

52/96

CASE NO: 516/94

**IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)**

In the matter between:

CHARLES MORGAN

Appellant

and

THE STATE

Respondent

CORAM: VAN HEERDEN, SMALBERGER *et*
MARAIS JJA

HEARD: 15 FEBRUARY 1996

DELIVERED: 14 MAY 1996

J U D G M E N T

MARAIS JA:

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Appellant was charged in the Witwatersrand Local Division with murdering one Butler on 25 November 1991 at Kempton Park by shooting him with a firearm. Despite his plea of not guilty, he was convicted of murder and sentenced to seven years imprisonment. With the leave of the Court *a quo* (Streicher J) he appeals against his conviction. Whether or not leave to appeal against the sentence was also granted is in issue and I shall revert to that question at a later stage.

Much of the background and many of the events leading up to the killing of the deceased are either common cause or not disputed.

Appellant struck up an intimate relationship with Mrs Michelle Butler after she had divorced her husband (the deceased) for

the second time on 10 May 1991. (She has remarried since the deceased was killed but I shall continue to refer to her as Mrs Butler.)

This brought him into conflict with the deceased who, despite the fact that he was no longer married to Mrs Butler, resented the relationship.

The deceased persisted in harassing Mrs Butler. He behaved aggressively and violently towards her, particularly after consuming alcohol. He raped her, threatened to kill her and on one occasion fired a shot at her. His violent conduct was also directed at appellant and there were instances where his threats to harm appellant were translated into action and he assaulted appellant. Police intervention occurred and an order by a magistrate binding the deceased over to keep the peace was issued. The deceased's hostility towards both Mrs Butler and appellant did not abate despite the fact that the relationship between appellant and Mrs Butler had cooled and they had become no

more than friends. Indeed, he threatened to kill appellant and had once threatened appellant with a baton and on two other occasions pointed a firearm at him. It is unnecessary to go into further detail. What I have said suffices to show that the relationship between appellant and the deceased was characterised by an aura of latent, and often patent, hostility.

In broad brush strokes, the following is the case which the State sought to prove. On 25 November 1991 Mrs Butler, with whom appellant worked in the security department of O K Bazaars, asked appellant whether he could take her to the school at which her three children were in order to collect them and take them to her home in Kempton Park. Her own car was at the panelbeaters. Having collected the children, they arrived at Mrs Butler's home at approximately 13:10. At the same time the deceased arrived

unexpectedly and announced that he had come to take the children to the zoo. According to Mrs Butler, she told appellant to wait at the car and she and the deceased entered the house. The deceased sat with two of their daughters on a sofa in the dining room in which a television set is situated. Mrs Butler commenced to sort out the deceased's post when she became aware that appellant had entered the house and was standing next to her in the doorway. According to her, the deceased approached appellant and demanded to know when he would cause the television set which he had kicked and broken on a previous occasion to be repaired. A physical struggle then commenced between them. Appellant appeared to be getting the better of the deceased and at one stage held him so firmly by his throat that saliva was emanating from his mouth. The deceased implored appellant to desist but to no avail. The deceased allegedly shouted more than once

to Mrs Butler that she should call the police. She attempted to do so but the telephone was knocked from her hand in the course of the struggle between the two men. She ran from the house to seek help. On her return she found the two men in the kitchen. Appellant was standing at the kitchen door which gives access to an external courtyard. The deceased was standing in a corner of the kitchen. Appellant was facing toward the deceased with a pistol in his hands. He pointed the pistol at the deceased who held his arms aloft in a position of surrender and screamed "Nee God, moenie". A shot rang out and the deceased fell forward onto his stomach. Another shot was fired by appellant at the deceased. She ran from the house with the domestic employee, Mrs Catherine Vilakazi, and the children. As she ran she heard a number of further shots being fired. She sought help and returned to the house with the police who, after entering the

house, reported to her that the deceased was dead. She insisted that the deceased was unarmed when he was shot by appellant and that the deceased was petrified and implored appellant to desist while they were struggling prior to the shots being fired.

