence as a whole, it cannot be said that the appellant's version, more specifically, that she had to act in split seconds; that she grabbed something to get the deceased away from her; that she did not think of a way to hurt the deceased; and that she did not think that the defensive act would result in the death of the deceased, was not reasonably possibly true. It is trite that there is no onus on an accused to convince a court of the truth of any explanation she gives. Where an explanation is given, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable, but false beyond any reasonable doubt.[35] That is not the case here.

[63] I would uphold the appeal and set aside the conviction and sentence.

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A Schippers

Judge of Appeal

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te steek nie. Ek dink dit is menslik onmoontlik om 'n aar raak te steek agter jou rug, al het jy, al het jy wetenskap gestudeer of die menslike skelet of wat ookal.'

[34] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 43; *S v Motau* 1968 (4) SA 670 (A) at 677.

[35] *R v Difford* 1937 AD 370 at 373.

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