REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case number: 332/2001

In the matter between:

HARRY JAMES JOSHUA Appellant

and

THE STATE Respondent

CORAM: **NIENABER, CAMERON and MPATI JJA**

HEARD: **9 MAY 2002**

DELIVERED: **31 MAY 2002**

Summary: Criminal liability – *mens rea* – test for putative private defence – accused's honest but erroneous belief that his life was in danger excludes *dolus* – culpable homicide – sentence.

JUDGMENT

MPATI JA:

[1] The appellant was arraigned before Rose-Innes J and two assessors in the Cape Provincial Division on five counts of murder (counts 1-3 and 5 and 6) and two of attempted murder (counts 4 and 7). He was acquitted on count 1 but convicted as charged on the remaining counts. He was sentenced to 15 years' imprisonment on each of the four remaining murder counts and five years' imprisonment on each of the two attempted murder charges. All the sentences were ordered to run concurrently, with the result that the effective term of imprisonment is 15 years. Rose-Innes J granted the appellant leave to appeal to this Court against the convictions and the sentences imposed.

[2] The charges against the appellant arose from the following facts. The appellant and his family lived in Welgelegen Avenue, Delft, Cape Town. During the afternoon of 23 May 1994 the appellant's wife was robbed of a sum of R200 in the presence of her two minor children (a girl aged 12 years and a boy aged 8 years) after she had

made purchases of household necessities. When she arrived home she telephoned the appellant, who was at work and reported the robbery to him. She informed him that she had been robbed by two youths of whom one held a knife to her throat. From the description she gave him the appellant had an idea of who his wife's robbers were. Later that evening he and his wife discussed the robbery over supper. At approximately 20h30 he requessed his next-door neighbour, Tohier Hofmeyer, to accompany him in search of his wife's robbers. Hofmeyer agreed. The appellant went into his house and armed himself with his 12 bore calibre Mosberg pump action single barrel shotgun which he fully loaded with six cartridges while Hofmeyer waited outside. He was well trained in the use of this type of firearm. He took an additional six cartridges and concealed the shotgun under his overcoat.

[3] When fully loaded the gun holds five cartridges in the magazine and a sixth in the chamber. The cartridges are designated "LG" which indicates that the shot or

pellets inside the cartridge are the largest available. There are eight pellets in a cartridge.

[4] Across the street in front of the appellant's house is a large sports ground fenced with a vibracrete wall. The appellant and Hofmeyer entered the sports ground through a gate in Welgelegen Avenue and walked across the length of the sports ground towards the far left-hand corner which abuts Delft Main Road. On approaching that corner they heard voices and on walking further they saw a group of five youths sitting in an "L"-shape against the wall in the corner. These youths were drinking beer and, according to the appellant, smoking what he believed was dagga. The appellant and Hofmeyer walked up to the youths, where, standing from a distance of approximately two to three paces from them, he demanded his wife's purse from one of them, who fitted the description given to him by his wife as one of her robbers. It is not in dispute that this youth was Marlin Mohammed (Marlin), a 17 year old schoolboy and the

deceased in the first count. I shall deal with the detail of what followed later in this judgment but the upshot of it all was that the appellant fired four shots with his shotgun with the result that three of the youths, namely Marlin, Fabian Rossouw (Fabian) (a 17 year old, the deceased in count 2) and Mervyn du Plessis (Mervyn) (also 17 years old, the deceased in count 3) were fatally wounded. Another youth, Ivan Mootjie, 14 years old at the time and the complainant in count 4 (attempted murder), was badly injured in his left upper arm.

[5] Ivan Mootjie's brother, Etienne Isaacs (Etienne), managed to run away but was pursued by the appellant who, during the chase, loaded two more cartridges in his shotgun. Etienne was eight paces ahead of him. At a certain stage the appellant took aim at Etienne but decided against shooting him. Etienne jumped over the wall of the sports ground and ran into a side street which led him into Delft Main Road. He testified that he ran along Delft Main Road, passed the house of one Abdurahman

Hassan (deceased in count 6) and hid in the bushes along Delft Main Road.

[6] The appellant, having loaded more cartridges in the shotgun, climbed over the wall and followed Etienne to Delft Main Road. He testified that when he entered Delft Main Road he saw Etienne enter Hassan's house. Hassan was unknown to him. He ran along Delft Main Road and when he came close to Hassan's house, which was approximately 175 meters from the scene of the shooting at the sports grounds, he saw three men standing at the door. The door was open. As to what happened then the versions of the State and the defence differ.