Under cross-examination she conceded readily that the deceased was habitually aggressive and quarrelsome and that he had often threatened to kill "that Australian bastard Charles" (the appellant). She confirmed many other allegations put to her which reflected poorly upon the deceased, including the drawing of a firearm by the deceased on other occasions. As against that, she also testified to the occasion on which appellant had lost his temper and assaulted her and had broken the television set by kicking it, resulting in her laying a charge against him which she did not pursue. She insisted that she had told appellant to remain at the car on this occasion

precisely because she wished to avoid a confrontation between him and the deceased, but acknowledged that appellant might have disregarded her admonition because he feared for her safety in the light of the deceased's previous assaults upon her. She denied that the deceased had grabbed appellant by the throat and tried to throttle him and said that after they had fallen to the floor, the deceased was under appellant who had his hands around the deceased's throat. She denied emphatically that appellant was acting in self-defence and repeated that the deceased kept asking appellant "to stop and to just leave it". She admitted readily that the deceased was always responsible for initiating the confrontations and fights with appellant which had occurred. It was her impression that appellant looked angry when he pointed the firearm at the deceased and she was quite sure that the deceased was terrified because all his actions and what he said, showed that to be so.

She said that it appeared to her that the first shot fired hit the deceased in the area of his shoulder or the upper part of his body and that the two men were standing very close to each other at that stage. She estimated the distance to be a metre. She did not actually see the wound nor did she see the body of the deceased after he had died. She strongly denied that the deceased had reached behind his back with his hand and that appellant had drawn his firearm in reaction to such a movement by the deceased. It was put to her that appellant would say that he could recall drawing his firearm and hearing the first shot, but that he had no recollection of any other shots being fired. She opined, for what it was worth, that he must have known what he was doing because he fired so many shots. She was alluding to the undisputed fact that appellant fired at least ten shots all of which hit the deceased. She reaffirmed that the deceased had been

standing with his hands uplifted in a position of surrender before he was shot. She said that the second shot was fired while the deceased lay on the floor and that it struck him on the side of his body causing his body to jerk. She was unable to say where Catherine Vilakazi was when these two shots were fired. She could not remember seeing her in the dining room. She said that the further shots which she heard while running from the house were fired in quick succession immediately after one another.

Mrs Vilakazi's evidence need not be reviewed in any detail for reasons which will become apparent. However, some aspects of it merit mention. She confirmed Mrs Butler's evidence that the deceased had entered the house ahead of appellant. She confirmed that she saw the two men fighting in the dining room and said that they stopped after Mrs Butler had appealed to them to stop. She said

that she went to collect some washing from the washing line and when she re-entered the house she found the deceased in the kitchen. He was fetching a cup and appeared to have switched the electric kettle on in order to make tea. As she was on her way to the bedrooms with the washing and while she was approximately five metres away from them, she heard, so she claimed, appellant saying to the deceased "I am going to shoot you. I am going to shoot you". At the same time appellant pointed a pistol which he had in his hand at the deceased. According to her, the deceased was standing with his hands upraised in a position of surrender. Appellant then shot the deceased who fell to the floor on his stomach. Before she ran from the house with the children, she heard, but did not see, two further shots being fired and, as she was at the door, she heard a fourth shot. She heard no further shots and said she was so scared and confused that she "would not

hear a thing". She saw no weapons in the possession of the deceased nor did she see him making any gestures which could be construed as threatening prior to being shot. She gave a rather more elaborate version than Mrs Butler did of what the deceased and appellant had said to each other before coming to grips and said that appellant laid hands on the deceased first. She was adamant that the fighting had stopped and that that was why the deceased had gone to the kitchen to make tea. She also said that Mrs Butler had screamed "No, no Morgan" when appellant said he was going to shoot the deceased and that she (Mrs Butler) was standing behind appellant at that stage. She did not hear the deceased say anything.

Her statement to the police was put to her. It was a very short account of what had happened and it contained some allegations which were in conflict with her evidence. Those she attributed to her

being misunderstood by the policeman who recorded her statement.

More serious were certain omissions, for example, that appellant had said that he was going to shoot the deceased and that deceased had had his hands raised in a position of surrender when he was shot.

