

SOUTH AFRICA / JUDGMENT

S v Sauer (81/87) [1989] ZASCA 44 (31 March 1989)

[1989] ZASCA 44**COURT**

Supreme Court of Appeal

BEFORE

Hoexter, Milne, Nicholas

CASE / FILE NUMBER

81/87

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Source record**Case No 81/87 - mp****IN THE SUPREME COURT OF SOUTH AFRICA****(APPELLATE DIVISION)****In the matter between:**

CAROL ROSETTE SAUER Appellant

and

THE STATE Respondent

CORAM: HOEXTER, MILNE, JJA et NICHOLAS, AJA

HEARD: 3 March 1989 DELIVERED: 31 March 1989

JUDGMENT

HOEXTER, JA

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HOEXTER, JA In the Witwatersrand Local Division the appellant was charged with the murder of one Jeremiah Ludick ("the deceased"). She was tried by a Court consisting of IRVING STEYN, J and two assessors. The appellant pleaded not guilty and at the close of the State case she herself testified and other witnesses were called for the defence. The appellant was found guilty of murder with extenuating circumstances and sentenced to imprisonment for ten years. With leave of the trial Judge the appellant appeals against both the conviction and the sentence. The appellant is a married woman and the mother of three young children. When her trial took place in November 1986 she was 32 years old. At the time of his death the deceased was some 40 years old. The appellant and the deceased were both already married when they met

in

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in 1978. They were strongly attracted to each other, and they became lovers. This relationship lasted until the night of Saturday 22 March 1986 when, shortly after 10 pm, the appellant shot and fatally wounded the deceased. The deceased died in hospital in the early hours of the next morning. A post-mortem examination on his body was performed by Dr D F van Blerk on 26 March 1986. Dr van Blerk was called as a State witness. He established the cause of death as a bullet wound of the brain. A bullet had entered the deceased's head over the right parietal region and left it in the left parietal area. The track of the bullet passed through both parietal lobes. On the postero-lateral aspect of the deceased's right upper arm there was also an entry and an exit wound, the track of the bullet being just below the skin. Dr van Blerk testified that the aforesaid head and arm injuries could

have

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been caused either by two separate bullets or - depending upon the precise position of the deceased's arm in relation to his head when he was shot - possibly even a single bullet. During April 1984 the marriage between the deceased and his wife ("Mrs Ludick") ended in a divorce. Despite their divorce the deceased and Mrs Ludick remained on friendly terms. The deceased was very fond of their children and he

continued to see both Mrs Ludick and the children. The

appellant's husband ("Sauer") was fully aware of the fact that the appellant and the deceased were lovers. Sauer did not condone the appellant's misconduct but he did nothing either to bring the relationship to an end or to rid him-self of the appellant as a wife. At the trial Sauer was called as a defence witness. He described the feelings of the appellant towards the deceased by saying that she was absolutely besotted with the deceased. On the other hand

Sauer

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Sauer appeared still to love the appellant. Although the appellant and the deceased saw each other daily and during almost every evening the appellant continued to live under the same roof with Sauer and their children. At the trial Mrs Ludick was a State witness. According to her evidence she had attended an office party in Krugersdorp on the night of Friday 21 March 1986, and the deceased had accompanied her to this function as her escort. Thereafter she did not see him alive again; but during the early evening of the night of the fatal shooting she had spoken with him over the telephone. At that time Mrs Ludick and her children were due to take a vacation at Storms River early in April 1986. The necessary reservations had been made; and it had been arranged between her and the deceased that the latter would join her and their children on the holiday. Asked what her feelings towards

the

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the deceased were at the time she replied that she considered -

" dat dinge tussen ons sal regkom en dat ons dit sou uitgesorteer het soos die tyd aangegaan het...." Meanwhile, and on Sunday 16 March 1986, the

deceased had moved into a flat which was only some 700metres away from the home in which the appellant lived with her husband and her children. The flat was in a building called "Blue Hills" in Third Avenue, Melville, very close to the intersection of Third Avenue and Main Street. In Main Street, Melville, and also close to the

said intersection, there is a restaurant called Freddy's Tavern. Freddy's Tavern was therefore just around the

corner from the deceased's flat. Walking from the flat to

Freddy's Tavern one passes an ice-cream parlour in which a student called Freddy was employed. Freddy was known

to .

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to both the appellant and the deceased.

