

SOUTH AFRICA / JUDGMENT

S v Liebenberg (CC90/2014) [2015] ZAGPPHC 1111 (19 November 2015) [2015] ZAGPPHC 1111

COURT

North Gauteng High Court, Pretoria

BEFORE

Ismail

CASE / FILE NUMBER

CC90/2014

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION , PRETORIA

REPORTABLE

OF INTEREST TO OTHER JUDGES

DATE: 19-11-2015

CASE NO: CC 90/2014

In the matter between:-

THE STATE

and

RETIEF LIEBENBERG

[hereinafter referred to as the accused]

J U D G M E N T

Ismail J:

The charges and background facts:

- [1] The accused is indicted on two counts of murder in terms of the provisions of section 51 (1) of Act 105 of 1997. The two offences relate to an incident which took place on 31 October 2014 at the accused residence at the Ebotsi Golf Estate in Benoni.

- [2] The accused pleaded not guilty in respect of both charges. He admitted that he fired the fatal shots which led to the death of the two deceased. A plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1997 [CPA] was tendered to the effect that after extreme provocation and having been assaulted by both deceased, namely, Visser Snr and Visser Jnr, the accused experienced extreme fear. He then acted in self-defence, contrary to his personality and values in a desperate bid to protect his daughter and himself. When the shooting ensued, he was in a state of disassociation and he acted in an involuntary way without a word being said and without being in control of his actions.
- [3] The deceased in count 1 Mr Visser snr, will be referred to as such or as the deceased in count 1. The deceased in count 2 will be referred to as such or as Mr Visser jnr, or as Poena. The deceased in count 1, was the father of the deceased in count 2.
- [4] It is common cause- between- the prosecution and the defence that Mr Visser Jnr was involved in a relationship with the accused daughter, 'Chevonne'. Admissions in terms of s 220 of CPA:
- [5] Certain admissions were made on behalf of the accused in terms of section 220 of the CPA, which are contained in a document marked exhibit 'A'. These admissions relate in the main to the identities of the two deceased and the causes of their respective deaths. The post mortem reports in respect of both victims specify the cause of death to be Multiple Gunshot wounds. The accused admitted the findings contained in the post mortem reports. He also accepted that the post mortem report completed by Dr Sarang was properly noted on the two post mortem reports.[1] Exhibit 1A' records that the deceased in count two was commonly known as Poena'. It was furthermore admitted that both deceased did not sustain any further injuries apart from those which were inflicted at the scene of the shooting.
- [6] Exhibit L is a photo album depicting-the scene of the crime containing photographs[2] reflecting the bodies of the two deceased, the firearm and
- other exhibits such as spent bullet shells and a licence to possess a firearms belonging to the accused.
- [7] The prosecution lead the evidence of seven witnesses during the trial prior to closing its case.
- [8] These witnesses were predominantly the accused family members such as his daughter, Chevonne; his erstwhile fiancée, Roxanne, who is currently his wife and his brother, Richard. The prosecution also led the evidence of the Dr Sarang, who performed the post mortem examination, Constable Jjhofu, the investigating officer, and Mr Duvenage, the person who accompanied the deceased in count 1 to the scene prior to the shooting.

- [9] I do not propose to summarize the evidence of all the witnesses in the course of this judgment, however, I will refer to salient aspects of the evidence which I consider to be relevant and cogent in arriving at the decision in this matter. The reason for not summarizing each and every witness evidence is that it appears on the record of proceedings. I am aware of and familiar with and the remarks of Nugent J (as he then was) in *S v Van der Meyden*[3].
- [10] The approach to be followed by the court whether to acquit or convict is to look at the totality of the evidence[4] , bearing in mind that the onus throughout the proceedings is on the state to prove its case beyond reasonable doubt.[5]

State case

- [11] Dr Sarang's testimony in a nutshell was to the effect that the deceased were shot several times. The wounds to the deceased in count 1, more specifically the entrance wounds, were from the front of the body.

There were five entrance wounds. He testified and pointed out the positions where the entrance wounds were and how they exited from the body. He was referred to the J88 which indicated that there were burns to the body and he immediately conceded during cross examination- that it was an error on his side.

He also gave evidence regarding the entry and exit wounds on the body of the deceased in count 2. His findings were recorded on the post mortem

reports referred to above.

- [12] Constable Tjhofu testified that he arrived at the scene in response to report of a shooting he received on his police radio. At the scene he spoke

to a white male who was smoking outside, who he pointed out in court as the accused. The accused told him that he shot two male persons. He observed the two bodies in the house and he described where he saw the corpses. The accused showed him where the firearm was. He stated that the accused did not show any signs of being frightened, and that the accused told him that he was not going to answer any questions without his legal representative being present.