[7] Moses Gouws, 30 years of age and complainant in count 7 (attempted murder), testified that during the evening in question he, Hassan, Johannes Jacobs (deceased in count 5) and Faizal Petersen were in an outside room in Hassan's house when an unknown man (the appellant) peeped through a window and asked about a youth who had allegedly run through the property. At that stage Hassan was busy preparing

supper for them and was peeling potatoes. He had a fixed-blade knife in one hand and a potato in the other. Hassan then opened the door and the three of them (Hassan, Jacobs and the witness) stood at the door, with Jacobs slightly behind and to the side of Hassan and the witness behind them but inside the room. The appellant was approximately two to three paces from them. Hassan's dog came around the corner of the house and barked at the appellant but did not charge or threaten to bite him. The appellant suddenly took out a firearm from underneath his long overcoat and shot the dog. It fell and died close to the door. When Hassan asked why the appellant had shot his dog the appellant turned and shot Jacobs, who fell and died where he had been standing in the doorway. Thereafter the appellant shot Hassan, who staggered forward as a result of being shot. He asked the appellant: "Skiet jy nou vir my ook?", whereupon the appellant fired a second shot at him. Hassan, who still had the knife and a potato in his hands then fell down.

[8] Gouws continued that when he realised what was happening he turned around and ran further into the room. While doing so another shot went off and he felt a burning pain in his right shoulder as a result of which he fell to the floor. A further shot was fired which struck the wall above and ahead of him. He was approximately five paces from the door when he was shot from behind. He called out to Faizel Pietersen, who was hiding behind a cupboard, that he had also been shot. He assumed, from the position where he was when he was shot, that the appellant must have moved from where he had been standing when he shot Jacobs and Hassan. Gouws testified that the appellant, after shooting him, entered the room and kicked him, saying: "Ja, jy is ook vrek". He went out after the appellant had left and he sat outside until an ambulance arrived and conveyed him to Tygerberg Hospital.

[9] Gouws's version is supported in material respects by Faizel Pieterson, although there are certain discrepancies in their testimony. While Gouws testified that after

Hassan had opened the door he did not say anything, Faizel Pietersen testified that Hassan enquired from the appellant whether he could help him ("kan ek jou help?"); that after the door was opened, Hassan and Jacobs stood at the door, with Hassan slightly outside, although the witness was unable to say how far from the door Hassan was. When Gouws called out to him that he had been shot he grabbed Gouws, threw him onto the floor and then hid behind a display cupboard in the room. He then heard footsteps inside the room but could not say how far they progressed into the room. The person, however, went out again without having said anything. The witness remained where he was hiding until he heard someone scream outside. He went out and saw that it was Fabian's mother.

[10] The appellant's version is that while he and Hassan were exchanging words about the youth, who he alleged had run through Hassan's property, a dog came out of the house and barked at him. He testified that the three men (Hassan, Jacobs and

Gouws) were storming at him. Hassan set the dog on him and when it charged he shot it. He then shot Hassan who was advancing on him with a knife in his hand. Thereafter he fired further shots as the men continued to advance, so the appellant testified. He was retreating as he fired. He did not know how many shots he fired. He believed that by setting the dog on him the men wanted it to draw his attention, thereby creating an opportunity for them to attack him. There was no opportunity to turn around and run away as the three men would have attacked him from behind, so the appellant continued. He was thus obliged to defend himself against the imminent attack as his life was in danger. He fired the shots in rapid succession. After the shooting he saw the door of the house next to Hassan's open and close again. He then ran home.

[11] The appellant denies that he entered Hassan's house. In this regard he finds support, in my view, from Wilma Rossouw (Fabian's mother). She was Hassan's next-

door neighbour and was at home on the evening in question. She testified that when she heard shots close by she opened the door and saw a man in a long overcoat with a firearm in his hand. When he turned and looked at her she slammed the door close. She then thought of her son Fabian, who frequented Hassan's house and she immediately opened the door again. By this time the man had disappeared. She went out and saw the bodies of Hassan and Jacobs. Wilma Rossouw confirmed that the man she saw with a firearm could not have entered Hassan's house and come out again before she had opened her door on the second occasion.