There seems to have been a generous side to the

deceased. He showered gifts upon the appellant and he gave her money with which to pay her personal accounts. If the appellant's evidence is to be accepted, however, there was also a less attractive side to the deceased's personality. The appellant described the deceased as an aggressive, intolerant, quarrelsome and rough-spoken individual easily given to churlish and offensive behaviour. In particular, on the appellant's testimony, the deceased was a person of ungovernable temper which in the past had found expression in acts of violence such as, for example, deliberate damage to a new motor vehicle belonging to Sauer. However that may be, what emerges as an indisputable fact in the case is this. Despite such imperfections of disposition as the deceased may have displayed to the appellant, her infa-

fatuation

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fatuation was complete; and emotionally she was enslaved to the deceased. The following significant passage is to be noticed in the appellant's evidence-in-chief:-

"I was virtually at his beck and call 24 hours a day. He didn't want me to move from the house, when he phoned I had to be at home, when he came around I had to be at home. At the same time I liked this because it showed me that he loved me but it was putting a strain on me."

The strain to which her emotional involvement subjected her took its toll of the appellant physically and psychologically. For some time before the shooting the appellant required medical treatment and she was on tranquillisers. For a while she had psychiatric treatment. She said that she needed psychiatric care -

"....because I was leading a double life and I just couldn't cope with it."

Sauer was the owner of a .38 Star automatic

pistol ("the pistol"). The pistol was a military handgun

which

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which had a trigger pressure of 7 3/4 pounds. Sauer had taught the appellant to shoot with the pistol. For reasons of self-protection it was the appellant's habit to carry the pistol in her handbag whenever she went out at night. The pistol was kept loaded, in the half-cock position, and with the safety-catch off. On Saturday 22 March 1986 the appellant was experiencing pre-menstrual tension. During the morning she received a telephone call from the deceased. He told her to be at the flat at 7 pm. In the evening appellant drove to the flat in a car belonging to Sauer and she arrived there shortly before 7 pm. She parked the car in front of the building and went up to the deceased's flat on the first floor. As usual the pistol was in her bag. The appellant and the deceased spent some time in the flat. According to the appellant the deceased had been drinking and he was in a very ugly mood. He accused her of discussing

their

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their relationship with Freddy of the ice-cream parlour; and he threatened to kill Freddy that very night. After a while they left the flat and went to have dinner at Freddy's Tavern. On the way to the restaurant, so testified the appellant, the deceased repeated his threat to kill Freddy. In the restaurant they had a substantial meal and a bottle of wine was ordered. The deceased sampled the wine, but drank no more of it. Three-quarters of the bottle of wine was consumed by the appellant. The deceased's mood did not improve in the restaurant and he continued to rail against Freddy. The deceased says that she was very upset and that she tried, but with little success, to calm the deceased down. After the deceased had paid the bill they left the restaurant, whereupon, according to the appellant, the deceased became more agitated and aggressive. In the vicinity of the ice-cream parlour he again threatened to kill Freddy;

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and she pulled him away. When they reached the intersection of Main Street and Third Avenue the deceased transferred his violent intentions from Freddy. According to the appellant the deceased said to her that on second thoughts, he would first kick dents into Sauer's motor car. At this stage of the events, so the appellant told the trial Court, she was under the influence of the wine she had consumed, but she knew what she was doing. She said that she was very upset and very scared. She thought that the deceased was about to damage Sauer's car whereafter he would dispatch the luckless Freddy. The appellant was carrying the pistol in her sling-over bag. She pulled the pistol out of the bag and pointed it at the deceased. She said she did so in order to scare the deceased. She then heard and felt the shot, and she saw the deceased fall. The next thing that she remembered was running in the road and waving down cars. A car stopped and took her home.

Her

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Her impressions of what happened at her home were very vague, but she remembered being very worried about her children. Her next clear recollection of events, so testified the appellant, related to her presence at the Parkview Police Station. The appellant told the trial Court that she had not wanted to harm or kill the deceased; and that she loved him very much. During her cross-examination the appellant conceded that she had known that there was a round in the chamber of the pistol. She agreed that before it could be fired the pistol had to be brought to the full-cock position, but she was unable to explain how that position had been achieved before the shooting of the deceased. The appellant admitted that she knew that the deceased and Mrs Ludick were good friends, and that they still went out together. She admitted too that on the Wednesday immediately before the shooting the deceased had told her that he intended joining Mrs Ludick and

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their children on their holiday at Storms River. She had known that on Friday 21 March 1986 the deceased had gone to visit Mrs Ludick and their children. The appellant denied, however, that a reconciliation between the deceased and Mrs Ludick had been imminent. She said that the deceased had told her that his flat would be their love-nest; and that it was his habit to refer disparagingly to Mrs Ludick as "the dragon". In cross-examination it was suggested to the appellant that during the meal at Freddy's Tavern the deceased had told her that he was going back to Mrs Ludick. The appellant repudiated the suggestion saying that the deceased had not so much as mentioned Mrs Ludick's name. However, the appellant conceded that if during their dinner at the restaurant the deceased should have told her of a reconciliation between him and Mrs Ludick she (the

appellant)....