At an inspection *in loco* a bullet hole was observed in one of the kitchen cupboards. It emerged that the bullet had been found lodged in the cupboard some days after the incident by Mrs Butler. She reported the find to the police who did not regard it as important. Neither Mrs Butler nor Mrs Vilakazi could say precisely when and how it came about that the cupboard was struck by a bullet. Mrs Butler conceded that it was possible that it may have been a consequence of the first shot that was fired and that the shot which first struck the deceased may have been the second shot fired.

Dr Peters, a district surgeon of long experience, testified

that there were no less than ten bullet entrance wounds on the body of the deceased. One of the wounds on the front of the left shoulder showed extensive burn marks indicating that it was fired at close quarters - within an arm's length. All the wounds were in the upper third of deceased's body and most of them were on the deceased's back. There was also a wound on deceased's face.

One Carter, a policeman who was in the vicinity and who had responded to a radio call to proceed to the house, testified as to what he found on arrival. The burden of his evidence was that appellant appeared to be calm and collected and claimed to have had a fight with deceased and to have shot him in self-defence. In reply to a question as to how many shots he had fired, appellant said that he did not know because he had "just continued to shoot by himself". Appellant asked to be allowed to telephone a lawyer and he did so.

He repeated what he had said to Carter. It was not suggested to Carter in cross-examination that his account of what appellant had said to him was incomplete and that appellant had told him that the deceased appeared to him to have reached behind his back for a gun, prompting him to draw and fire his own pistol.

It should be mentioned that appellant had elected when pleading to the charge to place the following written explanation of his plea of not guilty before the court.

"I have known the deceased for a few months. I and the deceased's ex-wife had a relationship which was unacceptable to the deceased, although they were divorced. On numerous occasions the deceased threatened to kill me and his ex-wife. The deceased had also on more than one occasion threatened me with a firearm. On 25 November 1991 I was in the company of the deceased's ex-wife at her home when the deceased arrived there. The deceased assaulted me and tried to throttle me. While fighting with the deceased he at one stage reached behind his back. I believed he was reaching for his firearm. I automatically drew my firearm. I can remember the loud noise

of the shot in my ears. Although I admit that I killed the deceased I cannot remember doing so or that I fired numerous shots. When I shot the deceased it was as a result of various factors, probably acting unconsciously and I did not appreciate that my conduct was unlawful. I was also not able to exercise any self control over my conduct for which I am accordingly not criminally accountable. My lack of criminal capacity was of a temporary nature and was not due to any permanent or temporary mental illness or mental defect as intended by section 78 of the Criminal Procedure Act."

That, in substance, was the State's case against appellant.

Appellant testified in his own defence and also called a psychiatrist to give evidence. Appellant said that confrontation first occurred when the deceased "got between (him) and the house" while he (appellant) was in the yard of the house. Mrs Butler and the children had preceded him into the house. There was an exchange of words about the damaged television set during which the deceased pointed his finger at appellant's face, touching his eyebrow. Appellant

proceeded to enter the house. He was followed by the deceased who again accosted him and pointed his finger at his face. Reciprocal recriminations and insults were exchanged whereafter the deceased grabbed appellant by the throat with both hands. A struggle ensued in the course of which they fell first onto a chair and then onto the floor. The deceased was on top of appellant and was throttling him. Appellant stuck his thumb in the deceased's eye and deceased got up. Mrs Butler was shouting "Stop it Tommy, stop it". Tommy was the deceased's name. The deceased tried to throw himself back on top of appellant but appellant managed to get up and he struck the deceased. The deceased shouted something and backed into the kitchen. Appellant followed him. The deceased suddenly turned sideways and reached behind his right hip in a manner which led appellant to believe that he was going to draw a firearm and shoot and kill him.

