REPORTABLE

CASE NO. SA 15/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between

JOHANNES JONKERS APPELLANT

AND

THE STATE RESPONDENT

CORAM: Shivute, CJ, O'Linn, AJA, *et* Chomba, AJA

HEARD ON: 24/10/2005

DELIVERED ON: 21/04/2006

APPEAL JUDGMENT

INTRODUCTION

Chomba, A.J.A.: The controversial legal question which falls to be determined in this appeal is whether the appellant, Johannes Jonkers, who was convicted of murder with *dolus eventualis* in the court below, acted in self – defence when he killed one, Benjamin Dawid Jonkers (the deceased). When his trial commenced way back in March, 1998, his counsel, Advocate Z. Grobler, made a basic

admission on the appellant's behalf pursuant to section 220 of the Criminal Procedure Act, No. 51 of 1977. He submitted that the appellant did indeed kill the deceased, but that he did so in self – defence. The charge against the appellant being that the killing was unlawful and intentional, the admission made nevertheless meant that the charge was being denied. Therefore, a plea of not guilty was entered by the court on the appellant's behalf. After a full hearing in which two prosecution witnesses, the appellant himself and a defence witness, were heard, the learned trial judge in the court a quo, Gibson, J. found the appellant guilty with *dolus eventualis* and as charged. She then sentenced him to 15 years imprisonment.

The appellant made an unsuccessful application to the trial judge for leave to appeal against both conviction and sentence. Thereafter he, by petition presented to the Chief Justice, sought similar leave. Three judges of this court considered the petition and granted leave. The first appeal hearing slated for 16th June 2005 was abortive since the State, due to some unsatisfactory handling of appeal notices, were unready to proceed. We finally heard this appeal on October 24, 2005, and then reserved judgment. We have given due consideration to the heads of argument backed by oral submissions given by Counsel for both the appellant and respondent and now deliver this judgment.

This court first wishes to commend Mr. Grobler and Ms. L.E. Dunn, who represented the appellant and the State respectively before us. Their learned and spirited arguments and submissions, each of them in an endeavour to carry the day for his or her client, were quite inspiring. Before we consider those

arguments and submissions, I propose first of all to review the facts of this case as presented in the court below.

THE FACTS

The setting of the case was on Friday 31st January, 1997, and the scene was a locality known as Grysblok in Katutura Township Windhoek. It was in the evening of that day and at a house in the single quarters, but oddly enough no witness mentioned whose residence that house was. A gambling game of dice was being played on the material occasion.

There were a number of gamblers present, including the appellant, the deceased, one Andries Albertus Beukes, who later became the main prosecution witness in the trial aforementioned, and a man called Albertus du Preez, who became a defence witness. Some other persons collectively referred to as "the Owambos" were also participants in the gambling. Andries Albertus Beukes (hereafter “Beukes”) arrived at the said house at around 19:00 hours (7:00 pm). He joined in the gambling. As the evening wore on and as the gambling was going on alcohol was being consumed, but it is uncertain from the evidence whether all or some of the gamblers participated in drinking the alcohol. Beukes testified that Granada wine and some beer called tombo was consumed. Again the evidence was imprecise about how much of tombo beer was drunk.

At about 23:00 hours (11:00 pm) an argument erupted between the appellant and deceased over a bet. Beukes testified that the deceased won off the appellant a

bet of N$20.00; the latter disputed the win and demanded his money back. On the other hand, Albertus du Preez (Du Preez) swore that the winner was the appellant but the deceased grabbed the money back and hence the brawl between the two. The appellant's version, not surprisingly, was the same as that of his witness.

At the behest of the appellant, the quarrelling pair moved a distance from the gambling place and went on to the courtyard which was paved with interlocking bricks. The version of the events which ensued, as given by Beukes, was that the deceased advanced towards the appellant and as he got closer to the appellant, the latter produced a knife and fatally struck the deceased with it. The victim collapsed and death was apparently instantaneous.

The version as given by Du Preez was that before the quarrelling pair moved from the gambling place the deceased struck the appellant a blow with the hand and this landed on the appellant's left ear. This particular assault was conceded by Beukes. Upon being struck, the appellant challenged the deceased to leave and go aside so that the two could "finish it", an apparent slang meaning that the two should go aside and fight it out. Du Preez was at one with the appellant in asserting that as the deceased advanced towards the appellant he put his hand into a trouser pocket and then lunged at the appellant. The appellant testified that in doing so the deceased struck two or three blows with a knife, but each blow ended in the jacket he was wearing. The blows caused a tear in the jacket. The appellant said that during the onslaught, he was retreating backwards, but later he came against a fence which blocked further retreat. The appellant then,

in self – defence produced a knife and stabbed the deceased with it. He then walked away.

