46/56.

G.P.-S.4706—1950-1—6,000. U.D.J. 445.

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

(Cape Provincial DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

HARRICHURRAN KALIDAS
Appellant.

versus

THE QUEEN
Respondent.

Appellant's Attorney / *Prokureur van Appellant*	*Respondent's Attorney* / *Prokureur van Respondent*
Appellant's Advocate / *Advokaat van Appellant*	*Respondent's Advocate* / *Advokaat van Respondent*

Set down for hearing on :— Tuesday 22nd May 1956.
Op die rol geplaas vir verhoor op :—

(SCL) 1, 3, 5, 8, 10

3 55

— Appeal allowed, conviction & sentence set aside. No order in the event that the Appellant be placed under the supervision of the Probation Officer.

— Beaumont, CJ, Hoexter, Steyn, Steyler et Price K(ATA)

Registrar. 11/6/56.

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

HARRICHURAN KALIDAS Appellant

and

R E G I N A Respondent

Coram:Centlivres,C.J.Hoexter,Steyn,Hall JJ.A. et v. Blerk AJA

Heard: 22nd. May, 1956. Delivered: 1/6/56.

J U D G M E N T

STEYN J.A. :- I concur in the conclusion arrived at by the Chief Justice , but would prefer to base it upon the second ground only mentioned in his judgment, i.e. on the ground that the evidence does not establish that the appellant exceeded the bounds of self-defence. In my view it is not necessary to decide both the issue of self-defence and the question whether the appellant has been proved to have been doli incapax. Had that been necessary I would in any event rather not have decided that question without a closer investigation of our own authorities than has been presented to the Court.

L. C. Steyn

Original

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :-

HARRICHURAN KALIDAS ... Appellant.

and

REGINA ... Respondent.

CORAM:-Centlivres,C.J., Hoexter, Steyn, Hall,JJ.A. et Van Blerk, A.J.A.

Heard:- 22nd May, 1956. Delivered:- 1st June, 1956.

J U D G M E N T .

VAN BLERK, A.J.A. :-

I agree that the appeal be allowed on the ground that the Crown did not prove that the appellant exceeded the bounds of self-defence for the reasons set out by the Chief Justice in this connection.

P J van Blerk

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

HARRICHURAN KALIDAS Appellant

&

R E G I N A Respondent

CORAM :- Centlivres C.J., Hoexter, Steyn, Hall JJ.A. et v. Blerk A.J.A.

Heard :- 22nd May 1956. Delivered :-

J U D G M E N T

CENTLIVRES C.J. :- The appellant was convicted by Henochsberg J. and two assessors sitting in a circuit local division of the Supreme Court in Natal of murdering, on October 16th, 1955, his mother to whom I shall refer as the deceased. As the appellant was under the age of 14 years on that date he was sentenced to receive in private a moderate correction of six cuts with a cane and to be placed under the supervision of the Probation Officer at Durban. Having been granted leave to appeal by Henochsberg J. he now appeals to this Court.

The deceased was an inmate of a mental institution for about nine years. In about 1952 she was released. From time to time after that she had relapses and became violent

towards members of her family. Whenever that happened the appellant's father left his home and he stated in evidence that when he did that she improved and that as the deceased was not normal on October 16th, 1955, he left his home, leaving the deceased, his daughter and the appellant there. While he was absent the events occurred which led to the charge of murder.

At some time during the day in question the appellant and the deceased were in one of the rooms of the house where they lived. The appellant took or was given an apple. While the appellant's sister, who was between 15 and 16 years of age, was sweeping the back verandah, she heard a noise and ran to see what was happening. She stated in evidence :-

" I saw my mother catch hold of my brother (the appellant), and I caught my brother's shirt and separated him from my mother. Then my brother ran away and my mother chased him with a plank."

Continuing, the appellant's sister said that the deceased afterwards fell down and collapsed and her brother ran away. The deceased was taken to hospital where she died. The doctor who conducted the post-mortem examination said that death was due to a large haemorrhage in the left side of the chest associated with a stab wound in the neck. There was also a stab

wound in the left arm. The wounds could have been caused by a sharp instrument like the blade of a knife. The doctor also said that it was apparently a known fact that persons who are ordinarily not strong can, under the strain of mental illness, become possessed of exceptional physical powers.

The appellant was arrested the day after the deceased died. The detective sergeant who conducted the investigations into the death of the deceased found that there were signs of a struggle in the yard of the house where the appellant's family lived. He failed to find any instrumant which could have caused the death of the deceased.

