247/54

G.P.-S.584—1952-3-30,000 U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(.....DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAKI.

.....

Appellant.

versus

.....

Respondent.

Appellant's Attorney ..... *Respondent's Attorney* .....
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate E.M. Grosskopf *Respondent's Advocate* F.L. Nel
Advokaat van Appelant *Advokaat van Respondent*

Set down for hearing on:— THURSDAY 3rd MARCH, 1955
Op die rol geplaas vir verhoor op:—

2.4.5.
9/45 am
11/35 am

Judgment:

21/3/55

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:-

ISAAC MOLEKO Appellant

and

REGINA Respondent

Coram:- Greenberg, van den Heever, Hoexter, JJ.A.

Heard:- 3rd February, 1955 Delivered:- 21/3/1955

VAN DEN HEEVER, J.A. JUDGMENT

In the Cape Provincial Division before Diemont, A.J., and a jury the appellant was tried on a charge of murder. He was convicted of culpable homicide and sentenced to imprisonment with hard labour for five years.

The issue raised on this appeal will emerge from a brief statement of the facts.

Appellant and the deceased, Tommy Saunders, were friends. On the night of the alleged murder appellant accompanied the deceased to the latter's lodgings. They woke the witness Matong who was already asleep in his

2/ room.....

room in the same premises and the three began to discuss a bottle of wine. Apparently the party became rather boisterous, for the landlord told the tipplers to go to sleep. Matong went back to his room and to sleep. Matong was again roused from his sleep by a noise in a passage at the back of the building from where someone called his name. To his question who had called, appellant admitted that he had done so. Appellant complained that while he was asleep the deceased had picked his pocket and taken practically his weeks wages. Deceased denied the allegation. Appellant persisted in his demand to get his money and threatened trouble if he did not get. it. Matong counselled them to be quiet and while they were still quarreling he again went to bed. Later he heard them leaving the building and quiet ensued, but not for long. Matong heard a noise in the street in front of the building and upon peering through the window saw appellant confronting deceased and heard him demanding his money. Appellant and deceased exchanged blows and Matong was under the impression that what he witnessed was the beginning of the fight. Matong says that after

the fight had lasted some time he heard the deceased saying: "Jy het my met die mes gesteek, wat soek jy nog met my?" The two contestants then moved in so close to the front that they were out of Matong's line of sight. Afterwards he saw appellant crossing the street and going away. When deceased failed to reenter the house Matong went to investigate and found the deceased in extremis.

Appellant gave evidence in his defence. If his evidence is accepted both he and deceased must have consumed a considerable amount of liquor during the course of the evening before they arrived at deceased's lodging; but deceased had brandy and wine while appellant only drank wine and stout. Appellant admits that he was drunk but maintains that he was not so drunk that he did not know everything that happened while he was awake. If appellant's evidence is true deceased knew that he had £8 in his trouser pocket - he had counted it out on the table just before going to sleep. Deceased knew that he had no weapon while deceased had a knife. Indeed, without his suggesting this inference his evidence is compatible with the deceased adopting a clever ruse, after he was

4/ aware .....

aware that appellant had so much money, to find out whether appellant was armed. Appellant says that when Matong left the room he was lying asleep on the bed. He woke when deceased was in the act of picking his pocket, extracting £7 and dropping £1 on the floor. When he could not recover his money and Matong left them the second time he left the premises saying that he was going to have the deceased arrested. Deceased ran after him and seized him and stabbed him in the shoulder. A running fight ensued back to the house. Ultimately appellant disarmed deceased by throwing a brick at him. When the deceased dropped the knife and appellant picked it up, deceased was already upon him and tried to regain the knife by twisting appellant's arm. In order to free himself he stabbed deceased; he remembers only one stab but, admits that he may have ~~done so~~, stabbed more than once. Thereupon deceased desisted and appellant departed. Both were covered in blood at this stage but deceased was still on his feet threatening future revenge.

In his summing up the learned Judge instructed the jury that the burthen of establishing self-defence

5/ lay .....

lay upon the accused. He repeated this instruction several times during the summing up, especially stressing it just before ~~kkrexjury~~ requesting the jury to retire and consider their verdict. In addition his summing up contains several passages implying such a rule as to onus.

The jury returned the verdict I have mentioned. After sentence upon the application of Counsel for the defence the learned Judge made a special entry and ordered a question of law in similar terms to be reserved, viz. :-

> "Whether the learned Judge erred in instructing the jury that the onus was on the accused to establish the defence of self-defence."