A Police Sergeant, Simon Kanyumara, was the investigating officer in this case. His testimony was that in the evening of that Friday, he was on stand-by duty. He received a telephone call as a result of which he proceeded to Grysblok in Katutura. There he went to a house in the single quarters. He found a crowd of people looking at a dead man who was covered with a white shroud. One man out of the crowd then came to the Sergeant and made a report. That person turned out to be Beukes. The latter reported about how that dead man met his death and also informed the Sergeant of the name of the suspect. The Sergeant eventually apprehended the suspect the same night and took him to the police station. The dead man was the deceased and the suspect the appellant in the present case.

The rest of the police Sergeant's evidence was as follows: Upon interrogation, the appellant informed the Sergeant that he, the appellant, was not the culprit in the murder case but that he knew the true culprit and he could identify him, although he did not know his name. Subsequently, however, the appellant owned up, confessing that he was the killer of the deceased, but added that he did so in self-defence. The appellant later led the Sergeant to a veld not far from the houses of Grysblok and in the grass there the appellant pulled out a knife which he said he had used in killing the deceased. He handed that knife to the Sergeant and that was the knife which the Sergeant produced as exhibit 1 during the time he gave evidence at the trial.

On the other hand Beukes claimed that he was the one who led the Sergeant to the veld where he pointed out the place where he had seen the appellant stick the knife in the grass on the material night. Beukes stated in court that after stabbing the deceased the appellant ran away, but he followed him. As on the material night there was moonlight, Beukes was able to see the appellant sticking the knife in the grass, although the appellant was then about 70 meters away from him at that time.

Exhibit 1, the knife, was the subject of controversy. The appellant and his witness denied that that knife was the weapon he used in the killing. His evidence was that when he learned later that night while he was visiting Du Preez that the man he had stabbed had died, he became apprehensive, went into the veld and threw away the knife. He was subsequently unable to lead the police to the place where he had thrown the knife. Du Preez's testimony on this point was that exhibit 1 did not belong to the appellant, but to the deceased. According to this witness Beukes took exhibit 1 from the scene of the stabbing and he, Du Preez, had thereafter seen Beukes in possession of the knife at work.

THE JUDGMENT OF THE COURT *A QUO*

The trial judge, quite rightly, held that this was essentially a case of a single identifying witness. She accordingly cautioned herself against the danger of acting on the unsupported evidence of such a witness. In cautioning herself she stated at page 13 of her Judgement:

> "Since Beukes was a sole witness to this events (*sic*) I have to treat his evidence with caution. Mindful that even a convincing witness could easily be mistaken about what he relates. I was careful to note the mistakes that Mr. Beukes made in his evidence and I am satisfied beyond all reasonable doubt that in relating the events of the night Mr. Beukes told the truth as he witnessed it, that in his account the truth of the events was clearly established beyond doubt. Not only was he consistent mainly, he was confirmed in some aspects by the inspection *in loco* and he was confirmed in some aspects by some of the evidence of Sergeant Kanyumara"

The evidence of Beukes, the single witness, is therefore critical to the destiny of this appeal. In this regard, it is necessary to mention at this stage that the trial judge discredited Sergeant Kanyumara as a witness. This was basically because during cross – examination Kanyumara conceded that he had made a prior statement relating to his investigation of this case. In a competent cross–examination, Mr. Grobler, who represented the appellant at the trial, exposed a number of aspects in which Sergeant Kanyumara's evidence in the trial materially conflicted with the earlier statement. I can do no better than reproduce the trial judge's observations in highlighting the conflicts. The following is pertinent:

> "From this point, the evidence of the state witness Sergeant Kanyumara was not free from difficulties, from the State's point of view. To the extent that an onset of doubts came upon me concerning the credibility of the Sergeant in most parts of his evidence. The statement made by the Sergeant concerning the events was admitted, it is an exhibit before the court. In that statement Sergeant Kanyumara stated in paragraph 9 as follows: 'suspect person interviewed at the station in the morning while the incident and the alleged offence of murder has been read and explained to him, but he denies the allegation and stated that he was present when the deceased was stabbed to death by his colleague Jona….. Jona has been searched and through the process one knife with a wood handle was handed to me by the witness

> Andries Albertus Beukes and that was the knife used stabbing the deceased person'. Just what this passage means is not all together clear to me for it appears to suggest that the finding of the knife followed the search upon a person named Jona. If this is what the statement seems to convey then what the Sergeant there stated is totally different from what he told the court. This contradiction is of substance." (See at pages 2 - 3 of her judgment).

