G.P.-S.117539—1954-5—5,000. 122/56 U.D.J. 445.

122/56

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

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

Original Exhibits

SAUL ADAMS Appellant.

versus/teen

REGINA Respondent.

Recd to [illegible] for [illegible] on 23/7/56

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate R C Whiting
Advokaat van Appellant

Respondent's Advocate v d Walt.
Advokaat van Respondent

3, 5, 6, 7 + 9.

Set down for hearing on:— Tuesday 14th September 1956
Op die rol geplaas vir verhoor op:—

(CPD)

Coram Hoexter, Steyn, de Beer, Reynolds + Brink J.J.A.

CAV.

HAR AR Morgan

Appeal allowed.
Conviction + sentence set aside.

Original

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

In the matter between:-

SAUL ADAMS ..... Appellant.

and

R E G I N A ..... Respondent.

CORAM:- Hoexter, Steyn, De Beer, Reynolds et Brink JJ.A.

Heard: 18th September, 1956. Delivered: 28th Sept., 1956.

J U D G M E N T.

REYNOLDS, J.A.:

I agree with the view of De Beer, J.A. that the appellant in this case was guilty of the crime of Culpable Homicide but not for the reasons he advances. It seems to me that in such a case as the present one, the questions of provocation and self-defence should not be treated separately, for the provocation sustained by appellant was the real reason for his stabbing the deceased and not that he was acting in self-defence. On the acceptable evidence, appellant had been provoked by the aggression of deceased. Deceased had slapped appellant and then attempted to assault him, and did so, with a knife in his hand. That was quite enough to anger the appellant who was a youth of 18, and younger and not so strong as deceased. Appellant, however, quite easily avoided the assault, tripped up deceased, and obtained possession of the knife. When

however...../2.

however, the intoxicated deceased then advanced again on appellant, he gave further provocation to appellant which would have made appellant desirous of hurting deceased in some way.

But the threatened assault by the unarmed and intoxicated deceased, put appellant in no reasonable apprehension of serious harm. He had easily dealt with deceased when deceased was armed with a knife, and appellant was unarmed, and when the stabbing occurred it was the appellant who had the knife while deceased was unarmed. Appellant, however, in no way tried to avaid the assault save by stabbing with the knife. But, what is more significant, he made no attempt or trial of any evasive effort by warning the deceased to stop, by throwing away the knife some distance, and then retreating, or calling on persons nearby for assistance. He could quite easily have escaped for he was young and active. His failure even to make any attempt to avoid the threatened assault leads only to one possible conclusion, and that is, in his anger at the provocation he evidently received, he did not use the knife for the purpose of self-defence but by reason of his anger at the provocation reveived. But, it seems to me, that the provocation received was sufficient to reduce the crime from Murder to Culpable Homicide.

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

In the matter between:-

SAUL ADAMS ..... Appellant.

and

R E G I N A ..... Respondent.

CORAM:- Hoexter, Steyn, De Beer, Reynolds, Brink JJ.A.

Heard: 18th September, 1956. Delivered: 28th September, 1956

J U D G M E N T.

DE BEER, J.A.:

The appellant was charged with the crime of murder, it being alleged that on the night of the 23rd December, 1955 and at Paarl he murdered one Joseph Jaries by stabbing him with a knife. He was convicted of the crime as charged but having found extenuating circumstances, the trial Court sentenced him to three and a half years imprisonment with compulsory labour. The matter now comes before us, leave to appeal on the merits having been granted by the trial Court.

The post-mortem revealed that death was caused by a stab wound penetrating the left ventricle of the heart and that an analysis of portion of the brain disclosed 0.28 per cent, by weight, of alcohol which is described by the District Surgeon as indicating a "very advanced alcoholic state". Whereas the deceased was 24 years old, 5' 8" in height and weighed 160 lbs., the appellant

was...../2.

was 18 years of age, 5' 5" in height and weighed 120 lbs.. The District Surgeon was of opinion that, owing to the quantity of alcohol consumed by him, the deceased would have been no match for the appellant: this, of course, assumes that the latter was not in a similar state.

The Crown evidence is to the effect that, on the night in question, two groups of coloureds visited Horne's Café to obtain refreshments. The deceased was accompanied by Solomon Damon and Josef Meintjies; the appellant was accompanied by Willem (Boetie) Daniels and three other unidentified coloureds. ~~The Crown case proceeds that~~ Whilst in the café the deceased purchased a packet of 50 Cavalla cigarettes and he then left for home with his two companions. The appellant and his party followed shortly afterwards and proceeded in the same direction. By this time Willem was so hopelessly intoxicated that his mother, Clardina and Martin Adams, a brother of the accused, were assisting him home. At some stage during the journey, when the deceased missed his cigarettes, he turned round and approached the accused's party. He asked whether they had his cigarettes and then slapped Willem's face, felling him to the ground. Clardina remonstrated with the deceased who thereupon asked the accused for his cigarettes and on receiving the reply that he did not have the cigarettes, proceeded to slap the appellant's face. In

the...../3.

the meantime Clardina and Martin continued with their task of assisting Willem to his home. Neither Clardina nor Martin knew what occurred after they left except that when Clardina looked back, at some later stage, she saw the appellant standing whilst the deceased was lying on the ground.

