Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
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IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Saakno / Case number: **CA & R 15/2017**
Datum aangehoor/Date heard: **05 / 06 /2017**
Datum gelewer/Date delivered: **19 / 06 /2017**

In the matter between:

MARIA GERTRUIDA ROSSOUW Appellant

and

THE STATE Respondent

Coram: Mamosebo, J *et* Erasmus, AJ

JUDGMENT ON APPEAL

ERASMUS, AJ

[1] The appellant was convicted on a charge of murder in the Regional Court, Calvinia, and sentenced to 15 years imprisonment in terms of the provisions of section 51(2) of Act 105 of 1997. She appealed against her conviction and

sentence, after leave to appeal had been granted on petition.

[2] The appellant had pleaded not guilty during her trial. In her plea explanation, she admitted to having stabbed the deceased on 2 March 2014 and that he had died as a result of the stab wound she had inflicted on him. It was stated that she had acted in self-defence.

[3] It is trite that there is no *onus* on an accused in a criminal case and that the State had to prove the guilt of the appellant beyond reasonable doubt.[1] This includes that the State had to prove that the appellant had not acted in self-defence and, if she had defended herself against an attack by the deceased, that she had exceeded the legitimate bounds of self-defence.

[4] The issue whether the appellant had acted in self-defence must be considered in the context of the evidence of the eye-witness, Mr Jimmy Solomons. He was a single witness in respect of the interaction that had taken place between the appellant and the deceased on the night in question.

[5] According to Mr Solomons he had gone to bed at 22:00 and shortly thereafter heard a scuffle outside his room and the

[1] *S v Jochems* 1991(1) SACR 208 (A) at 211E-F; *S v V* 2000(1) SACR 453 (SCA) at 455A

appellant calling his name. He proceeded to the kitchen where he found the appellant and the deceased quarrelling. At that stage the appellant had a knife in her hand and was standing at the door of the house. The deceased was inside the house, near the stove. The deceased moved towards the appellant and attempted to grab her. The appellant performed a stabbing action in the direction of the deceased, but missed him. The deceased jumped back, but again approached the appellant in an aggressive manner. This time he grabbed the appellant by her arms. The appellant again stabbed at the deceased and inflicted the fatal wound to his chest. The deceased left the house and, shortly thereafter, passed away in the street near the house of the appellant.

[6] The contents of the post mortem report, which had been handed in by agreement between the State and the accused, were not in dispute. From the report it appeared that the appellant had stabbed the deceased once on his chest and that the wound had penetrated into the left ventricle of the deceased's heart.

[7] There is objective evidence that the appellant had sustained bruises on her arms. These had been inflicted by the deceased and corroborated the evidence of Mr Solomons.

[8] It was common cause between the State and the appellant that the:

8.1 appellant and the deceased had been in a relationship and that this relationship had been terminated;

8.2 deceased had previously assaulted the appellant;

8.3 deceased had been bigger, heftier and stronger than the appellant.

[9] The Court *a quo* refused the appellant's application for her discharge at the end of the State's case. The appellant thereafter closed her case without adducing any evidence.

[10] It has long been settled law that a court of appeal should be slow to interfere with the factual findings of the trial court.[2] In the absence of factual error or misdirection on the part of the trial court, its findings are presumed to be correct.[3]

[11] Criticism was levelled against the evidence of Mr Solomons as his *viva voce* evidence had contradicted the version contained in his police statement. The Court *a quo* considered all the evidence and had carefully scrutinised the evidence of Mr Solomons in accordance with the guidelines

[2] *R v Dlumayo & Another* 1948(2) SA 677 (A) 705-6
[3] *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e- f

laid down in *S v Mafaladiso en Andere.*[4] The learned Magistrate had also approached Mr. Solomon's evidence with the necessary caution, as was required of her as presiding officer. We are satisfied that the Court *a quo* had not misdirected herself in accepting the evidence of Mr Solomons.

[12] In *S v De Oliviera*[5] Smalberger JA stated the test for self-defence as follows:

> "*The test for private defence is objective — would a reasonable man in the position of the accused have acted in the same way (S v Ntuli 1975 (1) SA 429 (A) at 436E)...*"

[13] The learned Judge proceeded in setting out the legal position in respect of putative self-defence as follows:

> *"In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude dolus in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide..."*

[14] The test as to whether the appellant had acted in self-defence, appears to have been applied correctly by the

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[4] 2003 (1) SACR 583 (SCA) at 593i-j

[5] 1993 (2) SACR 59 (A) 63i-64b; See also *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015) 2016 (1) **SACR** 431 (SCA) at para [52]

Court *a quo.* In *S v Makwanyane and Another* [6] at paragraphs [138] and [144] Chaskalson P stated:

"*Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with s 33(1). To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger. The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty. But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to" .*

And:

"*The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.*"

[15] The Court *a quo* found that the evidence that had been presented during the State case called for an answer from the appellant. The appellant elected not to testify in her own defence. The learned Magistrate appropriately referred

[6] [1995] ZACC 3; 1995 (2) SACR 1 (CC)

to and applied the principles that had been laid down in *S v Boesak.*[7]

[16] We are satisfied that a reasonable person, in the position of the appellant, would not have acted in the same way as the appellant and would not have stabbed the deceased under the circumstances that had existed at the time. The appellant had not acted reasonably and legitimately in order to protect herself against the deceased.

