



<u>FACULTY</u>	: Law
<u>DEPARTMENT</u>	: Public Law
<u>CAMPUS</u>	: APK
<u>MODULE</u>	: CRL 41 YO/SFR 000 CRIMINAL LAW
<u>SEMESTER</u>	: First semester
<u>EXAM</u>	: Semester test 2

<u>DATE</u>	: 25 May 2019	<u>SESSION</u>	12.30:14.30
<u>ASSESSOR(S)</u>	: Prof MM Watney		
<u>MODERATOR</u>	: Dr E Fourie		
<u>DURATION</u>	: 2 hours	<u>MARKS</u>	: 70

NUMBER OF PAGES: 9 PAGES (INCLUDING THIS PAGE)

INSTRUCTIONS:

1. Please write your surname, initials and student number on the answering paper.
2. Please answer all the questions on the answering paper.
3. The answering paper must be handed in alphabetically.
4. The question paper is handed in separately to the answering paper.
5. Good luck with the examination.

QUESTION 1

THE SET OF FACTS IS BASED ON AN EXTRACT FROM THE COURT CASE, *S V BOTHA* 2019 (1) SACR 127 (SCA):

S v BOTHA 2019 (1) SACR 127 (SCA)

Citation 2019 (1) SACR 127 (SC)

Case No 1074/2017
[2018] ZASCA 149

Court Supreme Court of Appeal

Judge Tshiqi JA, Seriti JA, Zondi JA, Schippers JA and Mokgohloa AJA

Heard August 24, 2018

Judgment November 1, 2018

Counsel *M Kolbe SC* for the appellant.
SH Rubin for the state.

Murder — *Mens rea* — Intention to kill — Accused must have foreseen possibility that by directing knife towards upper body of deceased, who was attacking her, she might injure or kill her — No proof, however, that she had reconciled herself with occurrence of death or disregarded consequences of it occurring — Conviction for murder changed to one of culpable homicide.

Headnote :

The prosecution of the appellant on a charge of murder arose from an incident occurring after the deceased arrived at a restaurant where she found her husband and the appellant, who were involved in a love relationship. The deceased assaulted the appellant, smashed the windscreen of her husband's car, returned to the appellant and attacked her again by hitting her over the head with an ashtray, grabbing her and pulling her by the hair to the ground. While the appellant tried with one hand to remove the deceased's grip on her hair, she grabbed a steak knife from the table and directed a stabbing movement towards the deceased who was standing behind her. The knife penetrated the deceased's chest through the muscles of the anterior chest wall, through the lung and into the brachiocephalic vein. Both her lungs partially collapsed, and she died. The appellant was tried in the regional court, convicted and sentenced to 15 years' imprisonment.

On appeal, the High Court substituted the conviction of murder with *dolus directus* to one of murder with *dolus eventualis*, and reduced the sentence to 12 years' imprisonment. In a further appeal against the conviction and sentence,

Held, per Tshiqi JA (Seriti JA, Zondi JA and Mokgohloa AJA concurring), 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, she might injure or kill her. (See [13].)

Held, further, that although she had foreseen that possibility, it was not clear that the appellant had reconciled herself with the occurrence of death or disregarded the consequences of it occurring. There was no evidence that she had deliberately or purposefully aimed a firm thrust at the deceased. On the contrary, the evidence showed that she had simply turned around while sitting, and directed a stabbing movement towards the deceased's upper body. This suggested that her conduct was not an impulsive reaction to the attack being inflicted on her. The state did not prove all the elements of murder in the form of *dolus eventualis*, and the conviction fell to be set aside and substituted with one of culpable homicide. A sentence of three years' imprisonment, subject to the provisions of s 276(1)(i) of the Criminal Procedure Act 51 of 1977, was appropriate in the circumstances. (See [15] and [20] – [21].)

