

CASE NO
78/92 /MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between

WESSELINA ANDRIAS JOHANNA LARSEN

APPELLANT

- and -

THE STATE

RESPONDENT

CORAM: NESTADT, P H GROSSKOPF JJA et
NICHOLAS AJA.

HEARD: 15 March 1994.

DELIVERED: 5 May 1994.

J U D G M E N T

NICHOLAS AJA/

2
NICHOLAS AJA:

Michael Larsen (known as "Mike") and Andrias Larsen (known as "Adrian") were married to each other in 1971. In 1989 they were living in a house in Weltevreden Park in the Roodepoort district together with their children, Jennifer aged 19, Keith aged 18 and Michelle aged 8. Mike was a successful and hard-working dental mechanic with his own laboratory, and Adrian had employment in a clerical capacity.

At the beginning of November 1989 the marriage was under severe strain. Each of the spouses was suspicious of the fidelity of the other. It had been planned that Mike should set out on Friday 3 November on a fishing week-end at the Loskop Dam with his cousin, James ("Jimmy") Dennison. Mike had asked Adrian to accompany them, with the object, it would seem, of keeping her under his eye during the week-end.

She refused and that probably fuelled Mike's suspicions. In the event the fishing trip was cancelled because of a report of bad weather in the area of the dam.

On the evening of Friday 3 November Mike and Adrian quarrelled. This erupted into physical violence. Adrian spent the night in Michelle's bedroom after she had taken Mike's 9 mm Browning Short semiautomatic pistol from the safe where it was kept and placed it under the mattress of Michelle's bed. The safe was in the main bedroom, which she normally shared with Mike.

At about 7 am on the Saturday morning Adrian went to the main bedroom and found that the bed had been made and Mike had already left. During the day she made a number of telephone calls, presumably in order to check up on Mike. In one of them she spoke to Susanna Dennison, Jimmy Dennison's wife, and told

her what had happened during the previous evening.

Mike came home at about 8 o'clock on the Saturday evening. He was churlish and foul-mouthed and went into the kitchen. Adrian was consumed with jealous suspicion and was overwrought. She fetched the Browning from Michelle's room and went to the kitchen, holding it behind her back. She closed the sliding door leading to the dining room, and shortly afterwards three shots were fired.

The police having been summoned at about 8.45 p.m, Det. Sgt Bakkes went to the scene. Inside the house he encountered Adrian. She was hysterical and in a state of shock. He found a man (it was Mike) lying on the floor of the kitchen. There was blood everywhere. The man was already dead. As a result of a report from Adrian he went to the kitchen door and found the Browning pistol lying on the steps outside it. There were four rounds in the magazine.

On post mortem examination it was ascertained that the cause of Mike's death was a gunshot wound through the brain. In the forehead was an entrance wound which appeared to have been caused by a point-blank shot, fired with the muzzle of the gun in contact with the skin.

The scene was visited on 6 November by Lieut Visser, an examiner of firearms and ammunition with the ballistics unit of the Forensic Science Laboratory. In the kitchen he observed a bullet hole in the one side of a metal cupboard and two bullet holes in the tiled floor, which had resulted from shots which must have been fired nearly vertically from above.

Arising out of this incident Adrian was arraigned in the Witwatersrand Local Division on 25 March 1991 on a charge of murdering Mike. She pleaded not guilty and confirmed a statement handed in in terms

6

of s.115 of the Criminal Procedure Act 51 of 1977, which reads as follows -

"1. The above-named accused admits that:

1.1 on the 4th November 1989 and at 1123 Knobthorn Street, Weltevreden Park, in the district of Roodepoort, a shot was discharged from a firearm which was then in her possession.

1.2 the shot aforementioned struck the deceased.

1.3 besides the shot referred to above, two other shots were discharged from the said firearm at the aforesaid time and place whilst the firearm was in her possession.

1.4 the deceased died as a result of a gunshot wound of the head/brain and ... death was instantaneous.

1.5 no further injuries were inflicted on the deceased after death had occurred as aforementioned.