As I read the judgment of the trial Court, the above facts were, with certain exceptions to which I shall presently refer, accepted as forming part of the background to the events of that night.

With reference to Solomon Damon's further evidence to the effect that he saw the appellant drawing a knife from his pocket and making a stabbing movement in the direction of the deceased, the judgment states that Solomon, on being recalled "to some extent conceded that although he thought that the knife was taken from the pocket it was not impossible that the knife was picked up from the ground by the accused. His evidence may be substantially true, but the Court finds him to be an unsatisfactory witness and it would be dangerous to convict on evidence of this nature". The trial Court also found that Josef Meintjies' evidence was unsatisfactory although this witness did not profess to know anything more about the occurrence than that he saw the appellant standing with a knife in his hand. Willem Daniels frankly admits that he remembers nothing about the events of that

night...../4.

night except that he visited two hotels and found himself in bed, next morning.

Finally, the trial Court finds that Martin Adams was

> " ~~obviously accordingly~~ untruthful when he claims that he
> " proceeded to walk away at this crucial stage.
> " If any serious assault was, in fact, commit-
> " ted upon his brother he would not have left
> " to take Willem Daniels home. Willem Daniel's
> " mother was there and could have taken Willem
> " Daniels home. He would not have left his
> " brother in the lurch. There must be some
> " other reason for Martin Adams not giving the
> " Court the truth in this regard".

I, however, fail to discover any passage in his evidence referring to a serious assault. He testifies that after the deceased had slapped Willem he went up to the appellant and asked for his cigarettes and

> " Toe klap hy my broer. Toe vra my broer waar-
> " voor hy hom klap. Met dit was daar 'n
> " stoeiery tussen die beskuldigde en die oor-
> " ledene. Ek kan nie sê hoe hy gestoei het
> " nie, want ons het saam met Boetie aangestap
> " huistoe".

In any event, by stigmatising the statement of Martin that he assisted in taking Willem home "at this crucial moment" as obviously untruthful, the trial Court must neccessarily cast doubt upon the veracity of Clardina whose evidence is exactly to the same effect, for she states that after the deceased stapped the appellant "links en regs" they had an argument whereupon she and Martin got hold of Willem and proceeded homewards.

My major difficulty, in this appeal, is to ascertain

exactly...../5.

exactly what facts the trial Court found to have been proved. It was held that the evidence of Solomon may be substantially correct: yet he stated that the appellant took the knife out of his pocket and later conceded that the appellant might well have picked it up from the ground. Then there is no evidence to whom the knife belonged and no evidence, apart from the discredited Solomon and Martin, that either the appellant or the deceased was seen with a knife in his hand when they closed; or that either, in fact, possessed a knife. No knife was produced at the trial.

Next, the appellant gave evidence which is thus summarised by the trial Court:-

> " The accused's evidence is that he had four
> " brandies that evening and that he assisted
> " Martin Adams and Clardina Daniels in taking
> " Willem Daniels home. On their way they met
> " the deceased and the aforesaid two witnesses.
> " According to the accused deceased first
> " assaulted Willem Daniels and then asked him
> " for a cigarette, whereupon the accused re-
> " plied that he did not have any; then the
> " deceased slapped him twice, they struggled,
> " the deceased pulled a knife, came for him,
> " but he managed to get hold of the deceased's
> " arm and tripped him, the deceased fell and
> " lost possession of the knife, which was then
> " picked up by the accused. The deceased
> " rushed at the accused again and he (the
> " accused) then stabbed the deceased. He did
> " not stab with the intention of killing, but
> " merely to defend himself.
> " Now the Court has no hesitation in re-
> " jecting the evidence of the accused. The
> " manner in which he gave his evidence was
> " most unimpressive. If anything of this

nature...../6.

" nature had happened he would not have given
" his testimony in such an unsatisfactory and
" unimpressive manner. In addition, the Court
" is satisfied that if he had been attacked
" with a knife he would have called to his
" brother to assist him, because they are all
" agreed that this took place in a very short
" space of time. His brother could not have
" been far away when he was attacked, as he
" alleges, with the knife. It is all very well
" to say that one must not judge an accused in
" the calm security of the Courthouse, but it
" is incredible that a man would not call out
" to his brother to assist him when he is
" seriously attacked. It is equally incredible
" that his brother would leave him while he is
" being attacked in the manner claimed by the
" accused".