During cross examination it was put to him that apart from introducing himself to the accused he did not say anything to the accused. It was also put to him that the accused did not smoke, which was confirmed by the accused under oath.

Constable Tjhofu was questioned at length about his written statement and why it failed to contain certain aspects of his oral testimony as tendered in court. The statement was handed in as exhibit

- [13] The accused daughter testified regarding her relationship with the deceased in count 2, 'Poena', and what transpired on the day of the fatal incident. She alluded to her drug problem and her cantankerous relationship with Visser Jnr. She stated that she was scared of

him and that he was abusive towards her. She described how the deceased, Visser Jnr arrived at her father's home and the subsequent arrival of Mr Visser senior. How her father was assaulted and how she fainted. She did not witness the shooting incident, however she heard gunshots.

She was questioned regarding paragraph 13 of her statement and she disputed that she told the investigating officer what appeared there.

According to her she and the investigating officer were having difficulties in communication with each other.

[14] Thereafter the accused erstwhile fiancé, Roxanne, testified. Since the incident she is married to the accused. The court explained to her that she was a competent witness but not a compellable one. She of her own volition agreed to testify. This witness was quite emotional when she gave evidence.

She stated that the accused requested Visser Jnr to leave his home and that Visser Jnr refused to do so, saying that if he left, he would take Chevonne with him. The accused called his attorney and sought advice in the presence of Visser Jnr, however the latter seemed undeterred and replied that their advocate had the ability to see to it that dockets against them would disappear. Visser Jnr threatened to call Mr G, a notorious bouncer in the area and that frightened them.

She described how Chevonne passed out and the manner in which the accused was assaulted as he tried to assist his daughter. According to her the shooting took place in the house. She did not witness the actual shooting.

[15] The accused brother, Richard, gave evidence thereafter. He testified that the accused called him and told him that the deceased in count 2 was at his home and that he was abusive and refused to leave. He came to the accused house. The deceased in count 1 arrived, accompanied by another male person, and entered the house. He mistook Richard for the accused and swung a punch at him, which Richard averted. Mr Visser Snr hit the accused on the mouth, causing him to bleed. Both deceased continued assaulting the accused. During the altercation, Chevonne fell to the floor, fainting. He recalled being aware that during the shooting, his brother was as he described him 'someone else, not himself. During the shooting the accused was firing wildly, continuously pulling the trigger even after the last shot left the magazine. He realised it was safe to approach the accused and he shook the accused, telling him to stop shooting.

[16] The prosecution thereafter called Mr van Rooyen to testify. He stated that he was in the employ of a security company at the Estate. His evidence merely related to him receiving a message about a shooting incident at the Estate to which he responded. His evidence did not take the case any further.

[17] Mr Duvenage testified that he accompanied Mr Visser Snr to the premises of the accused. His testimony was that the deceased in count 1 entered the premises and at some stage he struck the deceased on the face. The most crucial aspect of his evidence was that he stood

outside the house near the pillar as depicted in photographs 9 and 10 of exhibit At some stage he noticed the accused outside the house. The accused passed him and thereafter started firing into the house at Mr. Visser Snr. At that stage Visser Snr's back was facing the accused whilst the shots were fired at him. He estimated that 3 to 4 shots were fired from outside the house, where after the accused went into the house.

He also stated that neither he nor Mr Visser Snr were armed. It was put to this witness that the evidence of Dr Sarang, which was not challenged, was that Mr Visser Snr was shot from the front. The witness could not explain this, and he stuck to his version.

[18] The state thereafter placed on record that no spent cartridge cases were found at the scene outside the house. Thereafter the prosecution

closed its case.

Defence case

[19] The defence led the evidence of four witnesses. The accused testified in amplification of his state of mind and of the events preceding the shooting incident. He could not recall the events of the actual shooting. The defence called an expert, Prof Scholtz to testify. The accused evidence was in line with what he told Prof Scholtz as set out in detail in his report

[20] The accused version of events preceding the fatal shooting of the deceased was similar to the evidence of his daughter and his wife Roxanne. He testified about the problem relating to his daughter's addiction to the drug Methcathinone, commonly referred to as CAT, and his family's desire to get her assistance. According to him, Mr. Visser Jnr was a bad influence on his daughter and responsible for her taking drugs. To put it bluntly he was not particularly fond of Visser Jnr, because of the various reports he received from others about him.