2. The accused states that:

2.1 she had no intention to discharge the firearm on the three occasions referred to above.

2.2 she had no intention to kill or injure the deceased.

2.3 she had no intention of firing a shot or shots at the deceased.

3. The accused will state that all three shots referred to aforementioned were discharged from the said firearm in the course of a scuffle with the deceased.

4. The accused accordingly denies that she is criminally liable for the death of the deceased."

She was found guilty of murder and was sentenced to five years imprisonment, of which one half was suspended conditionally for five years. With leave granted on a petition to the Chief Justice she now

appeals to this Court against the conviction and sentence.

There were no eye-witnesses to the shooting, and the State relied on circumstantial evidence to prove its case. Adrian gave evidence in her own defence. In many respects her evidence stands alone and it is necessary, in order to assess it properly, to examine in some detail the events of the period between the evening of Friday 3 November and the evening of Saturday 4 November. Friday 3 November.

Adrian said in her evidence that Mike had informed her during the course of the day that he was not going fishing because of the weather. They had then arranged that he would go with her and the children to a Christmas office party to be held on the Saturday evening at Florida Lake. When Mike came home at about 7 pm she was sitting in the lounge watching TV. His

normal coming-home time was between 5.00 and 5.30 pm, and she asked him where he had been. His only reply was, "Sorry I spoiled your week-end", and then he went to the main bedroom. She followed and asked him what he meant by his reply. He answered to this effect: "Yes, you want to go to the party. You did not want to go fishing with me. You have known about the party for a long time." It seems clear that in uttering his initial remark Mike was being sarcastic. A quarrel developed and Mike assaulted her - not for the first time in their married life. He caught hold of her, and pulled her hair, and began striking her with his fists. Her body was sore and bruised. She tried to stop him by striking back at him. She went to the bathroom to clean herself up, but Mike banged on the door and told her that if she did not come out, he would break the door down. When she emerged, he assaulted her again. She went to the bedroom and started packing her clothes

because she felt she could not stay in the house any longer. She went outside to put her suitcase in the boot of the car but returned because a terrible storm was brewing and she decided not to leave. She took the Browning pistol from the safe for self-protection in case Mike started to assault her again. She put it under the mattress and went to sleep on Michelle's bed.

In her evidence-in-chief Adrian did not mention an incident which was a further indication that Mike had suspicions as to her fidelity. When she was asked in cross-examination whether it was correct that in the course of the quarrel with Mike she took off her clothes, she denied it, saying "Not at all". The cross-examination continued:

"So as dit vir my gesê is, is dit leuens, dat u op die Vrydagaand toe jou man vir jou gesê het jy wil net na die partytjie gaan om jouself te exhibit ..(tussenbei)--Kan ek dit regstel daarso?"

Asseblief? -- Asseblief. Nadat my man my geslaan net, toe sê hy vir my ek is 'n f-ing hoer, toe sê ek vir horn: Weet jy hoe lyk 'n hoer?

Ja? – Toe trek ek my klere uit. Dit was voor, nadat hy, voor, net nadat hy na die TV-kamer gegaan het, voordat hy soontoe geloop het.

Ja? – Toe staan ek by my voordeur. En dit is wat hy vir my gesê het ja, ek is 'n hoer, toe sê ek vir horn: Weet jy hoe lyk 'n hoer?

Ja. – Toe trek ek my klere uit, my skirt, want dit was helfte van my afgeskeur gewees in elk geval.

Dit is die eerste wat ons daarvan hoor, moet ek meld. – Toe het ek dit uitgetrek, ja, dit is reg en ek het buitekant toe gestap, buite my deur, en my seun [Keith] het buitekant toe gekom en my toegemaak en my terugbring in die huis.

Jy was naak, met ander woorde, jy het naak .. (tussenbei) -- Ek was nie kaal-kaal nie, ek het my bra en my pantie aangehad, om dit te korigeer, asseblief.

En jy het met jou bra en pantie na die hek gestap en dit is waar jou seun jou gekry het? -- Halfpad na my hek toe, dit is reg, en my

seun het my daar gekry en my toegemaak."