The judge went on to highlight a number of other conflicts between the Sergeant's evidence and the contents of his earlier statement. She also highlighted conflicts between some aspects of the Sergeant's evidence and those occurring in the evidence of the single witness, Beukes, whose evidence she accepted as being credible. The overall conclusion she arrived at as to the Sergeant's credibility was as follows on page 4 of her judgment:

> "Having regard to these contradictions or inconsistencies in the Sergeant's evidence my view is that it reads so badly that it would be unsafe to act on it totally. I will however, accept that part of his evidence which, as I previously indicated, is confirmed by other evidence."

In a number of passages in her judgment the judge indicated the extent to which she placed credence on the evidence of Beukes. Here below are some of them:

> "Beukes, the single witness to the events came over as an objective and honest witness. Mr. Beukes was forthright in his answers and was not at all shaken during cross–examination." (Page 255 record).

> "Mr. Beukes did not hesitate to admit facts which showed the deceased who was his cousin in a bad light in the moments before the fight. That showed in my view the witness's genuine attempt to relate the events as he knew them?" (Page 257 – record).

> "Given the general objectivity of this witness and his inclination to accept even aspects, of the case which clearly did not reflect well

> upon his cousin, the deceased, I have no doubt whatsoever that if the truth had been otherwise at the time of the stabbing Mr. Beukes would not have hesitated to say it." (Page 258 – record).
>
> "In my view Mr. Beukes never exaggerated his evidence" and
>
> "All in all, on the witness's evidence I was quite satisfied that his evidence read well even allowing for slight mistakes and discrepancies." (Page 260 – record).
>
> "His demeanour was good, he looked comfortable under cross–examination." (Page 261 – record)
>
> "In conclusion therefore I find that the events related by the single witness Mr. Beukes established beyond reasonable doubt the truth of what transpired that night during the stabbing of the deceased…." (Page 265 – record).

As for the appellant and Du Preez, the trial judges' assessment of their credibility was uncomplimentary. She stated at page 265 of the record (page 15 of the judgment):

> "I have no doubt at all that the accused (appellant herein) and his witness were clearly caught lying. … I reject without hesitation the account given by the accused and his witness as false".

EVALUATION OF THE FACTS OF THE CASE

Ms. Dunn submitted to us that we should uphold the findings of the trial Judge as to the credibility of the single witness, Beukes. She contended that the trial Judge had an advantage which we, sitting as an appellate court, did not have, namely the advantage of seeing and hearing witnesses and of being steeped in the atmosphere of the trial. She added that the Judge in the Court *a quo* not only had

the opportunity of observing the demeanour of witnesses, but also their appearance and whole personality.

In support of her contentions Ms. Dunn cited the case of *R v Dlumayo*, 1948(2) SA 677 AD. In that case two of the appellate judges, namely Schreiner, J.A., and Davis, A.J.A., quoted with approval the following propositions made by Lord Thankerton in the House of Lords case of *Watt v Thomas*, (1947) 1 All ER 582 at page 587, *viz*:

> "I. Where a question of fact has been tried by a Judge without a jury and there is no question of misdirection of himself by the Judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because of the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

We were also referred to a local authority which has a bearing on the issue of how an appellate court should treat conclusions of fact touching credibility of witnesses. This was the case of *S v Slinger,* 1994 NR 9 (HC) in which O'Linn, J., as he then was stated the following at C – D:

> "Where no irregularities or misdirections are proved or apparent from the record, the Court on appeal will normally not reject findings of credibility by the trial Court and will usually proceed on the factual basis as found by the trial Court."

Having cited the foregoing authorities, Ms. Dunn contended that there existed in the present appeal no grounds for this court to interfere with the decision of the court *a quo* as the appellant's guilt was proved beyond reasonable doubt.