In his report in terms of Section 372 (bis) of Act 31 of 1917 as amended the learned Judge remarked:

> "I have nothing to add to what I stated in my summing up to the Jury, save that it seemed to me quite clear that the accused did not act in self-defence. The jury's verdict was perfectly correct, and I think that even if I had not told them that the onus of establishing self-defence was on the accused, the jury would inevitably have come to the conclusion that this was not a case of self-defence and that he was guilty of culpable homicide."

The onus of negativing self-defence in a criminal case encumbers the Crown (R. v. Ndhlovu, 1945 A.D. p. 381). On this proposition Counsel were in agreement and it was consequently common cause that the learned trial Judge had misdirected the jury in this regard. But there was no agreement as to how the misdirection should affect this appeal.

Mr. Nel, for the Crown, maintained that this Court should, in spite of the irregularity, not interfere with the conviction and sentence since "the facts proved and properly taken into consideration against the appellant were so strong, that no failure of justice in

7/ fact .....

fact resulted from the irregularity". He based his argument largely upon the summing up of the learned Judge.

On this aspect of the case the decision of this Court in R. v. Koortz, (1953 (1) S.A. p. 371) is very much in point; in fact the present case is stronger. In that case there was an omission on the part of a Judge in a murder case to instruct the jury that the accused should not be found guilty of murder in the ordinary way if it was proved that, through a disease of the mind or mental defect, he was the subject of an irresistible impulse which prevented him from controlling his conduct and that they could return a verdict under Section 29 of the Mental Disorders Act. In the present case we have a positive misplacement of the onus. In the published report of the judgment in Koortz's case a misprint has crept in, a "temerarious 'if' " exalting itself above its proper station. What my brother Greenberg actually said was this (p. 380) :

> "The cases show that there is no failure of justice where, though there has been a misdirection, a reasonable jury, if properly directed, would "inevitably" or "without doubt" have convicted (R. v. Othitis,

1946 A.D. p. 362; Rex v. Mkize, 1951 (3) S.A. 28 at p. 32 (A.D.)). This rule was not intended to be altered by what was said in the cases of Rex v. Attwood, (1946 A.D. 331 at p. 341), and Rex v. McKenzie,

(1947 (2) S.A. p. 951 (A.D.)), to which we were referred."

Later in the same case he remarked:

> "This Court has to be satisfied that no reasonable jury could have come to a conclusion that appellant had acted on an impulse of the kind referred to."

before it can hold that there has not in fact been a failure of justice. He pointed out, moreover, that we are not concerned with what this particular jury has found, but with what according to our own view a reasonable jury might find.

In the present case a reasonable jury properly instructed may well have come to the conclusion that it was reasonably possible that the witness Matong saw neither the beginning nor the end of the fight and might therefore be mistaken in thinking that appellant was the first aggressor. They may have come to the conclusion that Matong might have been mistaken and that it might have been appellant, no the deceased who exclaimed "Jy het my met die mes gesteek, wat soek jy nog met my?" Matong saw paper money in appellant's hand in deceased's room, but says he did not know what it amounted to.

8(a)/ The.....

The witness Potsane says that about a month before the deceased's death appellant and deceased wanted to fight because deceased alleged that appellant had taken some of his money while he, the deceased, was asleep. A reasonable jury may have come to the conclusion that deceased might have resented that fact that appellant was going to call in police assistance when deceased had merely recouped his losses by means of the same trick. They might have come to the conclusion that the bloodmarks on the pavement were not inconsistent with appellant's story.

According to the medical evidence the deceased had a wound which could have been caused by a brick being thrown at him. It is true that the deceased also had six wounds which could have been inflicted with a knife, but we do not know the sequence in which they were inflicted.

According to medical evidence the wound which proved to be fatal need not have caused immediate death. A reasonable jury properly instructed may

10/ have .....

have regarded these factors which I have mentioned as militating against acceptance of the Crown case. They may have considered, moreover, that it was reasonably possible that appellant did not exceed the moderamen inculpatae tutelae merly because in the agony of the moment he could not account for and justify every wound he inflicted in a fight for his life with a drunken and determined agressor.

If properly instructed as to the incidence of the onus a reasonable jury may well have decided that, although not persuaded of the truth of appellant's story, there was a reasonable possibility of its being true. Then it would have been their duty to acquit.

In the circumstances it is impossible to say that on the evidence a reasonable jury, uninfluenced by the misdirection, would inevitably have come to the same conclusion as did the jury in this case.

In my judgment, therefore, the appeal

11/ succeeds .....

succeeds and the conviction and sentence are set aside.

J.A.D. Steyn.

Greenberg, J.A.
Hoexter, J.A.