[21] The accused gave his version of events regarding what transpired in his living room area when Mr Visser senior arrived and how he was attacked by him. He also narrated the version of how his daughter collapsed and when he went to pick her up, how he was assaulted again. Thereafter he does not remember what transpired. The next thing he remembered was that his brother held him and said to him to stop shooting. He thereafter saw the two bodies and he surmised that he must have shot them.

[22] Professor Scholtz, a professor at Pretoria University in the Psychology Department and head of Westkoppies hospital, testified

regarding the accused conduct on the day of the shooting. The accused conduct is fully outlined in paragraphs 2.11 to 2.13 and paragraphs 4.4 to 4.8 of his detailed report. Such conduct was essentially corroborated by the relevant witnesses for the prosecution, namely, the accused daughter, his wife and his brother. It was also corroborated by the accused evidence at the trial.

Prof Scholtz conducted several interviews with members of the accused family, including the accused daughter, brother and wife. He also conducted interviews with third parties. He also conducted a battery of psychometric tests on the accused, certain of which pointed to the fact that the accused responded openly, that he did not try and manipulate and did not try and create an overly positive or negative impression. Other test results indicated that the accused was not malingering with regard to his memory functions in general.

The accused could not recall facts about the period during which he was firing the shots, that is, from the time that he fired the first shot up to the point where his brother Richard was shaking him after the shots had been fired.

[23] In paragraph 4.11 of his report, Prof Scholtz stated that although there is no objective test that could confirm the accused claim of amnesia during the critical time of the shooting, the results of his personality assessment, his personal history and collateral information obtained from various people interviewed, supported the probability that the accused was indeed suffering from traumatic amnesia.

Prof Scholtz's conclusion is set out in paragraph 5 of his report as follows:

“After extreme provocation and being assaulted by both Visser senior and junior Mr Lieenberg experienced extreme fear which triggered his unfortunate actions. He acted in self-defence, contrary to his personality and his values in a desperate bid to keep his daughter safe and protect himself. During the shooting incident Mr Lieenberg was in a state of dissociation and acted in an involuntary way without awareness or control over his actions. He was unable to distinguish between right and wrong and/or act according to such realization during the time he fired the shots.

[24] The defence then led the evidence of Mr Jannie van der Westhuizen, a ballistic expert. He compiled an album[6] which showed the various bullet marks in the living room wall as well as other damage caused by projectiles in the living room area and kitchen section of the house. In the photo album compiled by him[7] a red circle appears on photo 9 and 10 of exhibit BB.

According to him the shooting in all probability took place from within the circle. In response to a question by the court of whether he could exclude the possibility of a shot being fired from outside the parameters of the circle, he answered that he could not.

Appraisal of Evidence and the Law

[25] The facts of the present matter are largely common cause between the prosecution and the defence, that is, what transpired before and after the snooting of the two deceased and the accused conduct and state of mind in this regard. The expert evidence of Dr Scholtz was not gainsayed by the prosecution. It was also common cause that the accused was the instrument or the cause of the deaths of the two deceased. The points of discrepancy in the evidence between the prosecution and defence related to aspects of Constable Tjhofu's evidence and aspects of Mr Duvenhage's evidence which have been outlined earlier in this judgment. Mr Duvenhage's evidence, namely that the accused started shooting Visser Snr

from outside the house cannot be sustained in view of the evidence of Dr. Sarang which was objectively in contradistinction thereto.

Constable Tjhofu said he arrived at the scene to find the accused smoking a cigarette outside the premises. The accused said that he did not and does not smoke. This aspect had not been included in the Constable's written statement. In this regard, I am left with a measure of doubt which should be resolved in favour of the accused. Regarding the testimony of Constable Tjhofu that the accused did not appear to be frightened when he attended at the scene, this was merely Constable Tjhofu's subjective impression, formed *ex post facto*, when he testified in court. I do not believe that anything turns on this point, in view of the fact that it does not add or detract from the essential finding which I am required to make in determining whether or not the accused acted in self-defence and/or in a state of automatism during the shooting, such that he lacked the necessary intent to kill the deceased persons.

I pause to state that the accused impressed me as being sincere throughout his evidence-in-chief and during cross-examination. He did not appear to hide behind his actions, nor did he attempt to play them down. On the contrary, he seemed forlorn and contrite.

[26] In the determination of the innocence or guilt of the accused, I will follow the principles set out in the cases referred in footnotes 3 to 5, *supra*.