In his own words: "So I drew my firearm and as I did he lunged towards me and I fired. I heard the sound of the first shot. I did not hear any subsequent shots and then I could see him, my concentration was holding him, I could see his head and upper body where he fell to his knees and then blood gushed from his mouth and then he fell straight upon his face. At that point I came to my senses and I realised what had happened. I called for Michelle, but all I heard was a long drawn-out scream. I turned around and looked into the dining room, but neither she nor the children were there. I looked down at the deceased and then I put my firearm into the holster. I went to the telephone and then using a telephone number which was written onto a piece of paper in a frame on the wall, I telephoned the Birchleigh North Police Station. I said: 'Come quickly to no 14 Winterkoning Street, Birch Acres, I just shot a man'. I spoke to a male person on

the other end and as my accent (sic) it took a while to get the message across. Then I hung up and I redialled again. I dialled 999 and I called the ambulance. I said: 'Please come quickly to no 14 Winterkoning Street, Birch Acres, I have just shot a man'. They said: 'Is he black or is he white', I said: 'He is a white man'. They said they will be right there. Then I put the phone down and then I ran out to my car and I got a first-aid kit from my car. I ran back into the house and I dropped the kit by his head and then I knelt down beside him and pulled him over so that he is now lying on his back. I wanted to see if he was breathing. I looked at his mouth, his mouth was full of blood, there were no bubbles. I then felt for a pulse, I could not feel the pulse either. So then I scraped the blood out of his mouth and commenced CPR on him. Shortly after that the police arrived my lord'.

Under cross-examination it emerged that appellant was experienced in the handling of firearms having been employed as a shooting instructor at one time. He did not deny that he had been asked by Mrs Butler to stay away from the house when they unexpectedly encountered the deceased, but said he had no recollection of it. He believed that the deceased, who was a member of the police force, had his firearm with him although he did not at any stage actually see such a firearm. He claimed that he had walked into the house ahead of the deceased, thus exposing his back to him, despite feeling threatened by him. On being pressed on this issue, he became vague as to the respective movements of himself and the deceased at that stage. It was inherent in his initial description of their respective movements once they were inside the house that he would have had a view of the deceased from behind. On being confronted with the

implications of that upon his allegation that he had not been able to see whether or not the deceased had a gun in his waistband, he professed to be unable to recall whether he had an opportunity of seeing the deceased from behind. Despite the fact that the deceased was wearing a relatively close-fitting T-shirt which was tucked into his trousers, appellant initially resisted the suggestion that he would have seen a firearm if the deceased had in fact had a firearm at the rear of his hips. However, he conceded that there would have had to be at least a visible bulge and that if he had seen the deceased's back (which he could not recall seeing), he would have seen it. On being asked why he thought the deceased was going for a gun when he allegedly reached behind his hip, he said that he was starting to get the better of the deceased in the fight, and that he thought the deceased would do what he had done in the past, namely, produce a firearm. He said that

the deceased had threatened to kill him in the past. He was unable to explain the bullet hole in the cupboard because he did not know where any of the bullets went that he fired. Indeed, he said he did not see his gun nor remember firing any shots other than the first shot which he fired. He remembered both hearing and firing the first shot towards the deceased but could not even remember hearing the subsequent shots. The deceased was lunging towards him when he fired the first shot. In reply to the question whether the deceased had anything in his hands, appellant said that he could see only the "face and upper body" of the deceased. He could not explain why he was unable to see the deceased's hands. He proceeded to contradict his earlier evidence that he had fired at the deceased when the deceased lunged at him, and reversed the sequence of those two actions. He said that, in firing the first shot, he wanted to stop the deceased from drawing

his firearm and shooting and killing him, but not to kill the deceased.

When asked at which part of the deceased's body he took aim, he professed to be unable to say despite remembering firing the shot. His answer: "I cannot explain that, all I know is that I heard the first shot go off". He repeated that he did not see the firearm and that included its sights. He did remember seeing the deceased falling to his knees with blood gushing from his mouth and then falling onto his face.

When taxed with why he told both Carter and the lawyer that he shot a man in self-defence if he did not really know what had happened, he said that he did not recall using those particular words.

When asked why that evidence was not disputed when it was given, he said that was his counsel's decision. He repeated that the reason why he shot the deceased was because he believed at that moment that he had a firearm and that he was going to draw it and shoot and kill

him. When asked how the repeated shooting of the deceased in the back while he lay on the floor was consistent with self-defence, he replied: "I have no reasonable explanation for what happened there my lord. The first I knew of those shots was when I saw the post-mortem report in August".