The day of 4 November.

Adrian said that in the morning she 'phoned the laboratory. Her object was to find out if Mike was at work, because she was very concerned about him and she only wanted to hear if he was all right. When Mike answered the phone, she just said, "Sorry, wrong number", and put the receiver down. This is a strange story. After the treatment she says that she received from Mike the previous night, it is curious that she should have been worried about him. The probability is that she 'phoned in order to check up on Mike, as she did several times later during the day. In the afternoon she again 'phoned the laboratory and asked Solly Moloto, Mike's assistant, where Mike was and was told that he was not there. She also telephoned her mother, a Mrs Pappadopoulos, who told her that she

thought Mike was at work. At about 6 pm she telephoned Susanna Dennison, Jimmy's wife, who was a state witness.

Mrs Dennison referred to this conversation in detail in her evidence. She said that Adrian told her about a quarrel on the previous evening which had arisen because Adrian did not want to take Mike with her to the party. Mike had told her that she only wanted to go to the party in order "to expose herself". She then said to him, "Okay, I will show you how to expose myself", and took her clothes off and walked out into the street, naked. When she returned, Mike assaulted her. Adrian had then told Mrs Dennison that she was going to shoot Mike. She was only waiting for him to come home and she was going to shoot him. Adrian told Mrs Dennison that the previous night (the Friday), she had taken the pistol out of the safe and put it under Michelle's mattress and was waiting for Mike to come

home and she would then shook him.

Adrian gave a somewhat different version. She telephoned the Dennison house and asked Susanna Dennison if Mike was there and she said "No". She asked her if Mike was with Jimmy and the reply was that Susanna did not know. Adrian had then told Mrs Dennison that if she found out that Mike had a relationship with a woman, she would shoot him.

It was submitted by counsel that Adrian's evidence regarding this telephone conversation was to be preferred to that of Mrs Dennison: that both Mrs Dennison and her husband had a motive to falsely implicate Adrian. This motive was said to reside in the circumstances of Adrian's involvement, shortly after Mike's death, with a man named Hans.

The first question put to Adrian in cross-examination was whether it was correct that about two years before Mike's death she had met Hans in prison

15

where she was visiting her cousin. Her first reaction was to deny that she had met Hans in prison. This was followed immediately by an acknowledgement that that was where they met. After their meeting there was no contact, she said, between them until 6 January 1990, which was Jennifer's birthday. Hans had telephoned that morning and said he had heard of Mike's death and offered his sympathy. He asked if he could come round for a cup of tea. Adrian agreed because she could see nothing wrong in

that. Immediately after he arrived at her house the Dennison's arrived. Naturally, she said, she got a fright. She did not know what to do and she told Hans to hide in the bedroom.

Dennison said in his evidence that on the occasion of Jennifer's birthday, he and his wife visited the Larsen house together with two friends. They had tea and later Susanna Dennison noticed Hans lying on the bed in one of the bedrooms. Shortly afterwards the

Dennison party left. That was the last occasion on which they visited the house. Dennison said that he and his wife were up to that stage still friendly with Adrian. Although he felt bad because Adrian had taken away his cousin who was like a brother to him there were no ill-feelings. whatever happened, it could not bring Mike back. Later Adrian 'phoned a couple of times. He said,

"....she told us she is sorry and all that and I said to her straight out: 'Adrian, you have got your life to lead, you must lead it as you see fit.'"

The trial judge did not made a finding in regard to the credibility of the Dennisons, but the impression I gain from a reading of their evidence is that they were both truthful witnesses without ill-

feelings towards Adrian. Certainly they were not people who would fabricate a story in order to falsely implicate Adrian. In so far as they differ, I have no hesitation in accepting Mrs Dennison's account of the telephone conversation and rejecting that of Adrian.

Evening of Saturday 4 November.