[12] It is, however, not necessary to make a finding on this aspect as will be shown presently. Photographs of the scene of the shooting at Hassan's house form part of the record. These photographs depict Hassan's body lying a few paces away from the door of the room from which he and Jacobs had emerged. Jacobs's body can be seen lying in the doorway with his knees bent and his feet on the ground just outside the door,

while the rest of his body is inside the room. According to the findings of Professor Jurie Potgieter Nel, who performed the post mortem examinations on the bodies of all the deceased on 24 May 1994, Hassan was shot three times. There was a shotgun wound of the right forearm where the anterior muscles were ripped off. Associated with this wound there was a gaping entrance wound on the right frontal side of the right chest near the sternum with three smaller peripheral wounds next to it. It appears that the wounds to the right arm and right chest were caused by the same shot. There was another group of shotgun wounds in the left chest. The third shot caused eight entrance wounds in the left hip area, spread over an area of 140 mm by 90 mm. All these wounds (chest and hip) caused severe internal damage. The cause of death was "veelvuldige skietwonde".

[13] Jacobs died as a result of "skietwonde van die bors", according to Professor Nel. He had shotgun wounds in the left arm and left chest and another wound through the

left abdomen. The wounds in the arm and chest appear to have been caused by one shot. Professor Nel testified that the wounds sustained by Jacobs evidenced a larger spread of slugs or pellets and those sustained by the rest of the deceased, which means that he would have been further from the appellant than the others when he was shot. However, he concluded from the size of their left chest wounds that to have sustained such wounds Hassan and Jacobs would have been shot from approximately the same distance. Although there was no indication of the sequence in which Hassan sustained his wounds, Professor Nel testified that the largest spread of entrance wounds was in the hip area, followed by the wounds in the left chest and then the right chest. Hassan was thus furthest from the appellant when he sustained the wounds in the hip area.

[14] A ballistics expert, Lieutenant Johannes Willem Nel, concluded from his examination of their wounds that Jacobs was shot from a distance of approximately 5-6 meters, while Hassan was shot from approximately 5-6 meters when he sustained the

wounds in his right forearm and from approximately 2 meters when shot through the chest. Professor Nel's conclusion that Hassan was furthest from the appellant when he sustained the wounds in the hip area suggests that at a certain stage Hassan was further from the appellant than Jacobs. Of that there is no suggestion in Gouws's evidence. That anomaly, however, does not affect the end result.

[15] There is some discrepancy regarding the injuries sustained by Gouws. Dr Jan Stadler Kirsten, an orthopaedic surgeon at Tygerberg Hospital, confirmed in his testimony that he attended to Gouws and Ivan Mootjie on 23 May 1994. He had recorded that Gouws had sustained six wounds to the right shoulder blade and one at the base of the neck, which means that he had been shot from behind. During the trial, however, Gouws displayed his injuries to the court, which recorded that there are three heeled marks on the left and three on the right of his spine. As the court *a quo* held, this discrepancy is not material. What is clear is that the location of the wounds

supports Gouws's version that he was running away from, or at least had his back to the appellant, when he was shot.

[16] The position of Jacobs's body as depicted on the photographs also supports the evidence of Gouws and Faizel Pietersen that Jacobs was standing at the door when he was shot and killed. Jacobs could thus not have advanced towards the appellant before being shot as was alleged by the appellant.

[17] As has already been mentioned above, Professor Nel concluded that when they sustained their left chest wounds Hassan and Jacobs would have been approximately the same distance from the appellant. Lieutenant Nel also concluded that when he sustained the wounds to his right forearm Hassan was approximately 5-6 meters from the person who shot him. This objective evidence is further support for Gouws and Faizel Petersen that Hassan was also standing at the door (Faizel Petersen said slightly outside) when he was shot. Gouws testified that after he was shot Hassan staggered

forward, whereupon the appellant shot him again. In my view, even if the appellant may have believed that Hassan was advancing with a view to attacking him, he had by then already dealt Hassan a fatal blow in the left chest and at a time when Hassan had been no threat to him.

[18] It follows that the appellant's defence of self-defence in this incident was correctly rejected by the trial court. On the facts, the appellant could not reasonably have believed that his life was in danger when he shot Hassan, Jacobs and Gouws. The convictions in respect of counts 5, 6 and 7 must, therefore, stand.