He was asked to explain how it came about that the empty shells which were found on the floor were distributed around the deceased in a pattern which was inconsistent with the shots being fired from a single position. He conceded that the ejecting mechanism in his pistol ejected spent shells to the right only, but said that the movement of the shells once they had struck the floor was unpredictable. He was asked to explain how he could have thought that the deceased was armed when he had spent some time wrestling with him and must have felt the firearm. He said that he did not feel

the firearm nor did he attempt to ascertain whether the deceased was armed despite previous experiences when the deceased had threatened him with a gun. He said that he did not think of drawing his own firearm during the struggle although he was afraid of being "physically beaten up". He denied that the deceased's retreat into the kitchen signified that the fight was over and said that his demeanour remained aggressive. He conceded that he had followed the deceased into the kitchen and said that he did so because he regarded the deceased as still being a danger to him (appellant), Mrs Butler and the children because of threats made in the past. When asked why he thought the deceased had retreated to the kitchen if he still wished to fight, he said "I do not know, I cannot think for him". He denied that the deceased had raised his hands above his head in the manner described by Mrs Butler and Mrs Vilakazi and suggested that there were policemen at

Birchleigh North Police Station who were good friends of the deceased and that they colluded together to put pressure upon those two witnesses to tell a more damning story against him. The opinion was based upon what he regarded as evidence of reluctance or refusal of the police on previous occasions to act against the deceased who was a policeman. He conceded that if he had been behind the deceased and Mrs Butler when they entered the house, he would have seen the deceased's firearm, but denied that he had been behind them. When asked why Mrs Butler's evidence that he was behind the deceased had not been challenged in cross-examination, he said that was his counsel's decision. He repeated that he could not remember how they managed to get from the driveway where the confrontation started, into the house. He said much the same concerning their respective movements in the house. He said the thought of removing any firearm

which the deceased might have, did not occur to him while the deceased was attempting to throttle him. When asked why, if he thought the deceased was intent upon continuing the fight, he did not attempt to engage him physically as he moved into the kitchen, he said he did not know and added "perhaps the opportunity did not present itself".

A psychiatrist, Dr Vorster, was then called to give evidence. In short, she expressed the opinion that the appellant was fully aware of his actions when he fired the first shot in self-defence in the belief that the deceased was reaching for his gun, but that he was not aware of his actions when firing the subsequent shots and "seemed to have acted reflexively". Her evidence is shot through with opinions which are based upon facts which did not exist. I cite but one example: on being asked why appellant would have stopped

firing when there were still five live rounds in the magazine if he was acting reflexively, she replied that he fired instinctively at the body of the deceased "and once the body had fallen he stopped firing". It is quite obvious from the position of the wounds on the deceased's body that appellant did not stop firing then but continued to fire while the deceased lay prone on his stomach on the floor. She disavowed any intention of suggesting that the firing of those shots was an act of automatism and said that they were "more an instinctive reflexive act".

She also ruled out amnesia. Her evidence fails utterly to explain why and how appellant's mental state could have undergone so sudden, swift, and dramatic a metamorphosis - from the calculated and controlled firing of the first shot in the belief that it was necessary to prevent himself being shot by the deceased, to "automatic" and "random" firing of which he was not actually aware. She conceded

too that if the second or subsequent shots were fired when the deceased was already lying prone on the floor, her theorising would have no foundation.

The defence case was then closed on 4 December 1992 and the matter was adjourned. On 10 December 1992 when the matter resumed, appellant was no longer represented by the same counsel. An application to reopen the defence case was made on various grounds which it is unnecessary to detail save to say that one of the grounds was the allegedly "poor report" of Dr Vorster which was said to have "miss(ed) the point entirely". The application was granted and on 10 May 1993 the defence case was reopened. A film of the scene of the alleged crime taken by the police by means of a video camera was shown to the court. Counsel for appellant sought to suggest that a "dark object" faintly visible on the floor at the corner of a cushion