Adrian gave evidence that she left the house with her children to go to the Christmas party at about 5.45 pm. Mike had not then returned. They only stayed an hour at the party and returned home at 7 pm. They took fire-works outside and let them off. Mike arrived at about 8.30 pm. He was very angry when he got out of his car. He greeted no one and walked into the house. Adrian followed him into the bedroom and asked him where he had been. He replied, "It has got f- all to do with you, I went whoring", and poked his

middle finger into her bosom. She said again that she wanted to know where he had been, and Mike gave the same reply. She then went to Michelle's room and fetched the pistol. She said she wanted to force him to tell her where he had been. She knew that the pistol was unloaded, although Mike did not. She did not intend to fire it. She would never hurt him or kill him.

Adrian found Mike in the kitchen. She aimed the pistol towards his stomach and put her question again and he gave a strange laugh and walked into the pistol. She asked him, "Are you crazy?" and he replied that if she wanted to shoot him she should make a good job of it. He put his hands over her gun-hand and lifted it to his head. She jerked it away, and he jerked it back again and it was then that the fatal shot went off.

Adrian said in her evidence-in-chief that she had never handled the pistol except for an occasion

nine years before, when she had fired three shots and just missed hitting Mike's foot. She did not know how it worked. She said that on the Friday evening, the gun did not have the magazine in it, or at any rate she thought it was empty because Mike always kept the pistol and the magazine separate.

It is not clear on the evidence whether Mike was in fact accustomed to keeping gun and magazine separate. Jimmy Dennison gave evidence that it was he who had trained Mike in the use of the firearm and how to leave it when it was not in use. He said that he always trained Mike to remove the magazine from it, cock it, make sure that the chamber was safe, put the magazine back in it and then put it on safe. He said that Mike was too scared of a firearm ever to have a round in the chamber. "He was terrified of guns actually."

It is not acceptable that Adrian believed or

thought that the gun was not loaded. Her assertions to that effect became less and less convincing as her cross-examination proceeded. Asked whether she made certain that the pistol was not loaded, she said she just took it out of the safe and did not look. Pressed on this point, she said that she did not see because the light was off and it was dark in her room when she opened the safe. As the following extract from the record shows, this story of the unloaded gun finally disintegrated :

"Nou hoe het jy geweet of die vuurwapen gelaai was of nie gelaai was nie? – Ek het nie geweet nie.

Met ander woorde, die moontlikheid kon bestaan dat die vuurwapen wel gelaai was? – Moontlik, ja.

En jy het eintlik nie daarop gesteur nie? --
Hmm-hmm."

Nor is her story acceptable that she did not

intend to kill Mike, but intended only to frighten him. On her own version she told Susanna Dennison that she intended to kill Mike if she found he was having an affair. Her whole conduct is consistent only with such an intention. Her story that her purpose was to force Mike to tell her where he had been is fatuous. On the Friday she took possession of a gun which she must have known was loaded. She hid it under Michelle's mattress. On the Saturday evening she took it out and went to the kitchen to confront Mike, and aimed it at his stomach.

It is clear from the record that Adrian was no friend of the truth. That is shown by her initial response to the questions about Hans and by her duplicity when the Dennisons arrived; by her denial at first that she had taken her clothes off on the Friday night; by her false account of the telephone conversation with Susanna Dennison on the Saturday; by

her untrue evidence that she thought that the gun was not loaded; and by her false statement that she did not intend to kill Mike but wished only to force him to answer her question. Her story that Mike caught hold of her gun-hand so that the weapon was pointed at his head and told her to do the job properly is inherently improbable and in the light of Adrian's many deficiencies as a witness it cannot be reasonably possibly true.

The learned trial judge said in his judgment :

"On the review of all the foregoing evidence I find the inference irresistible that she deliberately fired at the deceased with intent to kill him if he did not answer her question satisfactorily. She was no doubt in a state of mounting rage when she acted in this manner, but that is a matter more for mitigation and not for exoneration."

And again,

"My finding is that the accused loaded the fire-arm, slid the safety device into the firing position, aimed it at the deceased and fired it. This action is not explicable simply by reference to an attempt to scare. The single fatal shot was the first shot which the accused fired."