The trial Court proceeds to find that the appellant stabbed the deceased but "will give the accused the benefit of the doubt to this extent that it will accept that the deceased was the aggressor and attacked the accused". This concession throws further doubt on the veracity of the main Crown witness, Solomon, who stated that the appellant stabbed the deceased immediately after the latter asked for his cigarettes and who also stated that he saw nobody being slapped when the deceased approached the appellant and his party. There is no finding whether the deceased slapped Willem first or at all, but the finding that the deceased was the aggressor and that he attacked the appellant further lends force to the inference that the deceased was, in fact, armed with a knife because, when it is conceded that the appellant may have picked it up from the ground, this strongly supports the appel-

lant's...../7.

lant's story that the deceased dropped it when he was thrown to the ground.

It is on these premises, I think, that the further facts must be analysed and applied. Now, the deceased was very much under the influence of liquor whereas the appellant asserts that he was not drunk and that he clearly remembers all that occurred that night. He had no difficulty in throwing the deceased to the ground and after obtaining possession of the knife he stepped back some four paces. On these facts, Mr. Whiting contended that the Crown had failed to prove beyond reasonable doubt that the appellant, bearing in mind the liquor he had consumed, was not so provoked as temporarily to have been deprived of his power of self-control when he stabbed the deceased, and, that he should only have been convicted of culpable homicide.

But the only real provocation the appellant received was, on his own showing, that his face was slapped, and that the drunken assailant, whom he had thrown to the ground and disarmed, had suggested that the appellant had stolen his packet of cigarettes. I can, in the circumstances, find no support for this contention from the decision referred to, namely, Rex versus Molako (1954 (3) S.A.L.R. 777 at page 781) where, indeed, the learned Judge, in his judgment, states:-

> " I wish to add here that it seems to me, how-
> " ever, that to have to enquire what the effect

of...../8.

" of acts or words which would not provoke an
" ordinary man, would have on a particular
" accused, although it was not difficult in the
" present case, might in other cases become ex-
" tremely speculative and involve an enquiry
" into the accused's nature, e.g. whether he is
" quick-tempered or not, his capacity for and
" reaction to liquor, which again might be
" affected by the condition of his health, his
" mental development and a number of other
" factors; unless, of course one is to be
" guided by the result which the provocation
" had brought about as indicating whether the
" perpetrator had lost control of himself or
" not, regardless of whether the result was
" justified or not. If this were to be the
" case then one might find that the more brutal
" the murder, the greater the indication that
" the perpetrator had lost control of himself.
" It seems to me, as pointed out by Lord Read-
" ing in Lesbini's case, that Courts should not
" be inclined to go in the direction of weaken-
" ing in any degree the law that a person who
" is not insane is responsible in law for the
" ordinary consequences of his acts. Cf. Rex
" v. Taylor, supra."

On the facts of the instant case the Crown has, to my mind, established the absence of the requisite provocation.

The next contention advanced was that the Crown had failed to prove beyond reasonable doubt that the appellant did not act in self-defence. The appellant, again on his own showing, had easily overpowered his drunken assailant who was lying prostrate on the ground. He had disarmed the deceased ~~the deceased~~ and he had no real reason for thinking that, should the occasion arise, he could not equally easily repeat the performance of throwing the deceased. He had sufficient time to step back four

paces...../9.

paces and there was nothing to prevent him throwing away the knife. For him, thereafter, to use the knife and stab the deceased in the heart, even assuming that the deceased did regain his feet and make a rush at him, satisfies me that the means of defence employed were not commensurate with the danger apprehended and that the appellant adopted a dangerous method of defence when he could readily have avoided the threatened injury by throwing away the knife and running away from his drunken assailant. The appellant therefore exceeded the the legitimate bounds of self-defence but, in the circumstances, I think that a verdict of guilty of culpable homicide should be substituted.

The same conclusion may be arrived at on the grounds that the facts here disclose that homicide in self-defence, though not entirely excusable in law, may nevertheless be committed in such circumstances that the crime is reduced from murder to culpable homicide - see Rex versus Molife (1940 A.D. 202 at page 204.).

The facts do not satisfy me that the Crown has succeeded in proving beyond reasonable doubt that the accused had the necessary intention to kill. The verdict and sentence should therefore be set aside and the appellant is found guilty of culpable homicide. ~~The sentence imposed is in view of the evidence, which I need not repeat, one of twelve months imprisonment with com-~~

E.M. de Beer

~~pulsory~~...../10.