Cases cited

Cele v R 1945 NPP 173: referred to
Kruger v Coetzee 1966 (2) SA 428 (A): referred to
R v Difford 1937 AD 370: referred to
R v Patel 1959 (3) SA 121 (A): referred to
R v Zikalala 1953 (2) SA 568 (A): referred to
S v Bernardus 1965 (3) SA 287 (A): dictum at 307A – C applied
S v De Oliveira 1993 (2) SACR 59 (A): referred to
S v Grigor [2012] ZASCA 95: referred to
S v Heslop 2007 (1) SACR 461 (SCA) (2007 (4) SA 38; [2007] 4 All SA 955; [2006] ZASCA 127): referred to
S v Humphreys 2013 (2) SACR 1 (SCA) (2015 (1) SA 491; [2013] ZASCA 20): G dicta in paras [12] – [17] applied
S v Motau 1968 (4) SA 670 (A): referred to
S v Ngomane 1979 (3) SA 859 (A): referred to
S v Ntuli 1975 (1) SA 429 (A): referred to
S v Steyn 2010 (1) SACR 411 (SCA): referred to
S v Trainor 2003 (1) SACR 35 (SCA) ([2003] 1 All SA 435): dictum in para [12] applied
S v Van Aswegen 2001 (2) SACR 97 (SCA): referred to
S v Van der Meyden 1999 (1) SACR 447 (W) (1999 (2) SA 79): dictum at 449j – 450b applied
Union Government (Minister of Railways & Harbours) v Buur 1914 AD 273: dictum at 286 applied.

Legislation cited

Criminal Procedure Act 51 of 1977, s 276(1)(i): see *Juta's Statutes of South Africa 2017/18* vol 1 at 2-339.

Case Information

M Kolbe SC for the appellant.

SH Rubin for the state.

An appeal from a conviction and sentence for murder in a regional magistrates' court.

Order

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.' C

Judgment

Tshiqi JA, Seriti JA, Zondi JA and Mokgohloa AJA concurring):

The accused's conviction arose from an incident between her and the deceased at the Dros restaurant, Krugersdorp, on the afternoon of 27 July 2012. It is common cause that the deceased died as a result of complications following from a stab wound inflicted by the accused to her anterior chest wall during the incident. At the time the deceased's husband and the accused 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 accused from behind, assaulted the accused 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 accused 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 accused, swore at her and assaulted her again.

[3] The version of the accused on the nature and severity of this second attack is slightly different from that of the two eyewitnesses who testified for the state. The first state witness, Mrs Louise Fourie, said that there was a fight between the accused 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 accused 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 accused. During cross-examination she was asked whether the accused 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. During cross-examination she was referred to her earlier statement to the police where she stated that the accused was on the ground whilst the deceased was still holding her. When this discrepancy was pointed out she said that was what it looked like. Miss Fourie also said that she did not witness the actual stabbing.

[5] The accused'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 to 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, and 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. Doctor Rowe, who performed the post-mortem, testified that the wound inflicted on the deceased was approximately 4 – 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 were approximately two 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 accused 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. 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 appellant 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.

[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 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 movement, 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 requirements of self-defence were satisfied.

[60] Both the magistrate and the court a quo erred. The appellant did not evince any direct intention to kill the deceased.

Conviction for murder changed to one of culpable homicide.

You must give legal advice regarding the judgement.

Answer the following questions with reference to the given set of facts:

- 1.1 The accused did not use automatism as a defence (see par. 8). Very briefly indicate why the accused did not use automatism as a defence. (2)
- 1.2 The regional court found that the accused had exceeded the boundaries of her defence (see par. 7). Indicate very briefly why the regional court found that the accused had exceeded the boundaries of private defence. (1)
- 1.3 The Supreme Court of Appeal referred to the following 2 cases pertaining to her defence, namely *S v Grigor* [2012] ZASCA 95 and *S v Steyn* 2010 (1) SACR 411 (SCA). Briefly give the facts of each case, the test used and the judgement. (6)
- 1.4 The accused did not use the defence of necessity. Provide 2 differences between above-discussed defence and necessity. (2)
- 1.5 The regional court did not accept the defence of the accused but considered whether she had acted in putative private defence. Briefly define putative private defence. (2)