[19] Back to the first scene. The State's version, as testified to by Ivan Mootjie, may be summarised as follows: At 14 years of age he was no longer at school, having progressed only to standard 4. During the evening in question he, his brother Etienne and the three deceased, Marlin, Fabian and Mervyn, were sitting inside the sports ground and had just consumed one of six bottles of beer when they were approached

by two men. The two men (the appellant and Hofmeyer) stood 2-3 paces away from them when the appellant said, directing himself to Marlin: "Jy was vanmiddag saam, waar's my vrou se beursie?". Before he could elicit any response from him the appellant drew a firearm from under his coat, took two steps backwards and shot Marlin while he was sitting against the wall of the sports ground. Ivan Mootjie changed his evidence later in this regard and said that Marlin was on his feet when he was shot. Next to be shot was Fabian. He was shot while trying to rise after Marlin had been shot. Mervyn suffered the same fate. He tried to run away but was shot when he was approximately 5 meters from the appellant. Thereafter the witness was shot in his left upper arm from a distance of approximately 2½ meters. He was on his feet, having risen because of shock. The impact of the shot felled him. His brother Etienne ran away and the appellant ran after him. The witness seized this opportunity and ran through another gate out of the sports ground to the house of one Shameeg

Scholtz, from whom they had earlier purchased the six bottles of beer. Shameeg Scholtz summoned an ambulance and called the parents of the three deceased. Ivan Mootjie testified that the appellant's companion ran away when the shooting started.

[20] Etienne also testified. There were some contradictions between his evidence and that of Ivan Mootjie. He said, for example, that Marlin, when the appellant demanded his wife's purse from him, said: "Ek ken jou nie, ek weet nie waarvan jy praat nie". On Ivan Mootjie's version Marlin said nothing. It is in my view not necessary to record Etienne's testimony any further. The trial court found his reliability to be "open to considerable criticism". It also found, despite denials by Ivan Mootjie and Etienne that they were members of a gang known as Hard Livings, that the five youths were indeed members of such gang. (Etienne, however, testified that, bar himself, all the others were gang members.)

[21] The appellant's version was that when he asked for his wife's purse from the

youth who answered the description given to him by his wife the youth (Marlin) stood up, with a beer bottle in his hand, and said: "Moenie kak praat nie". The rest of the group then rose to their feet. When he repeated the question the other youths used foul language. Marlin then threatened to assault the appellant, lifted the bottle and moved forward as if to strike at him with it. The appellant stepped back and warned Marlin not to advance or else he would shoot. The youths surrounded him. Marlin then uttered the word "up", which the appellant interpreted as a command to attack. The youths were moving aggressively, the appellant testified, and were about to attack him. Marlin was virtually on him and according to the appellant Marlin was approximately 2-3 feet away. He testified that if he had turned around in an attempt to run away he would have been struck with the bottle. His life was therefore in danger. He accordingly drew his firearm and fired. He shot Marlin first and "then opened fire from right to left" as the other youths were advancing towards him. Two of the youths

ran away, one to the left and one to the right. The appellant ran after the one who was running to his right, who we now know was Etienne. Ivan Mootjie was the other one. The appellant said that he pursued Etienne instinctively. The culmination of that pursuit has already been dealt with above.

[22] Hofmeyer did not witness the actual shooting, on his version. He testified that he turned and ran when he realised that they were about to be attacked. He had run approximately 15 paces from the scene when the shots went off. There are some discrepancies between his evidence and that of the appellant on what occurred before he ran away. The court *a quo* accepted his evidence, however, where he corroborated the appellant that the command "up" was given; that the appellant gave the warning: "Moenie nader kom nie, ek sal skiet", and that he (Hofmeyer) turned and ran away before any shots were fired. Consequently, the court *a quo* accepted the defence version that Marlin gave the command "up" and that he threatened to assault the

appellant and "held the bottle in a fashion which indicated an intent to strike [the appellant] with the bottle". It also accepted the appellant's evidence that he could not turn around and run away "because he would be hit behind the head with the bottle". It is on this basis that the appellant's defence of self-defence succeeded in respect of the killing of Marlin (count 1). These findings were accepted by the State. The significance of this position on appeal will now emerge.

[23] With regard to the shooting of Fabian and Mervyn the court *a quo* concluded from the location of their wounds and the position where Mervyn fell and died, taken together with Ivan Mootjie's evidence, that they were running away when the appellant shot them. It held that the "situation of self-defence against Fabian, Mervyn and Ivan no longer existed" when they were shot.