[17] Even if it is accepted that the appellant had believed that there had been an imminent threat to her person, the degree of violence she had used was disproportionate to the attack on her person. She had thus exceeded the bounds of self-defence and her actions were unlawful. This raises the issue whether the State had proven that the appellant had the necessary intent to commit murder. Mr Van Tonder, on behalf of the appellant, correctly conceded that the appellant had intentionally killed the deceased and that the form of *dolus* in this instance is *dolus eventualis.*

[18] Given the circumstances under which the wound had been inflicted, the weapon used and the position and nature of the wound, we are satisfied that the appellant had foreseen the possibility of the death of the deceased as a result of her

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[7] 2001(1) SA 912 (CC) at para [24] and also reported as 2001(1) SACR 1 (CC) ; See also *S v Francis* 1991(1)SACR 198 (A) at 203h-j

actions, and secondly, that she had reconciled herself with this possibility by stabbing the deceased.

[19] In this instance it cannot be found that the Court *a quo* had misdirected herself on the facts or the law. It follows that the appeal against the conviction stands to be dismissed.

[20] The offence that the appellant had been convicted of falls under Part II of Schedule 2 of Act 105 of 1997. The prescribed minimum sentence in this instance is 15 years imprisonment, unless substantial and compelling circumstances were found to be present. The trial court had found no such circumstances and had imposed the prescribed sentence.

[21] With regard to sentence, it should be kept in mind that ordinarily the test on appeal is not whether this Court would have imposed a different sentence, but whether the Court *a quo* had exercised its discretion judicially.[8] In *S v PB*[9] it was stated that the approach should be different where a sentence had been imposed in terms of Act 105 of 1977, as these prescribed sentences could not be departed from lightly or for flimsy reasons. A proper enquiry is required on appeal as to whether the facts that had been considered by the sentencing court, constituted substantial and compelling circumstances.

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[8] *S v Obisi* 2005(3) SACR 350 (W) at 353 para [7]; *S v Pillay* 1977(4) SA 531(A) at 535 E-G

[9] 2013(2) SACR 533 (SCA) at 539F-G

[22] The personal circumstances of the appellant were common cause. The appellant was 40 years old at the time of sentencing and a first offender. She had completed grade 9 at school. She had three daughters aged 19, 16 and 4 years old. The appellant had been gainfully employed. She was a member of a church and had actively participated in church activities. The appellant had been moderately under the influence of alcohol during the commission of the crime. The deceased had assaulted the appellant on several occasions in the past and there had been a measure of provocation before the commission of the crime.

[23] Mr Van Tonder submitted that the circumstances, set out above, cumulatively amount to substantial and compelling circumstances and that the imposition of the minimum sentence in this instance constitutes an injustice.

[24] It was stated in *S v Malgas*[10], that all factors that traditionally taken into account during sentencing continue to play a role and must be measured against the yardstick of substantial and compelling circumstances. If the particular circumstances of a case are such that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the accused and the needs of society, a Court is entitled to impose a lesser sentence.

[10] 2001(1) SACR 469 (SCA) at 481B-C and 482C-F

[25] In this instance we are satisfied that, as a result of a consideration of the circumstances present, the cumulative effect of these circumstances can be characterised as substantial and compelling which would render the imposition of the minimum sentence unjust. It follows that we can therefore interfere with the sentence of the Court *a quo* and deem a sentence of 12 years imprisonment as appropriate.

We make the following order:

1. THE APPEAL AGAINST THE CONVICTION IS DISMISSED.

2. THE APPEAL AGAINST THE SENTENCE SUCCEEDS AND THE SENTENCE OF FIFTEEN (15) YEARS IMPRISONMENT IS SET ASIDE AND REPLACED WITH THE FOLLOWING:

"THE ACCUSED IS SENTENCED TO UNDERGO TWELVE (12) YEARS IMPRISONMENT."

3. THE SENTENCE IS ANTEDATED TO 24 APRIL 2015.

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SL ERASMUS
ACTING JUDGE

I concur.

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MAMOSEBO MC
JUDGE

For the Appellant:	Adv. Van Tonder (oio Legal Aid SA)
For the Respondent:	Adv. Kgatwe (oio NDPP)