It is settled law that proof beyond reasonable doubt means that whatever doubt is left in the judge's mind after considering all the facts proved in a criminal trial must be reasonable, and not a fanciful doubt. To this end, the authority cited by Ms. Dunn is apt. That authority states:

> "Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice".
>
> See *Miller v. Minister of Pensions* (1947) 2 All ER 371 at page 373 – 374

I grant that the learned judge in the court below directed herself impeccably on the law when she cautioned herself against acting on the unconfirmed evidence of the single identification witness, Beukes. Having done that, her rating of the evidence given by Beukes was so high that at the end of the day she was convinced that she could safely depend on it in convicting the appellant as charged. Granted also that she was undoubtedly in the advantageous position of

seeing and observing the witnesses as they gave their evidence and indeed in being steeped in the atmosphere of the trial. Therefore her conclusion on the reliability and acceptance of the single witness, Beukes, can only be reversed by this court if there are misdirections in her evaluation having regard to the totality of the evidence on record, or indeed if I feel satisfied and sure that because of the reasons she has given in accepting implicitly the evidence of the single witness she did not take proper advantage of her having seen and heard that witness.

In considering how I should treat the trial judges' conclusion on the credibility of Beukes as a witness, I shall start with that piece of evidence which, like a number of other portions of his evidence, was elicited only under cross–examination. That was about the relationship between Beukes and the deceased. It was only during cross–examination that Beukes revealed that the deceased was his cousin, born of Beukes's aunt – an elder sister of Beukes's mother. Beukes was then asked if he wanted the person who stabbed his cousin to be punished. He answered affirmatively. That piece of evidence, in my view, showed that Beukes was a single witness with a possible bias. He might have had an interest to serve, namely to ensure at all costs that his cousin's killer is convicted and accordingly punished. In other words Beukes was a single witness who was not totally disinterested in the outcome of the trial. It is in my judgment important to bear this in mind as this witness's credibility is assessed.

Secondly, the tenor of his evidence was that appellant was the aggressor in the brawl which ended in the tragic fatal stabbing of the deceased. This was so until he was made to concede in cross–examination that the deceased was the first to

deliver a blow on the appellant's left ear. According to Beukes the deceased was the winner of the N$20.00 bet off the appellant. The latter demanded his money back, and then the deceased walked towards the appellant as the quarrel between the two progressed. When the deceased got close to the appellant, the latter produced a knife and stabbed the deceased with it. It was also only under cross–examination that Beukes conceded that the deceased was the bigger in physical build than the appellant.

Thirdly, in his evidence during examination-in–chief Beukes testified that when the appellant challenged the deceased "to go and finish it" the deceased walked to the appellant, the latter produced a knife, and delivered the fatal blow with it. The impression thus created when one reads that part of his evidence is that Beukes was an onlooker at the developments leading to the stabbing. It was only when the narrative was being challenged under cross-examination that it appeared that he never, for instance, saw the appellant produce a knife, let alone stab the deceased. He admitted under cross – examination that all he saw was the appellant withdrawing his hand from the deceased. This was because he was busy gambling and at that time his back was towards the quarrelling pair. He saw the withdrawal of the appellant's hand only when he turned round and looked at the two. In other words, Beukes did not see the actual stabbing.

Further it was Beukes's evidence that when the deceased was walking towards the appellant he did not have a knife in his hand. He said this in an apparent refutation of the version given by the appellant and his witness when they said that as the deceased advanced towards the appellant the deceased put his hand

in his pocket and produced a knife. According to the defence version the deceased then lunged at the appellant and delivered blows which only managed to cause a tear in the appellant's jacket. Beukes said he did not see all that. There then occurred the following questions and answers between the trial judge and Beukes:

> "Court: Now it has been put to you that the deceased put his hand in his pocket after the accused challenged him, according to you, into his right trouser pocket and pulled out a pocket knife; that the deceased then lunged at the accused with the knife and caught him in the jacket at the tear which was shown to you. You said that you didn't see any of that. That's right isn't it?
>
> Beukes: I didn't see that.
>
> Court: When you say you didn't see it are you saying that it might have happened and you missed it or are you saying that it didn't take place at all? What are you saying?
>
> Beukes: My lady, it could have happened but I didn't see it."

Those questions and answers related to a critical aspect of the case, touching as they did, on the appellant's defence of self–defence. They were also extremely relevant to the credit to be accorded to the evidence of Beukes. This was especially so in the light of the evidence which was elicited earlier from Beukes in cross- examination, *viz*:-

> "Grobler: And you see if, let me put this another way, at what stage was the first time that you saw a knife in the hands of the accused person?

Beukes: Just at the time I turned around and the accused already executed the stabbing it is when I saw the knife.

Grobler: So you didn't actually see the stabbing?

Beukes: So at the time I just turned around is when the time the, it was the time then that the accused already stabbed, removing his hand and bringing his arm down.