just to the right of the deceased's head was a gun. Professor Botha, the Chief State Pathologist for the province of Natal and professor and head of the department of forensic medicine at the University of Natal, was called to testify. His evidence canvassed a number of hypotheses as to how, postulating various relative positions of the deceased and appellant to one another, the wounds could have been inflicted, but nothing in his evidence can be said to be in direct conflict with the version given by the State witnesses on that score. Indeed, some aspects of his evidence were actually inimical to appellant. Thus, he tended to discount the possibility of the shots having been fired successively quite as quickly as had been suggested, saying that the spread of wounds over the deceased's side and back was not what he would expect to find in such circumstances. He said too that they could not have been fired from one position and that either appellant

or the deceased must have changed position during the firing of the shots. He said that if the first shot was indeed the shot which fractured the neck of the humerus and the deceased then fell forward, that injury to his arm would not necessarily have prevented him from attempting to break his fall with that arm as the State witnesses had claimed he did. Nor could he exclude, for obvious reasons, the possibility that the deceased had his hands raised in a position of surrender immediately before the shooting commenced. He was puzzled by the bullet which lodged in the cupboard and could do no more than speculate how it might have lodged there. He could not connect it with a shot fired at the deceased's body.

Because it was proposed to call witnesses to say what Mrs Butler had told them she knew about this incident, and what they would say had not been put to her in cross-examination, she was

recalled to the witness stand. It was put to her that one Emmerson, who was her superior at her place of work, would say that she told him that she did not see the shooting and only heard it, and that one De Kock would say that she told him that she saw appellant draw his firearm and that the first shot was fired while she was on her way out of the house and that she only heard it. She denied having said any of these things. In re-examination by the prosecutor she identified an affidavit which she made on 26 November 1991 in which she said the appellant's gun had already been drawn by him when she first saw it. She said: "At that stage I was outside the house, the children ran back into the TV room, I went to get them and then noticed that Tommy was standing in the left back corner of the kitchen with his hands above his shoulders and Charles was standing in front of him with his back towards me. Charles had his firearm in his right hand and the

firearm was pointed towards Tommy. I heard a shot, Tommy fell on the ground and Charles fired another shot into Tommy's side and his body shook and he looked up to me, but I couldn't do anything. I ran out of the house with my children and just heard more shots coming from the kitchen". She said that De Kock had told her that she should not take it personally if he testified for appellant because he was scared of appellant and that Emmerson used to socialise with appellant. (Emmerson is in fact visible in the video film which was taken by the police of the scene of the alleged crime.) She said Emmerson had also expressed the view that the deceased needed to be shot. She was asked, with reference to the suggestion that the "dark object" visible in the video film might be a gun, whether she had a gun and she said that appellant had previously lent her a Walther 7,65mm pistol which was in her handbag at the time. She added that

when she ran from the house and encountered the person who stopped to help her, she handed the pistol to him and asked him to give it to the police. As a fact the police came into possession of the gun and it actually appeared on a list of exhibits. It was suggested to her that her evidence regarding the Walther pistol was a "very sinister fabrication". She denied the allegation. She refused to confirm that what appeared at the corner of the cushion was a pistol but did not deny that it might be.

De Kock then testified. He denied being afraid of appellant and proceeded to give a minutely detailed account of what Mrs Butler had told him about a month after the incident - this despite the fact that he was testifying some seventeen months later. He contradicted himself materially by saying at first that she had said that while the deceased had his hands around appellant's throat, appellant

had shouted to her to call the police, but then saying later that she told him that it was the deceased who shouted to her to call the police. He said that she had said that she had seen appellant drawing his firearm, but that she had been so scared that she ran out of the house and heard shots being fired while she was doing so. He gave illogical and incoherent explanations when questioned on how he had come to give evidence for appellant. He and appellant were friends and were both working for the same firm.

Emmerson testified. His version of what Mrs Butler told him was an extremely condensed one. In essence, his evidence was that she said she heard the shots thereby implying that she did not see any shots. He too was less than satisfactory in explaining how it came about that he was called to give this evidence. He denied that he had told Mrs Butler that the deceased needed to be shot.