The appellant's father stated in evidence that the appellant had a little pocket knife for the purpose of sharpening pencils. When he (the father) returned home on October 16th, 1955, the appellant was not there and only came back the following day. The father said that the appellant was a scholar in Standard V, that he came near the top of his class and that he knew the difference between right and wrong. He also said that he thought the appellant appreciated the fact that a knife could be dangerous.

The appellant did not give any evidence. His father said that the appellant told him that he was eating an apple

when the deceased struck him. He ran out of the house : "he "ran up to a lemon tree in the yard and he turned. When he "turned his mother had already approached him and fell on top "of him. When he was trying to run away from her she grabbed "him and Parvathy" (the appellant's sister) "arrived on the "scene and separated them and then he ran away."

In giving judgment the trial court said that it was the unanimous view of the Court that there was a struggle between the appellant and the deceased at the spot where the lemon tree stood and that that was where the appellant inflicted two stab wounds upon the deceased. Continuing the Court said :-

" It seems to us that the only possible reasonable inference to be drawn is that the accused inflicted these wounds upon his mother by means of some sharp instrument such as a knife. The accused did own a knife, but one cannot speculate whether it was that knife or some other knife. It is clear that a search was made for the knife that was used, but it was, however, not found. On the evidence it is clear that the accused knew the difference between right and wrong, that he was familiar with the use of a knife, and knew, or ought to have known, that a knife was a dangerous and a

" lethal weapon.

Now the accused actually stabbed the deceased not once but twice.

In these circumstances it seems to us that it is a reasonable inference, in the absence of any explanation from the accused as to what actually happened, that he knew, or ought to have known, that his acts were likely to cause death, and that he was reckless whether death would or would not result, or, alternatively, that he intended to inflict grievous bodily harm on his mother which was calculated to cause her death.

Every man is presumed to intend the reasonable and probable consequences of his unlawful acts. The accused's attack upon his mother, upon the evidence, was undoubtedly wrongful and unlawful, and the reasonable and probable consequence of that act was that death would - as in fact it did - ensue. "

In my view the learned judge erred in certain respects in his judgment. To find that the appellant knew or ought to have known that a knife was a lethal weapon and that his acts were likely to cause death is not sufficient in law in crimes like murder and attempted murder where intention must be proved.

To adapt the language used by my brother Schreiner in R. v Bergstedt (1955 (4) S.A. 186 at p. 188) the words "knew or "ought to have known" contrast knowledge with a merely reprehensible failure to know and wrongly import that either is sufficient for proving intention.

The last paragraph of the judgment occasions me some difficulty. Mention is made of "the accused's attack upon "his mother." If by this is meant that the appellant was the aggressor then, as Mr. Holden who appeared for the Crown candidly and correctly admitted, there is no evidence to support such a finding. This is, however, probably a slip on the part of the trial court, for earlier in its judgment it found that there was a struggle between the appellant and the deceased and it did not then find that the struggle was started by the appellant. In my view this appeal must be dealt with on the basis that the deceased, who on the day in question was deranged in her mind, was the aggressor, not only because the onus rests on the Crown but also because the evidence supports that basis.

As the appellant was over 7 and under 14 years of age when he committed the act complained of he is presumed to be doli incapax, "but this presumption is rebuttable on proof "of a malicious mind on the part of the child, in accordance

with the maxim of the canonists malitia supplet aetatem" (per Kotze J.A. in Attorney-General, Transvaal v Additional Magistrate for Johannesburg - 1924 A.D. 421 at p. 434).

There must, as Kotze J.A. put it, be proof of a malicious mind on the part of the appellant and it seems to me that his mind must be malicious in relation to the circumstances under which he committed the act complained of. Stephen in article 27 of Chapter III of his Digest of the Criminal Law puts the matter very succinctly. He says :-

"No act done by any person over seven and under fourteen years "of age is a crime, unless it be shown affirmatively that "such person had sufficient capacity to know that the act was "wrong. "

Russell on Crime 10th ed. Vol. I at p. 43 says :-

" The modern rule is that a child of eight and under fourteen is presumed to be incapable of criminal intent (doli incapax) : but the presumption may be rebutted and weakens with the advance of the child's years towards fourteen, and the particular facts and circumstances attending the doing of the act and manifesting the understanding of the child. The evidence of mens rea which is allowed to displace the presumption (expressed in the [illegible] phrase malitia

" supplet aetatem) should be strong and clear beyond all doubt."