I do not intend to repeat the legal principles in this judgment as they are all too familiar. In saying so it must not be construed that the principles were not considered or applied, simply because they were not stated.

[27] The principle of our law is "*actus facit nisi men sit rea*" "Loosely translated this means that an act must be coupled with a guilty intent/ mind. The more vexed issue is whether the accused had the intent to cause the deaths of the two deceased. Prof Scholtz in his report concluded that the accused suffered from dissociation during the shooting [8], a term used in Psychology and Psychiatry but referred to in law, *inter alia*, as 'automatism' or 'non-pathological criminal incapacity'. Prof Scholtz also found that the succession of events on the evening of the shooting, when viewed objectively, met all the criteria proposed by internationally accepted literature on the subject of dissociation. He lists the succession of events as well as the various criteria in relation to which the events are matched, in detail in his report.

[28] Prof Scholtz's report is persuasive. More importantly, it was not gainsayed and therefore stands uncontested. The correct approach to the evaluation of expert evidence, as has often been expressed in judgments of this court, involves an examination of the opinion and an analysis of the essential reasoning, preparatory to the court reaching its own conclusion on the issues raised. What is required in the evaluation of such evidence is to determine whether and to what extent the opinion advanced is founded on logical reasoning. The court must be satisfied that such opinion has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'.

- [29] In law the defence of non-pathological criminal incapacity has been raised in many cases in our courts.[9]
- [30] The significance of the passage referred to in para [23] above, namely, that there is no objective test to determine amnesia apart from a personality assessment and information gathered from other people, as suggested by Prof Scholtz, is such that it would appear that the accused past history in this regard is an important consideration which I have taken into account.
- [31] The test for intent is a subjective test measured against the reasonable man test in law. If the accused at the crucial time when the shots were fired acted as an automaton, could it be said he had the intent? The word automaton is described in the Oxford Paperback Dictionary 3rd edition as:

"...A person who seems to act mechanically and without thinking"

In layman's terms like a robot or machine which is operated by means of a computer, battery operated remote control and devoid of any independent cognitive brain functioning process. In other words without any thought process or stimulus from the human brain.

- [32] During argument before me I requested the prosecutor and defence counsel to address me on the defence tendered in terms of s 115 of the CPA. The defence was that the accused acted in self -defence and that he lacked the intention to kill the two deceased as he was acting in a state of automation and hence was not aware that he killed the two deceased.

The question I needed to be answered was whether the two defences tendered were not mutually inconsistent and exclusive of each other. Self - defence is a defence where a person consciously defends oneself against an attacker in fear of one's life- which is a conscious act or chain of events. With the defence of temporary non-pathological criminal incapacity the person acts involuntarily

and in a state of automatism, so that his acts would have been unconscious and involuntary.

- [33] During their address Ms Vorster submitted that the one defence excluded the other. Mr Hodes SC agreed that the two defences were mutually exclusive of one another but submitted that they could operate in tandem, the one defence operating in that the fear caused the accused to suffer from amnesia, and the other defence operating when the accused had no control of his movements during a state of automatism. He suggested that when the one defence stopped the other came into play.
- [34] The evidence of Prof Scholtz was unchallenged and there was no expert opinion to the contrary. I am therefore of the view that his evidence cannot simply be brushed aside. He is a head of a reputable Psychiatric hospital and he deals with diverse cases on behalf of both the prosecution and defence. He certainly was not challenged to be a "hired gun" for the defence. The court asked him many questions, as this was not the court's area of experience, and he on many instances agreed with the court. Where he disagreed he gave examples and

endeavoured to clarify the court's concerns. For example the court enquired whether the tests he conducted could be manipulated by the subject and he explained that they were universally accepted tests which would be extremely difficult to manipulate. Furthermore the test was not a single test but a battery of tests which results were all analysed in their totality.

[35] Professor Scholtz pointed out a personality weakness of the accused, namely that he is a person who tends to avoid conflict, which causes anxiety which will build up. This is what happened on the day, namely there was a build up of emotions which exploded with him being assaulted which led to his disassociation.

[36] It was put to Prof Sholtz that the accused took his gun from top of the fridge prior to the arrival of Mr Visser, and that he anticipated trouble and armed himself in preparation thereof. If this was the true intent of the accused, then one wonders why he did not use his gun against his attackers whilst in a state of consciousness, particularly when considering that he had been injured physically by the two deceased and was facing overwhelming odds in that there was no way to flee the situation.