A clinical psychologist, one Segal, was then called to testify. His evidence is virtually worthless. It purports to support reflexive behaviour on appellant's part *ab initio* when he first started firing. That is in conflict with appellant's own evidence which was that it was a fully controlled and deliberate action on his part. Moreover, it was given without any appreciation of the fact that the deceased and appellant were no longer actually fighting when the shooting began, the deceased having withdrawn to the kitchen. When he was asked whether the version of the shooting upon which the State relied could be attributed to reflexive behaviour, his answer was "Probably not". What is more, he said that if shots had been fired reflexively, that would not preclude an appreciation by appellant that he had fired the shots and that he would expect him to say that he was aware of firing the shots but could not control his actions. That of

course was not appellant's version.

The trial judge then allowed the State to call further witnesses in regard to the issue of the "dark object" visible in the video film. They were policemen who attended the scene at the time. It is sufficient to say that their evidence convincingly eliminates any possibility of the object (if it was indeed an object) being a gun.

The Court *a quo* reviewed the evidence fully when giving judgment. It was fully alive to those aspects of the evidence given by the State witnesses which were submitted by counsel for appellant to cast doubt upon its veracity or reliability. That was why it decided that the evidence of Mrs Vilakazi could not be relied upon. The trial judge was also not satisfied that Mrs Butler's evidence was always reliable. That is not to say that he entertained any doubt as to her honesty as a witness. His reservations concerned the reliability of her

observations and her recollection of what she had seen happen immediately before the shooting. Those reservations stemmed from discrepancies in the accounts which she gave of what had happened. He did not believe that she was biased against appellant or that she was seeking to portray her ex-husband (the deceased) in a favourable light. He pointed to the many concessions she made about the quarrelsome and aggressive character of the deceased and her confirmation of many aspects of appellant's version as to what happened on that day and on occasions in the past when there had been confrontations between the deceased and appellant. He decided not to rely upon her evidence that the deceased had his hands raised in the air when appellant commenced firing at him and that the deceased did not reach behind his back with his hand before firing commenced.

For adequate reasons the trial judge was not impressed with the evidence of Emmerson and De Kock regarding what Mrs Butler told them about the incident. In the result, the trial judge was satisfied that it had been proved beyond reasonable doubt that the deceased had not reached behind his back in the manner described by appellant, that appellant's evidence in that regard was false, and that appellant had not fired the first shot or indeed any other shot in self-defence. He was equally satisfied that appellant's claim to have fired reflexively after firing the first shot was also untrue.

Those findings are, in my view, unassailable. As a fact, the deceased was unarmed. Appellant admitted that to have been the case but claimed that he did not realise it until after he had shot the deceased. Given that the deceased was unarmed, there was no reason why he would have reached behind his back for a pistol in the manner

described by appellant. Moreover, at that stage the deceased had retreated into the kitchen and the physical grappling with one another which had preceded his retreat had ceased. There was no suggestion by appellant that either before allegedly reaching behind his back, or while doing so, the deceased looked behind him, so that any possibility that he might have reached for something else to use as a weapon lacks plausibility. Furthermore, appellant must have been aware of the fact that the deceased was unarmed before he shot him. He had grappled with him physically for an extended period in a manner which would certainly have made it possible for him to ascertain whether or not the deceased was armed. He was aware that the deceased had been armed on previous occasions when there had been confrontations between them and that the deceased had been prepared to brandish his firearm. It would be quite unrealistic to

suppose that despite those previous experiences, it did not occur to appellant during the struggle to ascertain whether or not the deceased was armed. The clothing which the deceased was wearing would have made it very obvious that he was armed, if he did have a pistol tucked into his waistband behind his back, and equally obvious that he was unarmed, if he did not. Appellant's own evidence was that the deceased entered the house ahead of him and his own justifiable concern at what the deceased might do, would have resulted in him looking at the deceased. Appellant's evidence as to other actions of the deceased was also inconsistent with the deceased having reached behind his back for a firearm. Initially, he said that as he (appellant) drew his firearm, the deceased lunged towards him and that he (appellant) then fired. Lunging forward in that manner is not the action of a man who has just reached behind his back for a firearm.