The above statement of the law seems to me to accord with the law as laid down in our country. In Queen v Lourie (9 S.C. 432 at p. 434) de Villiers C.J. said :-

" The nature of the crime or the circumstances under which it was committed may supply the necessary proof to show that the offender was actuated by evil motives. "

In R. v Maritz (1944 E.D.L. 101) where the accused, who was 13 years of age, was charged with malicious injury to property the Court held that in view of his age and the nature of his acts no inference could be drawn that he must have intended to injure the property.

When, for instance, a child under the age of 14 and above the age of 7 kills a person and hides the body those circumstances would be evidence to show that the child knew, when he killed, that he was doing a wrongful act. The question in the present case is whether the Crown has proved that when the appellant struck the deceased with a knife he knew that he was doing a wrongful act. It does not seem to me that the trial court addressed its mind to this question. It found that the appellant knew the difference between right and wrong but the fact that the appellant did know that difference is not, in my opinion, sufficient per se to show that when the appellant was

attacked by the deceased at a time when she was demented he knew that, assuming that he used more force than was necessary to repel that attack, he was not entitled to use that force. Another ground for holding that the appellant was guilty of murder was that he knew or ought to have known that a knife was a dangerous and a lethal weapon. I have already drawn attention to the fact that the use of the words "or ought to "have known" was a misdirection. There was no evidence on record to show that the appellant knew that a knife was a lethal weapon. The only evidence was that the appellant's father thought that his son appreciated the fact that a knife could be dangerous. Another factor apparently relied on by the trial court was that the appellant stabbed the deceased "not once but twice." The stabbing must have taken place before the appellant's sister released him from the clutches of his demented assailant and the two stabs must have taken place in rapid succession. In the circumstances I do not think that it can be said that the fact that ~~there were~~ two stab wounds in the frenzy of the struggle which took place is sufficient to warrant the conclusion that the appellant knew that he was doing a wrongful act in defending himself.

The trial court also relied on the rule that every man

is presumed to intend the reasonable and probable consequences of his unlawful act. Assuming that the appellant committed an unlawful act by defending himself in the manner in which he did, I do not think that the presumption can be applied to a child between the ages of 7 and 14 : the Crown must show affirmatively that the child knew what the reasonable and probable consequences of his act would be.

A further factor which influenced the trial court in arriving at its verdict was that the appellant failed to give any explanation as to what actually happened. The explanation which he gave to his father and which is set out earlier in this judgment is consistent with the theory that the deceased was the aggressor. What the trial court probably meant was that the appellant failed to give evidence on oath before it as to what actually happened. A number of cases decided in this Court were relied on by counsel for the Crown as going to show that the fact that an accused did not give evidence is a factor which a trial court is entitled to take into account. Too much stress should not, however, be laid on the fact that an accused has elected not to give evidence. See R. v Matthews (1947 (4) S.A. 508 at p. 511). That is a factor to be taken into consideration only when at the

end of the Crown case there is evidence on which a reasonable person may find the accused guilty ; that presupposes that the Crown has prima facie discharged the onus which rests on it. In the present case I do not think that in the very special circumstances of this case the Crown discharged the onus of proving that the appellant, at the time he used a ~~knife~~ sharp instrument in defending himself, knew that he was doing a wrongful act. I say that the circumstances were very special because here we have a case where a child of 13 was attacked by a person who was deranged in her mind. In these circumstances I do not think that it is going too far to say that such a child may in his terror well think that he was entitled to use every means at his disposal to repel the attack.

There are other factors not mentioned by the trial court which may be regarded as evidence tending to show that the appellant knew that he was doing wrong when he used a sharp instrument in defending himself. He was apparently a few months younger than fourteen years of age. As Russell (loc. cit.) states the presumption weakens with the advance of the child's years towards fourteen but the onus still rests on the Crown to prove that the appellant was doli capax. There is the fact that he absented himself from home during the night

of the day when the deceased was killed. There is, however, no evidence to show that he knew that the deceased had died and his absence from home may be explicable on the ground that he was too frightened to return to his home when the deceased might still be awaiting him. There is also an inference which may be drawn from the fact that the instrument used in the struggle was not found. Somebody must have got rid of that instrument : if it was the appellant, it would constitute evidence which would tend to show that he had a guilty mind. There is, however, no evidence which would justify the inference that it was the appellant who got rid of that instrument : one of the members of his family may have done so.