Grobler: Now were you standing with your back to them or what was the position?

Beukes: My lady I was, initially I was busy here with the game when they approached one another there so at the time I turned around and looked towards them it was then that I saw the accused bringing away his arm from the body of the, or from the deceased and bringing it down."

The picture which Beukes had portrayed in his evidence–in–chief, of watching the deceased approaching the appellant, of the appellant producing a knife and stabbing the deceased was thus exploded to smithereens by the answers Beukes gave to questions asked by the court and those of Mr. Grobler. As a result of these answers, a reverse picture was painted, a picture of Beukes having his back towards the deceased and appellant as they were confronting each other; Beukes was busy gambling; when he eventually turned round to face the duo all he saw was the appellant withdrawing his hand from the deceased. In the circumstances Beukes was not in a position to categorically refute the appellant's version, as supported by that of his witness, Du Preez. Beukes was equally not in a position to refute the version that the deceased struck two blows with a knife and managed only to inflict a tear in the appellant's jacket. What is more is that the answers to the court's questions and to those of the appellant's counsel, see supra, belied Beukes's assertion that as he walked towards the appellant, the deceased did not have any knife in his hand.

Yet another unsatisfactory piece of evidence which was shrouded in controversy was exhibit 1, the knife. Beukes's evidence purported to prove that it was the weapon the appellant used in striking the lethal blow on the deceased. Beukes testified that after the stabbing, the appellant ran away, Beukes followed him for some distance and saw the appellant hiding the knife in the grass. The defence denied that exhibit 1 was the knife used. The appellant said that he threw his knife away. Du Preez testified that exhibit 1 belonged to the deceased and that Beukes was the one who took it away from the scene of the events under consideration herein. It is not without significance that in the statement which Sergeant Kanyumara compiled as part of his investigation into the case, he recorded that he collected exhibit 1 from Beukes. Standing by itself that statement might not be of any consequence. But Du Preez testified that Beukes took a knife from the scene of the alleged crime and he identified that knife as exhibit 1. Is it not an odd coincidence which a court may have to consider, that Beukes is mentioned as the source of the knife which was produced as exhibit 1, although it was produced pursuant to evidence of a conflicting nature, since Sergeant Kanyumara testified in court that it was the appellant who led him to the place where the knife was recovered in the veld.

Furthermore, I am of the view that Beukes's evidence that the knife, exhibit 1, was the weapon used in stabbing the deceased ought to have been given more critical evaluation than was given to it by the trial judge. A knife which, according to the post mortem report on the deceased's body, had penetrated the heart and lung should reasonably be expected to have remained with blood stains on its

blade. It was recovered the very next day after the stabbing. At that time the stains could be expected to still be visible on the blade. After all it had supposedly been concealed in the grass. For some explained reason, however, the trial judge stated on a number of occasions in her judgment that the knife was found stuck in the ground and had to be pulled out. That finding of the fact was not borne out by any evidence. Sergeant Kanyumara's evidence was that the knife was found in the grass. So was Beukes's evidence. The factual finding that the knife was stuck in the ground could imply that the act of sticking it into the ground and later pulling it out caused the blood stains to be removed from the blade. As part of the investigation of this case, the knife ought to have been subjected to a forensic examination to determine whether or not there was blood on it and secondly, if blood was on it, whether or not the blood grouping of the stains on the blade matched with the blood grouping of the deceased's blood. Such forensic examination would have gone a long way to affirm or disaffirm that it was the weapon used in the alleged crime. Had the examination produced negative results on both scores, namely, that there were no stains on the knife's blade and thereby establishing no relationship with the deceased's blood group, such results could have been favourable to the appellant. It could thus have belied Beukes's evidence that the knife belonged to the appellant and that would have refuted the evidence that it was the weapon used in committing the alleged offence.

It is my considered opinion that when evidence is potentially available to the prosecution, but due to dereliction of duty on the part of an investigating officer, such evidence is not availed to the prosecutor and to the court in due course, a

reasonable presumption should be drawn that such evidence, if it had been adduced, might have been favourable to the defence. For that reason, I am of the view that the learned trial judge was incautious in readily accepting the evidence of Beukes that exhibit 1, the knife was the weapon used in stabbing the deceased.

Also not without significance is the evidence which Beukes conceded only under cross – examination. It was the evidence that the deceased was in the habit of going armed with a pocketknife every weekend. This evidence raised the probability that even on that fateful Friday, the start of the weekend, the deceased might have been so armed. That probability should not be excluded out of hand as the trial judge appears to have done by implicitly accepting Beukes's evidence which, in my view, was not without flaws.