[37] The Supreme Court of Appeal in *S v Eadie*[10] stated

" It is well established that when an accused person raises a defence of temporary non-pathological criminal incapacity, the state bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this court that:

(i) In discharging the onus the state is assisted by the natural inference that in the absence of exceptional circumstances a sane

person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;

(ii) An accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;

(iii) evidence in support of such a defence must be carefully scrutinised;

(iv) it for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.

[38] Navsa JA in *Eadie*, supra, dealt with most of the judgments referred to in footnote 9, and several other cases in dealing with the issue of non pathological criminal incapacity and automatism. I have had regard to what was stated at par [61] of the judgment, which is worthy of repeating:

" The time has come to face up !o. the fact that in some instances our court's .in dealing with accused persons with whom they have sympathy, either because of the circumstances in which an offence has been committed , or because the deceased or victim of a violent attack was a

particularly vile human being, have resorted to reasoning that it is not consistent with the approach of decisions of this Court. Mitigating factors should rightly be taken into account during sentencing. When an accused acts in an aggressive goal- directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still being able to appreciate between right and wrong and while still being able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone , that at some stage during the directed or planned manoeuvre he lost his ability to control his actions. Reduced to its essence it amounts to this: the accused is claiming that his uncontrolled act just happens to coincide with the demise of the person who prior to that act was the object of his anger, jealousy or hatred. As demonstrated courts have accepted such versions of events from accused persons."

The learned appeal court Judge continued at para [70] remarking as follows:

" It must now be clearly understood that an accused can only lack self control when he is acting in a state of automatism. It is by its very nature a state that will be rarely encountered. In future, courts must be careful to rely on sound evidence and to apply the principles set out in the decisions of this Court...."

[39] Ms Vorster submitted that the accused was aware at all times of his actions as his conduct was goal driven in that he managed to:

1. obtain his firearm from the top of the fridge as he anticipated trouble;
2. he phoned his brother; his attorney and the security at the estate regarding the possibility of problems;
3. he could remember the occurrence prior to him firing the shots, namely that he was assaulted, his daughter passing out ; he assisting her and even feeling the gun against his body;
4. he remembers handing over the firearm to the police after the shooting;
5. constable Tofu testified that the accused appeared to be normal and that he said to him that he would not make a statement in the absence of his attorney;
6. the only aspect which the accused seems not to remember is him firing at the deceased.

I have already dealt with the first and fifth submissions listed above earlier in this judgment. For the remainder, it is trite law that submissions do not constitute evidence. In any event, the said submissions do not take into account the evidence of Prof Scholtz, set out in paragraphs 4.8, 4.9 and 4.10 of his report. For ease of reference, I quote the relevant extracts therefrom:

"[4.8] In the minutes leading up to the shooting, Mr. Liebenberg was threatened and assaulted. He experienced some negative emotions, mostly fear. He feared both for his own safety and for the safety of his daughter. In his mind, she had been 'abducted twice before and Mr. Visser made the threat that he would never see her again only minutes before the shooting. In the seconds

leading up to the shooting, Mr. Liebenberg had been injured physically and was facing overwhelming odds. There was no way to flee the situation and his daughter was prostrate on the floor. His utter helplessness and the continued blows on his body by his assailants acted as the final trigger. The last conscious thought he is able to recall refers to the safety of his daughter.

[4. 9] Mr. Liebenberg suffers from traumatic amnesia. He is unable to recall facts about the period during which he was firing the shots. He also 'remembers' the post- incident scene to be as it was pre-incident. No blood, no bullet holes and no disturbed furniture. He recalls looking at the victims and thinking they are just lying there, unsure of exactly why. ...

[4.10] Recent research has confirmed the neurobiological and potential neuro - cognitive mechanisms by which emotional memories are suppressed The writers also point out the evidence that §Ugg ests that amnesia is most commonly reported after the commission of violent crimes, particularly homicides, which appear not to have been premeditated and are associated with extreme emotional arousal. Experience in clinical practice supports research findings regarding traumatic amnesia in cases of disassociation"

[40] In his report, Prof Scholtz gave an indication of the time span of the shooting, being 10 seconds. See par 4.14 at lines 830

- 831 of his report. Prof Scholtz's stated that he made an inference of the time from what he heard from others. It is clear from the evidence that the shots were fired in quick succession and therefore Prof Scholtz's time estimation is not out of kilter or unrealistic. It would therefore seem logical that the amnesia endured for a couple of seconds and not minutes. The duration of the shooting was more a question of seconds rather than minutes.