[24] Fabian was shot twice: once through the chest and once through the left upper leg. The last-mentioned wound was a gaping wound which went right through the left

upper thigh from the outer to the inner aspect, shattering the femur. A cardboard disc from the front edge of a cartridge, inscribed with the letters “LG”, was found inside this wound. The disc is ejected from the muzzle of a firearm when a shot is fired. The other shot struck Fabian on the posterior part of the left upper arm, behind and below the armpit. It went through the chest cavity, fracturing the fourth and fifth ribs. There were exit wounds in the right armpit. When his body was unclothed at the mortuary a plastic plug, which holds the pellets inside a cartridge, was found in Fabian’s clothing. According to the ballistics expert, Lieutenant Nel, when a shot is fired the plastic plug is ejected and falls to the ground approximately 2-2½ meters from the muzzle of the firearm. The cause of death was “skietwond deur borskas en been”.

[25] Mervyn sustained a gaping entrance wound behind the left armpit. It appears that all eight pellets from a cartridge entered his body as there were eight different wound tracks through the right lung. The plastic plug from the cartridge was found in

the aorta between the two lungs. There were two exit wounds in the area of the left armpit. The course of death was “skietwond van die bors”.

[26] The position of the wounds sustained by Fabian and Mervyn clearly shows that they were shot from the side, unlike Marlin, who was shot in the front of his chest near the sternum. I might mention that in the case of Marlin a plastic plug and cardboard disc marked “LG” were found inside his body. Mervyn’s body was found at a distance of 8 meters from where Marlin had collapsed exactly on the corner of the sports ground. The photographs, which form part of the record, indicate that Fabian fell and died right next to Marlin. To get to Marlin’s body one would have to step over Fabian’s body.

[27] Because the plastic plug was found inside Marlin’s body and the fact that the plug falls 2-2½ meters away from the muzzle of the gun, Lieutenant Nel concluded that Marlin would have been approximately 2 meters from the point of the barrel when he

was shot. He said the same in respect of Mervyn. As to Fabian, Lieutenant Nel estimated that he was shot from a distance of approximately 4 meters. From the position of Fabian's body as depicted on the photographs, i.e. right next to Marlin, the fact that the plastic plug was found on his clothing and the cardboard disc inside the wound in his thigh, it would not be unreasonable, in my view, to conclude that Fabian was more or less the same distance from the appellant, as was Marlin, when he was shot. Indeed Professor Nel also concluded that all three were shot from a distance of approximately 2-3 meters. There being no evidence that the appellant moved positions while he was shooting, the inference to be drawn is that Mervyn tried to run away after he had been shot and that he fell at a distance of 8 meters from where Marlin collapsed and died. Ivan Mootjie's evidence that Mervyn ran passed him before he was shot and that he was shot in the back while running cannot be correct. As I have already stated, Mervyn was shot from the side.

[28] The appellant testified that everything happened fast. It is important to bear in mind that in critical respects the trial court accepted his version in this regard. From this followed its acquittal of the appellant on count 1. There is to my mind no reason to reject the defence version that when Marlin gave the order "up" the rest of the youths advanced upon the appellant. What must be remembered is that these were gangsters, even though relatively young. As I have mentioned, Fabian and Mervyn must have been more or less within the same range from the appellant as Marlin when they were shot. One of two things could thus have happened for them to be shot from the side. Either they turned sideways to avoid being struck from the front, or they turned in order to get away. In either event, in my view, they could not still have been advancing with the view to attack. But they were still so close to the appellant that he may very well have believed that he was still in danger of the imminent attack as he said he was. That does not mean, however, that his invocation of the defence of self-

defence must be upheld.

[29] In *S v De Oliveira* 1993 (2) SALR 59 (A) this Court (per Smalberger JA) said the following (at 63i-64a):

> "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 436 E). 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."

In considering Fabian's position the court *a quo* said that if the appellant had paused for a moment before firing the second and third shots (Fabian was shot twice) he would have realised that "this man is turning away and I have nothing to fear from him". On this reasoning the trial court ought not to have convicted the appellant of

murder. Considering that the *onus* was on the State the evidence did not prove that the appellant did realize that his life was no longer in danger from Fabian.

[30] The court *a quo* held that the appellant must have realised that Fabian was running away from him and that he "must give him another few seconds because it looks as if he is turning away". Clearly, the court *a quo* arrived at this conclusion merely from the location of Fabian's wounds, which, as has been mentioned, indicate that he was shot from the side. In my view the trial court did the very thing against which it warned itself when it considered the verdict in respect of Marlin. It said that it had come to the conclusion that the appellant must not be treated as if he was in a position where he could calmly consider his options. The court *a quo* lost sight of the fact that the incident played itself out very fast. It also lost sight of the fact that Fabian was more or less the same distance from the appellant as Marlin was, having been advancing to attack. The fact that the appellant was "very well equipped and trained to

fire rapidly" does not alter the position, in my view.