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appellant) would have reacted very sharply to such news: she would have been "mad and angry" and she would have made a scene. At this juncture it is convenient to leave the appellant's own evidence for a while in order to examine the evidence of the sole eye-witness to the shooting; and the evidence of three other persons in whose company or presence the appellant came to be shortly after the shooting. It is, in particular, in the light of the testimony of the last-mentioned three witnesses that the truth or otherwise of the appellant's evidence as to her state of mind at the time of the shooting falls to be tested.

Very close to Freddy's Tavern in Main Street is a restaurant called "The Front Page". On the night in question a young man called Jassinowsky and his

girl-friend

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girl-friend had been dining at the latter restaurant. This couple emerged from it at about 10.20 pm and they proceeded to walk to their car. At the intersection of Main Street and Third Avenue Jassinowsky saw a man and a woman standing a metre apart in Third Avenue almost opposite to the entrance to "Blue Hills". They were facing each other and they appeared to be conversing. The man made a movement as if to turn around, whereupon the woman withdrew a handgun from her handbag, raised her arm and fired a shot. The man fell and the woman fired a second shot. The witness demonstrated the movements executed by the woman at the time when the shots were fired: the first shot was fired with her arm fully extended in a horizontal plane; the second shot was fired with the arm still extended but at an angle of 45 degrees downward, as though shooting

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at something on the ground. Jassinowsky then started to cross Main Street and he saw the woman put the handgun back in her bag, take three or four steps, and then run away up Third Avenue. For a while Jassinowsky ran after the woman. He abandoned his chase when he reflected upon the fact that he was unarmed. As the woman ran along Third Avenue she had to master an incline. According to Jassinowsky he pursued the woman for some 30 to 40 metres, during which pursuit the woman appeared to him to be running normally and without staggering or swaying. Shortly after the events witnessed by Jassinowsky a motor Kombi driven by an off-duty policeman, Constable Bekker, stopped at a stop-street on the corner of First Street and Second Avenue in Melville. A front-seat passenger in the kombi was a Mrs F Pretorius.

At

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At the stop-street Bekker and Mrs Pretorius noticed a woman signalling with her arms and running towards them. When the woman reached the kombi she jerked open the door on the passenger's side and leapt into the lap of Mrs Pretorius. The woman in question was the appellant. Both Bekker and Mrs Pretorius were witnesses for the prosecution. Each testified that the appellant was very hysterical and that she smelt of liquor, but that she was not drunk. The appellant asked for a lift to her home. According to Bekker she shouted hysterically :-

"Oh my God, I have shot a man, I have killed my boyfriend. Please take me home."

Bekker said that the appellant was flustered and that he had difficulty in following her directions, but that

they managed to get her home. The appellant asked them

to go inside with her. She ran into the house screaming:-

"I

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"I have shot him, I have killed my boyfriend, Oh my God what is going to happen to my children."

The husband was at home and, while Bekker spoke to him, the appellant took Mrs Pretorius to show her the children. Mrs Pretorius told the trial Court that while the appellant was being driven home she shouted:- "I killed a man, I have shot my boyfriend" and that, inter alia, the appellant also said:- "I loved that man but he fucked my life up." At the appellant's home her husband appeared and the appellant said "I have killed him, I have killed him". The appellant took Mrs Pretorius to see her children, and from her exclamations it was clear to Mrs Pretorius that the appellant was greatly concerned about the fate of her children. Thereafter Mrs Pretorius drove off from the appellant's home in Bekker's Kombi while Bekker and the

appellant,

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appellant, in a car driven by the husband, proceeded to the scene of the shooting. During that journey the appellant asked to be taken to the police station. She further remarked:- "He fucked up my life." When they got to the flat Bekker noticed a man lying on the pavement in front of the flat. The police had already arrived and an ambulance was in attendance. The appellant was reluctant to get out of her husband's car. Bekker took her by the hand and dragged her out of the car. The appellant clung to Bekker and refused to approach the actual scene of the shooting. Bekker handed the appellant and the pistol over to the police investigating the shooting. Bekker was asked whether the appellant had given any reason for shooting the deceased. Bekker replied that the appellant had made some mention of a man named Freddy: he had