The evidence of the appellant was also that when the deceased attacked him with a knife the blows of that attack caused a tear in his jacket. The jacket, with the tear in it, was displayed at the trial. Beukes conceded under cross-examination that the jacket was the very one which the appellant wore that Friday evening. That evidence, especially in the light of Beukes's concession, was highly relevant and an essential aspect of the case. It tended to prop up the appellant's version of being attacked by the deceased who was wielding a knife that caused a tear in his jacket. Yet the trial judge appears to have glossed over it despite its relevance.

In the light of all the foregoing I hold the view that much more creditworthiness was accorded to Beukes, than he deserved. Beukes was a single witness who:

(a) was a close relative of the deceased and therefore, a person with a possible interest to serve, namely to ensure that the person who killed his relation should at all costs face the consequences of the law;

(b) was so busy gambling most of the time while the confrontation between the deceased and the appellant lasted that he could not possibly have seen the appellant with a lethal weapon;

(c) on his own evidence under cross–examination, he only saw the appellant withdraw his hand from the deceased but never actually saw the stabbing;

The judge in the court below described Beukes's evidence as not having been exaggerated. To the contrary, it was exaggeration for him to have –

(i) denied that the deceased had any knife in his hand as he charged at the appellant, since at the time he turned to watch the brawl between the deceased and the appellant all he saw was the appellant withdrawing his hand from the deceased, after the stabbing;

(ii) asserted that he saw the appellant produce a knife and stab the deceased, since at the time of the stabbing Beukes was busy gambling with his back against the deceased and appellant.

(iii) asserted at one time that he participated in consuming only one bottle of wine and no other alcoholic drink, only to admit later under cross – examination that he also drank tombo beer.

In light of all the foregoing aspects which I have found to be adverse to the single witness, Beukes, I firmly hold the view that the judge in the court *a quo* did not apply sufficiently critically the otherwise correct direction she gave herself of treating with caution the evidence of a single witness. She came to the conclusion that Beukes had told evidence worth acting on in convicting the appellant in spite of the serious flaws in that evidence as I have highlighted in the preceding paragraphs. I have highlighted above a number of serious flaws in the evidence of Beukes. Those flaws notwithstanding, the trial Judge paid glowing tribute to Beukes as a witness of truth (see above). I feel sure that if she had directed her mind to them she would not have put on Beukes a stamp of creditworthiness to the high degree she did. I consequently hold that the unwarranted glowing tributes amounted to serious misdirections.

Additionally I am, for the same reasons, convinced and feel satisfied and sure that the learned trial judge did not take proper advantage of the opportunity she had of seeing and hearing the witness Beukes.

Quite apart from the flaws herein pointed out, one or two additional comments require to be made on the judgment of the court, *a quo*. As part of her notes regarding her observations at the scene of the stabbing she made the following comment:

> "Quite obviously therefore there were unlimited avenues of escape if the accused was so minded, if he felt that his live (sic) was in danger".

That observation seems to suggest that the appellant had a duty to retreat when he was under attack by the deceased as earlier narrated. The law does not impose a duty to retreat, especially as in the present case, where the attack was with a lethal weapon, a knife. One could expose oneself to greater danger by turning one's back to the onslaught. *Smith* and *Hogan*, the learned authors of the 8th edition of "*Criminal Law*", state the following at page 263 - 264.

> "There were formerly technical rules about the duty to retreat before using force or at least fatal force. This is now simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable. If the only reasonable course is to retreat, then it would appear that to stand and fight must be to use unreasonable force. There is, however, no rule of law that a person attacked is bound to run away if he can." (underlining mine)

The foregoing statement of the law reflects the English position. However, the Roman-Dutch position is basically *in pari materia* with English law. Jonathan Burchell, the learned author of " *Principles of Criminal Law*", second edition, states the following at pp 139 – 140:

> "Avoiding the attack
>
> Where the threat is one of personal injury, a defence is not necessary if the attack can be avoided by retreat or escape. Indeed some legal systems, concerned about the preservation of human life, impose on the victim of an attack a duty to retreat in so far as this is possible and would not expose the defender to even greater danger. Clearly, if to flee would be to worsen the acccused's chances of avoiding the injury, he would be justified in standing his ground and defending himself."