So far I have assumed in favour of the Crown that the appellant would have exceeded the bounds of self defence if he had been an adult. In R. v Zikalala (1953 (2) S.A. 568 at p. 572) this Court approved of the following passage in Gardiner and Lansdown's Criminal Law and Procedure, 5th ed., Vol 2 p. 1413 :-

" Where a man can save himself by flight, he should flee rather than kill his assailant. So think Matthaeus (48.5.3.7) and Moorman (2.2.12), and see also van der Linden (2.5.9) ; R. v Odgers (1843) 2 Mood. & R. 479 ; R v Smith (1837) 8 C. & P. 160 ; but Damhouder (c. 72), with his ideas of defence against dishonour, is of the contrary opinion. But no one can be expected to take to flight to avoid an

" attack, if flight does not afford him a safe way of escape. A man is not bound to expose himself to the risk of a stab in the back, when by killing his assailant he can secure his own safety - Moorman (2.2.12) ; von Quistorp, para. 244.....

In considering the question of self-defence, a jury must endeavour to imagine itself in the position in which the accused was. "

In the present case the evidence tends to show that the appellant was unable to resort to flight : in fact he was rescued by his sister. We must imagine ourselves in the position in which the appellant, a youth of 13 years, was. He was confronted with a woman who was apparently in a state of frenzy and he could not free himself by his own efforts.

The law as accepted by this Court may be compared with what Holmes J. said in Brown v United States (256 U.S.R. 335 at p. 343) :-

" Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills he has not exceeded the bounds of lawful self-defence..... Detached reflection cannot be demanded in the presence of an up-lifted knife," (and one may add in the presence of a mad person). " Therefore

" in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or disable his assailant rather than to kill him."

The judgment of the trial court does not show that that Court considered the possibility that the appellant acted in self-defence, the reason being probably because the appellant did not give evidence. When, however, the evidence for the Crown leaves one in doubt - to put it at its lowest - whether the appellant acted in self-defence (the onus always being on the Crown to prove guilt) then it seems to me that the trial court should have directed its mind to the question. In Mancini v Director of Public Prosecutions (1942 A.C. 1 at p. 7) Viscount Simon L.C. said :-

" The fact that a defending counsel does not stress an alternative case before the jury (which he may well feel it difficult to do without prejudicing the main defence) does not relieve the judge from the duty of directing the jury to consider the alternative, if there is material before the jury who would justify that they should consider it. "

On the record as it stands it seems to me that there is a reasonable doubt whether the appellant was doli capax at the

time he stabbed the deceased and that there is also a reasonable doubt whether in all the circumstances of this case he exceeded the bounds of self-defence.

In my opinion therefore the appeal should be allowed and the conviction and sentence set aside as well as the order that the appellant be placed under the supervision of the Probation Officer.

ORIGINAL.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

REGISTRAR, SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)
17 APR 1956
BLOEMFONTEIN
GRIFFIER, HOOGGEREGSHOF VAN SUID-AFRIKA (APPÈLAFDELING)

In the matter of:

HARRICHURAN KALIDAS Appellant

versus

REGINA Respondent.

IN APPEAL from the Judgment and Sentence of the Honourable Mr. Justice Henochsberg in the Southern District Circuit Local Division of the Supreme Court delivered at Durban on the 21st day of March, 1956, wherein the Appellant was convicted of the crime of Murder and sentenced to receive in private a moderate correction of six cuts with the cane and to be placed under the supervision of the Probation Officer, Durban.

Second Day's Proceedings.

Wednesday, 21st March, 1956.

J U D G M E N T.

HENOCHSBERG, J.:

HARRICHURAN KALIDAS, on the 16th October last, your mother died at the King Edward V111 Hospital, Durban. A post mortem examination held at 8 a.m. on the 17th October, 1955, revealed that she died as a result of massive haemorrhage from the neck and the side of the chest caused by stab wounds.

The pathological findings were that the deceased had two stab wounds, one in the chest and the other in the left arm, and that there was massive haemorrhage.

It would appear that your mother was about the same height as yourself, that is somewhere in the neighbourhood of five feet three inches, weighed about 100 lbs., and that her physique was slender. The observations made by the doctor who performed the post mortem showed that there was a vertical stab wound in the neck, that the wound was about one and a half inches in length and that it had been sutured surgically. The internal jugular vein had been cut over a length of about ¼". There was also the stab wound in the left arm, as indicated by the doctor in his evidence. The doctor expressed the view that the wounds could have been caused by a sharp instrument such as a bladed knife. He also said they might have been caused by falling on a sharp object, but he considered it most unlikely in the circumstances of

/this...

this case because of the direction of the wound, that that is what happened.