gathered

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gathered that the deceased had wanted to assault Freddy. The person who summoned the ambulance and the police to the scene of the shooting was Miss A M Witty who was also a State witness. She is a nurse at the Johannesburg General Hospital. On the night in question she came upon the deceased lying on the pavement in Third Avenue at the place already described. The deceased was lying on his back and he was surrounded by bystanders. He was still alive but his pulse was very weak and he was bleeding extensively from two head wounds. Miss Witty tried to stem the bleeding and when the deceased was re-moved to hospital Miss Witty accompanied him in the ambulance. The ambulance had already arrived, so testified Miss Witty, when three persons approached the place at which she was attending to the deceased. The appellant was one of them, and she was supported on

either

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either side by a man. One of the men asked the appellant to look at what she had done, but the appellant, who was struggling and resisting, was unwilling to do so. The appellant cried out:-

"He has fucked up my life."

I come back to the evidence of the appellant herself. The unchallenged evidence of const. Bekker, Mrs Pretorius and Miss Witty as to the anguished utterances made by the appellant within an hour of the shooting tend very strongly to show that, despite her love for the deceased, the appellant saw him as the man who had confounded or destroyed her life. During cross-examination this important aspect of the case was explored with the appellant. Her answers were, I think, neither convincing nor satisfactory. I quote an excerpt from her cross-examination dealing with her statements to Bekker and

Mrs Pretorius:-

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"You wanted a lift, that is true; you said also that you wanted help, that was true. You said also that you had shot a man, that was true. You said also that he messed up your life, to put it gently, was that true? No, he hadn't. Why did you say it then? I can't remember saying it. COURT: No but assuming you said it can you give any reason why you did say it? No, I can't think of any reason why. MR BERRY: So that statement was not true? No. You are saying that the deceased had not messed up your life? No. Are you saying that on the contrary he had made your life happy? We had very happy times together, he could make me laugh where my husband could never make me laugh. It seems very strange to me that you should say something like that about this person that you loved very much, who had now, as you realised, been shot by you?

I. . .

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I find it strange as well, perhaps my psy-chiatrist could give you an answer to that." At the time of her plea of not guilty, senior

counsel who appeared for the appellant at the trial made no statement in terms of sec 115 of the Criminal Procedure Act. At the conclusion of the evidence of Mrs Pretorius, however, counsel for the appellant made the following

statement in the Court below to indicate the nature and grounds of the appellant's defence:-

"My Lord, we say that the accused is not guilty of any offence or unlawful act because in the circumstances there was a failure to comprehend what she was doing attributable to a combination of alcohol, factors such as provocation and severe mental and emotional stress. Also we submit later that because of the accused's state when the gun was fired we don't know whether it went off accidentally or not."

The trial Court considered that neither the deceased's

threats to harm or kill Freddy nor the deceased's threats

to

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to damage Sauer's motor car amounted to provocation to the

appellant. In the course of his judgment the learned Judge

remarked:-

"Had it been a threat to herself or a threat to her child or a threat to a loved one, it might possibly be regarded as provocation, but how a threat to kill a person like Freddy in the instant circumstances can ever amount to provocation in so far as the accused was concerned we fail entirely to see."

And later in the judgment:-

"Secondly, how threatening to kick dents into her husband's car could amount to provocation we also fail to see. After all, the deceased had actually done it twice before and on both occasions the car had been repaired at the company's expense, so why that should be provocation we also fail to see."

The Court below, quite rightly, I consider, gave the defence based upon the possibility of an accidental shooting short

shrift. In this connection the learned Judge remarked in his judgment that:-

"....if

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" if it had been an accident, the obvious thing would have been to have said: 'I shot him by accident' and not that 'he messed up my life'".