[41] During the court a quo hearing in the case of Eadie, Griesel J reminded himself that the courts have scrutinised the defence of involuntary actions with circumspection and have examined the psychiatric and other evidence. This view was confirmed on appeal. see para [38] supra.

[42] I am satisfied that in the present case, the accused laid a foundation for the defence of temporary non-pathological criminal

incapacity, certainly in the expert evidence tendered on his behalf, sufficient to at least create a reasonable doubt on the point. I have carefully scrutinised the evidence tendered in support of the defence and I have given due regard to the expert testimony of Professor Scholtz. Having regard to all the facts peculiar to this case and the expert evidence, including the nature of the accused actions during the relevant period, I am not satisfied that it has been proved beyond a reasonable doubt that the acts which form the basis of the charges against the accused, were consciously directed by him, or put differently, that the acts were involuntary. A reasonable doubt exists that the accused psyche had disintegrated to such an extent that he was unable to exercise control over his movements and that he acted as an automaton at the relevant time of shooting.

- [43] On the facts of this case the accused has punched in the face and thereafter hit on the neck and the back of the head. Although there was no evidence that he suffered from concussion the facts are not so far removed from those in Wiid's matter, supra. The assaults to the head occurred within seconds of the shots being fired. In this regard the observation and remarks of his brother, Richard, are crucial and it is supported by the 'sound evidence' of Prof Scholtz
- [44] Having dealt with the issue of lack of criminal capacity I will now deal with the question of whether the accused conduct at the time, fell within the ambit of private defence.
- [45] It is trite that a person has a right to defend his person, property and his family. In doing so the accused actions must be commensurate or proportionate to that of the attack.

See: Burchell and Milton, Principles of Criminal Law (2005)

[46] In S v Walters[11] it was held that:

"Self defence is treated in our law as a species of private defence... Until now, our law has allowed killing in defence of life, but has also allowed killing in defence of property, or other legitimate interest, in circumstances in which it is reasonable and necessary to do so... the law applies a proportionality test balancing the rights of the aggressor against the right of the victim, and favouring the life or lives of innocents over the lives of the guilty"

[47] I am not at all convinced that the defence of self defence under the circumstances of this matter would have succeeded. The private defence which was raised in the section 5 statement in my view tended to obfuscate issues in this matter.

It was a 'red herring' and inappropriate. Had it not been for the evidence of Prof Scholtz on the incapacity defence the accused would have been convicted in my view of murder exceeding the bounds of self defence.

[48] The self defence version also resulted in the prosecution having to cross examine the accused at length as it was raised as a defence. In reality it is the fear which propelled Mr Liebenberg's to a state of amnesia wherein he 'unconsciously' shot the deceased and not consciously. It is for this reason that i am of the view on its own the self defence version would have failed. Having found that the accused acted in a state of temporary non pathological criminal incapacity he should be acquitted, and that the self defence argument therefore becomes academic.

[49] Accordingly the accused is acquitted of both counts of murder.

Ismail J

19/ XI /2015

APPEARANCES:

For the State: Adv P. Vorster from the DPP's office Pretoria.

For the Accused: Adv L M Hodes SC assisted by Adv Van Wyngaard instructed by Matsemela Krauses & Ngubeni Attorneys, Notaries and Conveyancers.

Date of Trial: 2- 6 November 2014.

Date of judgment: 19 November 2015

- [1] Exhibit E ppl0-14 and exhibit K pp 19-23
- [2] Pages 24 to 154
- [3] 1999 (1) SACR 447 (W) at 449j-450b
- [4] See: S v Chabalala 2002
- (1) SACR 134 (SCA); S v Van Aswegen 2001
- (2) SACR 97 SCA . The court should look at the conspectus of evidence as referred to in S v Trainor 2003 (1) SACR 35 (SCA)
- [5] R v Difford 1937 AD 370; S v M 1945 and S v Pha/lo and Others 1999
- (2) SACR 558 at 563c-e.
- [6] Exhibit BB
- [7] Exhi bit BB
- [8] Lines 770 and 771 of his report exhibit Z
- [9] See S v Ingram 1995 (1) SACR ; S v Campher 1987 (1) SA 940 (A); S v Kalagoropoulos 1993 (1) SACR 12 (A) ; S v Di Blasi 1996 (1) SACR 1(A); S v Gesualdo 1 997 (2) SACR 68 (W) ;and S v Wiid 1990 (1) SACR 561 (A) at
- 564. S v Nursingh
- [10] [2002] ZASCA 24 at pa ra [2]
- [11] 2002 7 BCLR 663 CC (53)

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