The author cites the case of *R. v Manuele Sile*, 1945 WLD 134 at 135 as authority for the preceding quotation. That was a case in which the deceased, a friend of the accused, had suddenly attacked the accused, stabbing the latter and causing him severe head injury. Reacting to the deceased's challenge to him to stand up and fight, the accused produced his own knife and struck the deceased on the cheek. The blow proceeded downwards and severed an artery, thus causing the deceased's death. The court was called upon to determine the question whether the accused's attack satisfied the self-defence test. In determining that question, Neser, J. stated the following in his judgement:

> "If there was no agreement to fight we are unanimously of the opinion that at the time of the assault the Crown has failed to prove that the accused did not act in self-defence. The *onus* is on the Crown throughout and if the accused tenders evidence of self-defence at the conclusion of all the evidence the Court, before it can convict, must be satisfied beyond reasonable doubt that the accused did not act in self-defence. At the place of the assault, the accused had reason to apprehend danger because the deceased was armed with a knife and had actually stabbed at him. …
>
> It is contended by the Crown that the accused could have avoided the injury which was threatened, in that he could have turned tail and fled. We feel, however, that any reasonable person in the position of the accused at the time would not have considered that it was safe to have done so. There was a distance of only two yards between himself and the deceased and had he turned his back on the

> deceased there was every danger of himself being fatally stabbed in the back. Under the circumstances we do not feel that it is reasonable to have expected him to turn tail and flee."

In the light of the adverse and dim view I have formed of the credibility of the single witness, Beukes, the appellant's version, as supported by defence witness Du Preez, has to be accepted. In summary that version was that the deceased advanced towards him, pocketknife in hand. He delivered two or three blows at the appellant while the latter was moving backwards. One of the blows tore the jacket which the appellant was wearing at the time. In those circumstances it was unrealistic of the trial Judge when she stated that there were unlimited avenues (for the appellant) to escape if he was so minded. My view would be the same even if the appellant's further evidence was discounted – as the trial Judge in fact did – when he testified that his continued movement backwards was blocked by a fence, thus justifying his own counter-attack. Based on the appellant's story, it is evident that at the time of the attack upon him the appellant was within arm's length from the deceased, since the deceased's knife blow was able to reach the jacket which was on the appellant's body and caused a tear in it. At such proximity it would be the height of folly for any reasonable person in the appellant's position to turn one's back in order to flee.

In the case of *The State v Gabriel Matheus*, case no. SA 11/2001, unreported, delivered on 21/06/2002, we had occasion to consider an argument on self-defence which was submitted before us on the appellant's behalf. My brother O'Linn, A.J.A., delivered the unanimous judgment of the Court in which he quoted

with approval the following dictum from the judgment of the full bench of the High Court in *The State v Naftali*, 1992 NR 299 at p. 303.

> "The defence of self-defence is more correctly referred to as private defence. The requirements of private defence can be summarized as follows:
>
> (a) The attack: To give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which had commenced or was imminent.
>
> (b) The defence must be directed against the attacker and necessary to avert the attack and the means used must be necessary in the circumstances. See: Burchell and Hunt *South African Criminal Law and Procedure,* Vol I, 2nd ed at 323 – 9.
>
> When the defence of self-defence is raised or apparent, the enquiry is actually twofold. The first leg of the enquiry is whether the conditions and/or requirements of self-defence have been met, which includes the question, whether the bounds of self-defence were exceeded. The test here is objective but the onus is on the State to prove beyond reasonable doubt that the conditions or requirements for self-defence did not exist or that the bounds of self-defence have been exceeded.
>
> When the test of reasonableness and the conduct of the hypothetical reasonable man is applied, the Court must put itself in the position of the accused at the time of the attack. If the State does not discharge this *onus,* the acused must be acquitted. On the other hand, if the State dischares the said *onus*, that is not the end of the matter and the second leg of the enquiry must be proceeded with. The second leg of the enquiry is then whether the State has proved beyond reasonable doubt that the accused did not genuinely believe that he was acting in self-defence and that he was not (*sic*) exceeding the bounds of self-defence. Here the test is purely subjective and the reasonableness or otherwise of such belief, whether or not it is based

on or amounts to a mistake of fact or law or both, is only relevant as one of the factors in the determination whether or not the accused held the aforesaid genuine belief. (See Burchell and Hunt (*op cit* at 164 – 81 and 330 – 2); S v De Blom, 1977 (3) SA 513 (A).) ....