Appellant sought to resile from this allegation in cross-examination by altering the sequence of events. He claimed that the deceased lunged towards him only after he (appellant) had fired the first shot. Yet another weakness in the appellant's version is his alleged inability to say whether or not he saw that the deceased had not in fact drawn a firearm before he shot him. If, as he claimed, his decision to draw his own firearm and fire a shot at the deceased was prompted by a movement by the deceased of the kind described, it is inconceivable that he would have failed to notice whether or not a pistol was in fact produced by the deceased. He does not claim to have reacted so fast to the movement that he had fired before he was able to see whether or not the movement had led to a pistol appearing in the hand of the deceased. Nor could he have done so; the period of time which would have been required for him to react to the movement by

reaching for his own firearm, withdrawing it from its holster, adopting the shooting posture which he described, and firing at the deceased, would obviously have been appreciably longer than the time it would have taken for the deceased (who had allegedly started withdrawing his firearm before appellant commenced doing so) to merely produce his firearm.

Then there are the other shots. These are obviously entirely inconsistent with self-defence. Herein lay appellant's dilemma. He sought to resolve it by claiming to have been in full possession of all his faculties and having acted deliberately and intentionally up to the firing by him of the first shot in self-defence, but to have lost conscious control of himself immediately thereafter and to have fired the remaining shots reflexively without any recollection of having done so. The trial judge, as I have said, rejected as false the claim

that the other shots were fired reflexively. In my view, he was justified in doing so. The entire hypothesis that appellant fired the further shots reflexively rested upon appellant's claim that he neither heard nor remembers firing those shots. His evidence in that regard cannot reasonably possibly be true. His version of these events lacks consistency and smacks of opportunism. In his written statement in explanation of his plea he sought to create the impression that even the first shot was not consciously fired. In his evidence he abandoned that stance and said that he fired that shot deliberately and with a full appreciation of what he was doing. His claim that he remembers nothing about the firing of the further shots is not consistent with those shots having been fired reflexively. As mentioned earlier, Segal said that if the shots had been fired reflexively, that would not have precluded appellant remembering that he had fired the shots, and that

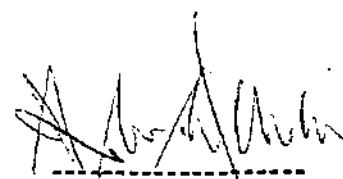
he would expect appellant to have said that he was aware of firing the shots but could not control his actions. Finally, there is the fact that appellant professed to have had full control of himself and a good recall of everything that happened from the beginning of the confrontation up to the firing of the shot which brought the deceased to his knees with blood gushing from his mouth, and also from the time when he became aware of the deceased lying on the floor after the further shots had been fired. He described in some detail how he had reacted and what he had said and done during both those phases of events. That he should have no conscious recollection of anything that occurred only while the highly compromising further shots were fired at the deceased is just too convenient to be true. In my view, all these factors, looked at in their totality, show that the trial judge correctly rejected the allegation as not being reasonably possibly true.

It was not argued that any verdict other than guilty of murder should have been returned if appellant did not act in self-defence. The appeal against the conviction can therefore not succeed.

I turn to the purported appeal against sentence. Application for leave to appeal was made immediately after sentence had been imposed. It was made orally and counsel's submissions form part of the record of proceedings. There was no mention made of any intention to appeal against the sentence. The trial judge granted the application and he did not indicate that he was granting leave to appeal against anything other than the conviction. There is therefore no appeal against the sentence properly before us. However, we allowed counsel to address us on the question of sentence pending our decision on whether or not an appeal against sentence was properly before us. If it is of any solace to appellant, I may say that we would

not have felt justified in interfering with the sentence imposed by the trial court. That court has not been shown to have misdirected itself in any respect in considering the question of sentence and while we might have imposed a somewhat shorter period of imprisonment had we been the court of first instance, we do not regard a sentence of seven years imprisonment as startlingly inappropriate. It is true that there are mitigating factors present and that appellant's personal circumstances count in his favour but the fact remains that he gunned down and killed an unarmed man in anger. South African society has seen too much of this kind of thing in recent times to make it appropriate for courts to deal leniently with those who indulge in it.

The appeal is dismissed.



R M MARAIS

VAN HEERDEN JA)
SMALBERGER JA) CONCUR