It would appear that your mother had, at one time, been a patient in a mental hospital from which she was released some three years ago. Whilst she was a patient in that hospital your father married another woman. From time to time after her release your mother had brief relapses and at such times she became violent towards some members of the family. Whenever that happened your father left home, and he, in his evidence, said that when he did she improved.

On the day in question your father left home. He apparently feared a possible relapse on that day and went to a temple. Whilst he was away you and your mother were in one of the rooms of the house and you apparently took or were given an apple. After that something transpired which apparently/only you know about, with the result that there was some scuffle or squabble between you and your mother. Your sister Parvathy's attention was called to this by a noise which she heard. At that time she was sweeping the kitchen verandah. Outside the yard of your house is a lemon or thorn tree. At that spot there is a flower bed surrounded by bricks, and on inspection by the Police it was found that the flowers were trampled down, that there were footmarks in all directions, indicating that a struggle had taken place, that there were numerous blood stains at that spot over an area of three paces in diameter, and that there were also blood spots on the trunk of the tree. At that spot too, a white shirt button was picked up. It appears that that shirt button came off your shirt or the shirt you were wearing that day, and that your own clothing was bloodstained. It is, therefore, the unanimous view of the Court, that there was a struggle between you and your mother there and that that is

/where...

where you inflicted two stab wounds upon your mother.

At some stage, either after or during the scuffle or struggle between you and your mother, your mother had hold of you, and your sister, Parvathy, released you from your mother's hold. You thereafter ran away and your mother ran after you. At a certain spot which was indicated to the Court on a sketch plan put in by consent, by counsel for the defence, and identified by other evidence, Sergeant Odendaal found more blood. There was also a small beam about three inches by three inches, and about three feet long, apparently bearing blood stains. That beam was at one time in your mother's possession, and evidence was led as to the manner in which she was holding it. That beam was found near the spot where the marks indicated that the struggle had taken place.

The law in relation to a charge of murder is laid down in Rex vs. Ndhlovu, 1945 A.D. 369, and I quote from the judgment of Davis, A.J.A., at page 386:

> "In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove all averments necessary to establish his guilt. Consequently, on a charge of murder, it must prove not only the killing, but that the killing was unlawful and intentional. It can discharge the onus either by direct evidence or by the proof of facts from which a necessary inference may be drawn. One such fact from which (together with all the other facts) such an inference may be drawn, is the lack of an acceptable explanation by the accused. Notwithstanding the absence of such an explanation, if, on a review of all the evidence, whether led by the Crown or by the accused, the jury are in doubt whether

/the...

the killing was unlawful or intentional, the accused is entitled to the benefit of the doubt. That doubt must be one which reasonable men would entertain on all the evidence; the jury should not speculate on the possible existence of matters upon which there is no evidence, or the existence of which cannot reasonably be inferred from the evidence. The only exception to the above rules, as to the onus being on the Crown in all criminal cases to prove the unlawfulness of the act and the guilty intent of the accused, and of his being entitled to the benefit of any reasonable doubt thereon, are, in regard to intention, the defence of insanity, and, in regard to both unlawfulness and intention, offences where the onus of proof is placed on the accused by the wording of a statute."

In Rex vs. Blom, 1939, A.D., Page 188 at 202, Watermeyer, J.A., said:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

1) The inference sought to be drawn must be consistent with all the proved facts, if it is not, the inference cannot be drawn.

2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude every reasonable inference, then there must be a doubt where the inference sought to be drawn is correct."

Applying these principles, it seems to us that the only possible reasonable inference to be drawn is th t the accused inflicted these wounds upon his mother by means of

/some...

some sharp instrument such as a knife. The accused did own a knife, but one cannot speculate whether it was that knife or some other knife. It is clear that a search was made for the knife that was used, but it was, however, not found. On the evidence it is clear that the accused knew the difference between right and wrong, that he was familiar with the use of a knife, and knew, or ought to have known, that a knife was a dangerous and a lethal weapon.

Now the accused actually stabbed the deceased not once but twice.

In these circumstances it seems to us that it is a reasonable inference, in the absence of any explanation from the accused as to what actually happened, that he knew, or ought to have known, that his acts were likely to cause death, and that he was reckless whether death would or would not result, or, alternatively, that he intended to inflict grievous bodily harm on his mother which was calculated to cause her death.

Every man is presumed to intend the reasonable and probable consequences of his unlawful acts. The accused's attack upon his mother, upon the evidence, was undoubtedly wrongful and unlawful, and the reasonable and probable consequence of that act was that death would - as in fact it did - ensue.

In all the circumstances, therefore, the Court unanimously finds him guilty of murder as charged.