The trial Court formed the opinion that the appellant was not a good witness and it disbelieved the appellant's version as to what it was that had precipitated the shooting. I

should mention that a reading of the appellant's evidence as a whole reveals, in my opinion, that she was an unsatisfactory witness. The defence that the cumulative effect of the wine consumed by her together with the provocation and emotional

stress to which she had been subjected had deprived her of

the power to comprehend what she was doing when she shot the

deceased, was rejected by the trial Court as false beyond reasonable doubt. Having unanimously found the appellant guilty of murder the trial Court further unanimously found that there

were

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were extenuating circumstances. These were formulated by

the learned Judge in the following words:-

"Firstly, the accused was held in an emotional grip by the deceased throughout their association. Secondly, the accused was slightly under the influence of liquor, which condition did to a more-or-less degree break down the inhibitions of the accused and her capability to resist committing a wrongful act. Thirdly, there was absolutely no malice and no premeditation in the murder concerned and in fact it was committed on the spur of the moment without any premeditation whatever. Emotional stress, in our view and on the probabilities, was occasioned by the fact that the accused was very much in love with the deceased right up to the end; that three days before the shooting she was informed by the deceased of his intention to join his ex-wife and the children in the Cape on a holiday and that what probably happened on the Saturday evening in question, at the restaurant, or on the way from the restaurant back to the deceased's flat or just in front of the deceased's flat, was that the deceased led the accused to believe that he was leaving her and returning to his ex-wife. That in our view is what the probabilities support, and it is in that emotional stress that the action of the slightly inebriated

and..

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and highly emotional accused was triggered off and which caused her to fire the shot that killed the deceased." Mr Tiedemann, who argued the appeal on behalf of

the appellant, urged upon us that the trial Court had erred in rejecting the appellant's version of the events immediately preceding the shooting; and in further finding that the appellant had probably been goaded into shooting the deceased by the latter's intimation to her that he might be

leaving her and going back to Mrs Ludick. In particular counsel submitted that the possibility of a reconciliation between the deceased and his former wife depended wholly on the evidence of Mrs Ludick whose evidence, it was said, was open to criticism. I am unable to accept this submission. It overlooks the fact that the deceased himself had told the appellant about his forthcoming holiday with Mrs Ludick and their children, and it glosses over the appellant's significant

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significant utterances, very shortly after the shooting, made to or heard by

- (1) Bekker (2) Mrs Pretorius and (3) Miss Witty. Mr Tiedemann suggested that too much should not be read into the appellant's words concerning the deceased that "he fucked up my life"; and that the notion thereby conveyed was irreconcilable with the other sentiment expressed by the appellant at the same time, viz that she had killed the man she loved. The two ideas are not, however, necessarily in consonance. They can be satisfactorily reconciled along the lines indicated by the learned Judge in describing the appellant's emotional anguish. The appellant's version of the events leading up to the shooting is a highly unconvincing one, and it fails to provide any really acceptable motive for the shooting. On the other hand the trial Court's assessment

of

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of the probabilities - which seems to me to be a sound one - immediately yields a ready and powerful motive : rejection of the appellant by a lover after an intense love-affair which had lasted for some seven or eight years. In my opinion the trial Court correctly determined the motive which actuated the appellant in her shooting of the deceased; and it correctly held that at the time the appellant knew what she was doing. It follows that the appeal against the conviction cannot succeed.

I turn to the appeal against the sentence of ten

years imprisonment. Having reviewed the appellant's personal circumstances the learned Judge in his judgment on sentence alluded to the appellant's motive in brief and rather general terms. He disposed of the point in the following words:-

"This is an unusual case in that there were unusual circumstances, that is emotional circumstances involving love and all that accom-

panies

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panies that emotion." In finding the appellant guilty of murder with extenuating circumstances the trial Court had found that the appellant acted as she did under "emotional stress". While such "emotional stress" was carefully delineated in the trial Court's formulation of the extenuating circumstances, it seems to me, with respect, that when the learned Judge came later to ponder the matter of sentence the nature and extent of that emotional stress was insufficiently perceived and not accorded due weight. On the facts found by the trial Court it is clear, I consider, that at the critical stage of events immediately preceding the shooting the appellant was subjected to what can only be described as extreme provocation. In my judgment the learned Judge misdirected himself in regard to sentence by failing to give sufficient

recognition

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recognition to this arresting feature in the case. I should add that Mr de Villiers, who argued the appeal for the respondent, very fairly conceded as much. It seems to me furthermore - the matter of misdirection apart - that the sentence imposed in the Court below is in all the circumstances of the case a disproportionately severe one. In my judgment a sentence of imprisonment for five years would have met the justice of the case. The disparity between the last-mentioned and the sentence actually imposed is a glaring one. It follows that the sentence imposed by the trial Judge cannot stand; and that this Court is entitled to exercise its own discretion in regard thereto. In the result the appeal against the conviction is dismissed. The appeal against the sentence succeeds.

The

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The sentence imposed in the Court below is reduced to one of imprisonment for five years.

G G HOEXTER, JA

MILNE, JA)

NICHOLAS, AJA) Concur

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