I do not agree that these are the only reasonable inferences from the proved facts, or that they are the most probable inferences. It is reasonably possible that the magazine was in the gun when Adrian took it from the safe and that she did not load it. It is reasonably possible that the fatal shot was the last shot which was fired. In regard to the shooting there is another scenario which is largely consistent with Adrian's story and with all the proved facts. It is in my view more probable than that described by the trial judge.

The setting was the kitchen, which is a room 5,80 m long and 2,80 m in width, and the floor space is limited by furniture alongside the walls - a refrigerator, a freezer, shelving and a stove on one side and a table on the other - so that there was little room for two people to manoeuvre. All the action took place in the half of the kitchen next to the sliding door to the dining room. It appears that at the beginning of the episode Adrian and Mike were standing about half a meter apart from each other. When she aimed the pistol at him, it would have been natural for him to grab her pistol hand and to try to disarm her. That indeed was the effect of something she said under cross-examination:

"Nou wat sou u gedink het wat u man se reaksie gaan wees as hy die vuurwapen sien? -- Hy sou dit by my gevat het, sal ek dink, want hy is bale bang vir 'n geweer."

They grappled with each other and in the course of the ensuing scuffle two shots went off, which hit the tiled floor. Then the fatal shot was fired at a time when the muzzle was in contact with the skin of Mike's forehead. Consistently with a struggle for possession of the gun was the post mortem finding of an area of bruising 3 cm by 2 cm on the back of the deceased's right hand over the knuckle of the right index finger. In the view of the district surgeon that could have been sustained prior to the gunshot wound.

It was argued by counsel for the State that this was an execution type of killing. I do not think that that was proved. The probabilities are rather in favour of the fatal shot being fired in the course of a struggle for the possession of the gun.

In my opinion the question of Adrian's guilt should be approached on the basis of this scenario.

She entered the kitchen intending to kill

Mike. She aimed the pistol at him. There was no novus actus interveniens. Mike's reaction was a normal reaction for a man faced at close quarters with a pistol. And the fact (if it be the fact) that the shot which killed him was fired in the course of a scuffle for possession, does not affect Adrian's guilt.

In my view she was correctly convicted.

In regard to the appeal against sentence, I am of the opinion that the trial judge misdirected himself in the respects I have referred to, and that as a result the question of sentence should be considered afresh. In the circumstances of this case I think that the proper course is to remit the matter to the trial court.

The circumstances are these. The appellant was convicted on 12 April 1991. In order to assess a proper sentence it should be known what has happened to her in the last three years. Since she was sentenced,

a sentence of correctional supervision under s.276(l) (h) of the Criminal Procedure Act 1977 has become a sentencing option. The fact that she was convicted before s.276(1)(h) came into operation does not prevent the imposition now of such a sentence. See S v R 1993(1) SA 476(A) at 484J-485A. Correctional supervision may be an appropriate sentence in the case of a conviction for murder. See S v Potgieter 1994(1) SACR 61(A). The appellant was 38 years old at the time of her conviction. She had no relevant previous convictions. She was in full-time employment. She has three children including Michelle who was eight years old. There was a history of assaults on the appellant by Larsen, of which that on 3 November 1989 was only the last. When she entered the kitchen on the evening of Saturday 4 November she was probably in a state of towering rage, stemming from the incidents of the Friday, her jealous suspicions, and her increasing

frustration and Mike's taunting and abusive attitude. It may be that she does not fall into the category of persons who ought to be removed from society by a sentence of imprisonment.

Counsel referred to a possible difficulty which lies in the fact that the trial judge has now retired and might not be available to reconsider the matter. In my view however it would not be profitable to speculate in this regard.

The following order is made :

(a) The appeal against the conviction is dismissed.

(b) The sentence is set aside and the matter is remitted to the trial court to sentence the appellant afresh after receiving such further evidence as may be proffered, and complying with the

provisions of s.276 A(l)(a) of the Criminal Procedure Act in regard to correctional supervision under s.276(l)(h) of the Act.

H C NICHOLAS AJA.

NESTADT JA)
F H GROSSKOPF JA) Concurred.