- 1.6 The Supreme Court of Appeal had to decide whether the High Court was correct in its finding that *mens rea* for murder in the form of *dolus eventualis* was proven. Define *mens rea* and discuss *dolus eventualis*. (5)
- 1.7 The Supreme Court of Appeal referred to *S v Ntuli* 1975 (1) SA 429 (A) and *S v De Oliveira* 1993 (2) SACR 59 (A) regarding fault. Give the facts and judgment of each case in respect of the fault element. (4)
- 1.8 The Supreme Court of Appeal overturned the conviction of murder and found the accused guilty of culpable homicide. Define the fault element for culpable homicide and motivate whether you agree with the judgement with reference to putative private defence. (6)
- 1.9 The Supreme Court of Appeal referred to *S v Humphreys* 2013 (2) SACR 1 (SCA) (2015 (1) SA 491; [2013] ZASCA 20. Briefly indicate why the court referred to this case with reference to the facts of the case and the judgement. (2)
- 1.10 Discuss fully why the accused did not use provocation as a defence with reference to the relevant element, case law and the test applicable. (10)

[40]

QUESTION 2

Set of facts:

A with B and C had planned a housebreaking with the intent to commit theft. They were under the impression that the home owner was away on holiday. However, when they broke in they discovered the home owner in residence. A was armed with a gun and shot the home owner. The primary motive for shooting the home owner was to prevent him from being able to identify A as one of the perpetrators.

After A and the other accused had loaded all the electronic equipment, money and jewellery into the home owner's car, they set the house alight. The motive for setting alight the house was to destroy evidence.

The J 88 reveals that the home owner died of carbon dioxide poisoning caused by the fire. His death was not as a result of the gunshot wound.

An anonymous tip resulted in accused A and the other accused being arrested. At the time of their arrest, they were found in possession of the stolen goods and accused A had the gun on him.

Accused A pleads not guilty. The defence argues that accused A cannot be held criminally liable:

- 2.1.1 The fire was a *novus actus interveniens*, and in the alternative;
- 2.1.2 The accused made a mistake regarding the chain of events.
- 2.2 The accused were under the influence of drugs that affected his criminal liability.
- 2.3 The accused's belief in witchcraft justifies the killing of the home owner.

You are the presiding officer in the criminal matter.

Answer the following questions with reference to the given set of facts:

- 2.1 You rejected the defence that the fire was a *novus actus interveniens* pertaining to the death of the home owner. Explain why you rejected the defence with reference to the relevant requirement, type of crime and definition of *novus actus interveniens*. (4)
- 2.2 Discuss fully the defence, mistake regarding the chain of events with reference to two case law and indicate whether you would accept the defence or not. (8)
- 2.3 If the accused were under the influence of drugs when he committed the crime, discuss with reference to case law how it may affect criminal liability. Indicate in your answer the approach the courts follow pertaining to intoxication as a result of drugs. (5)

- 2.4 Assume the accused alleged that he feared that the home owner may be a witch (wizard) and put a curse on him for breaking into his house. He alleges that his belief in witchcraft should serve as a defence for killing the home owner. Briefly indicate why you as the presiding officer rejected the defence of witchcraft with reference to case law, the relevant section in the Constitution and whether your rejection contradicts decolonisation. (4)
- 2.5 Assume accused A was referred for a psychiatric evaluation to determine whether the accused is fit to stand trial. Discuss the legal position where an accused is found not fit to stand trial with reference to relevant case law and legislation. (5)
- 2.6 Briefly discuss the theory of fault the South African courts apply. Indicate in your answer which theory of fault academic authors support. (4)

QUESTION 3

MULTIPLE CHOICE QUESTIONS

[30]

TOTAL: 70

Final comments:

- Please ensure that your SURNAME and student number are on the answering paper.
- Please remember that your assignment must be handed in paper format on/before 25 July 2019 (first class after the winter holiday). It must be handed in at class or to the tutor, Gugu.
- If you are repeating the module, please indicate on the answering paper that you are repeating this module.
- I wish to thank you for your commitment to your studies.
- I wish you a happy and well-deserved winter holiday.