If the State discharges the *onus* to prove beyond reasonable doubt that the accused held no such genuine belief, then the accused must be convicted of the charge of murder. If the said *onus* is not discharged, then the accused cannot be convicted of murder requiring *mens rea* in the form of *dolus*, but can be convicted of a crime not requiring *dolus* but merely *culpa*, such as culpable homicide."

In the book *South African Criminal Law and Procedure,* Vol II, 3rd edition by Milton, the offence of culpable homicide is defined as follows at p. 364:

"(1) The crime of culpable homicide differs from the other form of criminal homicide – murder – in one profoundly important respect – it lacks the intent to kill. It is this intent which makes murder the most heinous of all crimes, a fact reflected in the extremely severe punishments imposed for murder. Culpable homicide, by contrast, is punished with much less severity – often with no more than a fine. Culpable homicide is thus a crime of minimal moral turpitude; X is punished not because of his evil intent (indeed, he has no intent at all) but rather simply for being careless." (Underlining mine.)

On the basis of the facts of this case as already summarised, and with the collapse of the evidence of Beukes the sole prosecution witness to the killing of the deceased, the evidence given by the appellant as supported by that of the defence witness, Du Preez, remains unchallenged. I have consequently no difficulty in holding that the appellant's version of what transpired on the fateful day establishes the necessary requirements of self-defence, *viz*:

(a) the attack by the deceased on the appellant while the former was wielding a knife was unlawful and it induced a grave fear in the appellant for his life. The attack had in fact commenced.

(b) the defence by the appellant was directed against the attack and was necessary to avert the attack. The attack by the deceased having been made with a lethal weapon, namely the pocket knife, the means the appellant used in defending himself was necessary and did not exceed the bounds of self-defence.

Thus, using the objective test, I am satisfied that the prosecution, particularly in the wake of the collapse of the evidence of Beukes, did not discharge its onus of proving beyond reasonable doubt that the appellant did not act in self-defence. Therefore the prosecution's evidence was deficient as a basis of convicting the appellant of murder.

Applying the second test, the subjective test, and bearing in mind the definition of culpable homicide as reproduced from the *South African Criminal Law and*

Procedure, *supra*, I am satisfied that the appellant's conduct did not amount to culpable homicide. There was noting careless or negligent in that conduct. I am certain that the only thought that must have gone through his mind in the face of the armed onslaught was to save his own life. I would consequently and equally absolve him of the possible alternative charge of culpable homicide.

I have further considered the provisions of Article 6 of the Constitution which states:

> "Protection of Life
>
> The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia."

Reading the first sentence of the Article in the context of the Article as a whole, it would appear to me that the entities which were and are being enjoined to respect and protect the right to life are the legislative and judicial bodies, as well as the executive bodies responsible for executing condemned prisoners. If, however, Article 6 was aimed at the man in the street or members of the public as well, then I would echo what O'Linn, A.J.A., said in *Gabriel Matheus, supra*. He stated at page 33 of the judgment as follows:

> "In my view the aforesaid provision does not affect the existing principles. It is true that the right to life must be respected and protected. This includes the right to life of the victim of an aggressor. The victim’s right must also be respected and protected. One way for the victim to protect his/her life or that of others, is to act in self-defence or private defence. The existing principles which the Courts

> apply set out herein, are in my view adequate to respect and protect also the right to life of the aggressor and no change to the existing approach is required."

Lastly, there is the question of dereliction of duty in that the police failed to ensure that the weapon supposedly used to stab the deceased was subjected to forensic examination. In the result potential evidence which might have been favourable to the appellant was not forth coming. It was open to the trial judge, in my judgement, to draw the presumption that the results of a forensic examination might have bolstered the defence of the appellant. She failed to draw that presumption by remaining silent. That was another misdirection.

In conclusion, I feel that in this judgement I have shown that there is justification for reversing the verdict made by the trial judge: first the single witness's evidence was seriously flawed; secondly the trial Judge made a number of misdirections on crucial aspects of the case and thirdly I am left with serious doubts, reasonable doubts, which do not justify a conclusion that the appellant acted unlawfully and intentionally when he killed the deceased. In other words, the prosecution did not in my considered opinion, discharge the burden of proving the appellant's guilt beyond reasonable doubt.

I would, therefore, allow this appeal and in doing so I make the following orders:

1. The appeal is allowed.

2. The conviction is quashed and the sentence set aside.

3. The appellant is therefore acquitted; and

4. I direct that he be immediately set at liberty.

_____
CHOMBA, A.J.A.

I agree

_____
SHIVUTE, C.J.

I agree

_____

O’LINN, A.J.A.

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