CRIMINAL APPEAL NO.16/95

In the matter between:

ESTHER NGCOTHILE MAGAGULA

VS

THE KING

CORAM

: TEBBUTT J.A.

: SCHREINER J.A.

: STEYN J.A.

FOR THE CROWN : MR. NDUMA

FOR THE APPELLANT : MR. SIMELANE

JUDGMENT

The Appellant stabbed the deceased, Monile Ngwenya, twice with a knife, one wound in the chest proving fatal. As a result of the death of the deceased, the Appellant was charged with and convicted in the High Court of murder with extenuating circumstances and sentenced to six years' imprisonment, to commence on 9th August, 1994. The Appellant now comes on appeal to this court against both her conviction and sentence.

The background to the stabbing of the deceased by the Appellant is this. While she was drinking at a beer hallo with certain people, a woman told her that the deceased was making allegations that the Appellant and the deceased's husband were having an affair. The Appellant decided to

have it out with the deceased about her allegations. She left the beer hall and went to her home where she changed her clothes, and armed herself with a reed (sic) or whip and a large knife. She then went to the deceased's house to confront her about her allegations. What started as a verbal discussion took a nasty turn when the deceased, according to the Appellant, hit her three times on the chest with her open hand and then started throttling her. The Appellant then stabbed her twice with the knife she had been carrying.

None of the adult Crown witnesses saw, or could testify, either to the stabbing or as to what had transpired between the Appellant or the deceased at the latter's house. The deceased's ten-year-old son, however, gave some evidence as to what had happened there. The trial Judge relied on this testimony finding that the Appellant "had pulled his mother outside" where the stabbing took place.

The trial Court's reliance on this evidence was criticised before this court by Mr. Simelane for the Appellant on two grounds: (a) that the boy had not been properly sworn in or admonished properly to tell the truth; and (b) that his evidence had not been approached with the necessary caution, regard being to his youth. Both criticims are justified. The record shows that the trial Judge said this to the boy before he gave his evidence:

"JUDGE: How old are you?

PW4: 10 years, My Lord.

JUDGE: Do you go to school?

PW4: That is correct, My Lord.

JUDGE: What standard?

PW4: Standard 1, My Lord.

JUDGE: Do you know the truth and lies?

PW4: No, My Lord.

JUDGE: When you tell the court, you must not tell lies.

PW4: I understand, My Lord."

Without wishing to set out any rigid guidelines as to what judicial officers should say to young witnesses when admonishing them to tell the truth as each instance must depend on the individuality of the witness concerned, it seems to me that what was said by the trial Judge to the boy in this case was wholly inadequate, particularly when the boy said that he did not know the difference between the truth and lies, a statement he repeated in cross-examination by Mr. Simelane, who also appeared for the Appellant at the trial. Secondly, and more importantly, all the boy said was that after hearing his mother talk to the Appellant about the latter and her husband, he left to call his aunt. His mother was then outside the house talking to the Appellant. Asked how the deceased left her hut, the boy said "She (the accused) was holding her." He said he later saw the

deceased "bleeding." She was also "groaning like a cow."

Under cross-examination the boy admitted not having seen or heard anything else that occurred and when it was put to him that he was telling lies when he said that the Appellant was holding his mother and that in fact his mother followed the Appellant out of the kitchen, he gave no reply. No reliance should therefore have been placed on his evidence by the trial Court.

The court is therefore left only with the version of the Appellant as to what happened on the evening in question. Her defence was that she had stabbed the deceased in self-defence when the latter was throttling her. On her evidence, she left the beer hall when it was already dark but instead of going straight to the deceased's house she first went to her own home where she armed herself with the reed and the knife. Asked why she had done this she said she used the reed "to ward off dogs" and the knife "so that I would protect myself with it along the way because it was already dark." The latter statement is obviously untrue. It was also dark when she left the beer hall to go to her house, which she also need not have done as she could have gone straight from the beer hall to the deceased. Her reply to the Crown was that she had not needed a knife to protect herself from the beer hall to her own home because "it was not yet very dark", serves to underline her untruthfulness in this regard. It is, in my view, clear that knowing that

she was going to confront the deceased over her allegations she decided to take along a weapon that

she could use should that confrontation get out of hand as far as she was concerned. And that is exactly what happened. There is nothing to gainsay Appellant's evidence that the deceased first struck her and then started throttling her and it is accepted that that occurred even though she had no injuries or marks caused by the throttling. Indeed, she said as much to certain people immediately after the events. When, however, she was being throttled she clearly never hesitated to use the weapon, with which she had obviously armed herself for just such an eventuality, to stab the deceased.

The facts show that the Appellant was the initial aggressor, going deliberately to the deceased's home armed with a whip and a knife to have it out with the deceased about her allegations. She was, she admitted, offended and angry and obviously knew that the incident might flare up into violence in which she might have to use the knife with which she had intentionally armed herself before going to confront the deceased.

The knife was a large one and the Appellant must have foreseen as a possibility that should she stab the deceased with it, the latter's death could be the result.

In South Africa, it has been held that If an accused foresaw the consequences or circumstances in question e.g. the death of the deceased as not only a probable result of his acts but considered that there was a possibility that they would result and nevertheless went ahead with her acts, (as the Appellant did), such accused has the necessary intention to commit murder in the sense of dolus eventualis (see BURCHELL AND MILTON: PRINCIPLES OF CRIMINAL LAW (1994) p.255). The same principles apply, in my view, in this country. They also apply to the circumstances of the present case.

It follows that, in my opinion, the Crown succeeded in negativing beyond reasonable doubt the Appellant's defence of self-defence and the trial Court correctly convicted her of murder on the basis of dolus eventualis.

The sentence imposed causes no sense of shock. It is indeed a lenient one. The trial Judge also committed no misdirection in imposing it.

The appeal against both the conviction and sentence accordingly fails and they are both confirmed.

TEBBUTT J.A.

I agree:

SCHREINER J.A.

I agree:

STEYN J.A.

Delivered on this…7th day 8 October 1996.