[31] The same considerations apply in respect of Mervyn and Ivan Mootjie. The court *a quo* held that the shooting of these two youths "who were running away" was unforgivable. It erred, in my view, in holding that Mervyn and Ivan Mootjie were running when they were shot. I have already dealt with the position of Mervyn. As to Ivan Mootjie, he was, on his own version, shot from a distance of approximately 2½3 paces. He did not testify that he was shot while running.

[32] Based on what was said by this Court in *S v De Oliveira*, *supra*, in the passage quoted above, at worst for the appellant he should have been convicted of culpable homicide on the murder counts involving the deaths of Fabian and Mervyn. He erroneously believed that he was still in danger of being attacked by them and that he was accordingly entitled to retaliate, when in fact they were turning or had turned sideways, probably in an endeavour to escape. His erroneous belief that his life was in

danger excludes *dolus*. Again the same considerations apply to Ivan Mootjie, but fortunately he was not fatally wounded. Culpable homicide would thus not be a competent verdict in his case. Neither would a conviction of assault with intent to do grievous bodily harm because *dolus*, which is an element of the offence, is excluded. The appellant should accordingly have been acquitted on count 4.

[33] As to the sentences imposed, the appellant's counsel commenced his argument with a concession that 15 years imprisonment for murder seems to be a lesser sentence than would to now have been imposed. Counsel continued, however, that the trial court misdirected itself in failing to take into account the nature of the attack which the appellant believed he was facing; also that insufficient weight was given to various factors which I find unnecessary to list here. Ultimately, counsel's argument amounted to saying that a lengthy period of imprisonment was inappropriate in the circumstances of this case and that a sentence of correctional supervision in terms of s 276(1)(*h*) or (*i*)

should have been imposed.

[34] I agree with counsel for the State that the trial court did not misdirect itself in any respect. It painstakingly weighed all the relevant factors and, subject to what follows regarding the offences involving Fabian and Mervyn, arrived at what I consider to be appropriate sentences. It considered the cumulative effect of all the sentences and decided to ameliorate the position by ordering them to run concurrently. I can find no fault with the trial court's approach. Obviously the sentences in respect of counts 2 and 3 have to be set aside and sentences imposed afresh due to the alteration of the convictions from murder to culpable homicide. That will of course be cold comfort to the appellant since the sentences in respect of the other murder convictions will remain the same. I consider that 5 years' imprisonment for culpable homicide is an appropriate sentence in the circumstances of this case.

[35] One further aspect requires attention. Leave to appeal in this matter was granted

as long ago as 2 October 1995. Since then or soon thereafter the appellant has been out on bail. The record was only lodged on 14 August 2001, a delay of almost 6 years. When leave to appeal to this Court is granted to an accused the registrar of the court granting such leave is obliged, in terms of s 316(5) of the Criminal Procedure Act 51 of 1977, to cause a notice to be given to the registrar of this Court *without delay* and to cause to be transmitted to her a certified copy of the record. Rule 52(1) of the Uniform Rules of Court is substantially to the same effect. It would appear, *prima facie*, that the delay has to be laid at the door of the registrar of the Cape Provincial Division. We were not in a position to call for an explanation from that office. The delay is, however, inexcusable. The matter has remained in limbo for more than half a decade through a lack of administrative safeguards to prevent such occurrences. We were informed by Mr Cilliers, for the State, that previously no rules of procedure existed in the office of the Director of Public Prosecutions in terms of which a follow-up could

be made where an accused had been granted leave to appeal to this Court. Now there are - a welcome development indeed. One can only hope that delays of the nature encountered in this matter will be avoided in the future.

[36] The following order is made:

(a) The appeal against the appellant's convictions on counts 2 and 3 is upheld to the extent that each such conviction is altered to "guilty of culpable homicide".

(b) The sentences in respect of counts 2 and 3 are set aside and replaced in each instance with the following:

"5 years' imprisonment."

(c) The appeal against the conviction and sentence on count 4 succeeds and the conviction and sentence are set aside.

(d) The appeal against the convictions and sentences on counts 5, 6 and 7 is

dismissed.

(e) All the sentences imposed above are to run concurrently.

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L MPATI JA

CONCUR:

NIENABER JA)
CAMERON JA)