G.P.-S.117539—1954-5—5,000.

187/56

~~U.D.J. 446.~~

187/56

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

(Bloemfontein DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

MTWANA NGCOBO

Appellant.

versus/teen

THE QUEEN

Respondent.

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

Appellant's Advocate _____ *Respondent's Advocate* _____
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on:— (Postponed)
Op die rol geplaas vir verhoor op:—

(NPD)

(9·45 – 11·42)

C.A.V.

~~1,3~~, 2, 5, 6, 7, 8

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

MTWANA NGOBO Appellant

and

REGINA Respondent

Coram:Schreiner,Steyn,de Beer,Reynolds, et de Villiers JJ.A.

Heard: 29th. October, 1956. Delivered: 5 - 11 - 1956

J U D G M E N T

SCHREINER J.A. The appellant was convicted of murder by a judge and assessors and, extenuating circumstances being found, was sentenced to ten years imprisonment with compulsory labour. Leave to appeal was granted by the trial judge.

It was admitted at the beginning of the trial that the appellant caused the death of the deceased by stabbing him with a knife. The medical evidence showed that there were two stab wounds in the abdomen penetrating the small intestine and another just below the ribs on the left side,which entered the pleural cavity;these were the fatal wounds. There was a fourth stab wound in the back to the left of the spine,between the shoulder blades. The

district/.....

district surgeon thought that this was probably caused by some weapon other than the knife that caused the other wounds, but the trial court apparently concluded that it too was caused by the knife. All these wounds were about one and a half inches deep. There were several other stab wounds in the abdomen which did not penetrate into the abdominal cavity and there were also four lacerations of the scalp and one of the face, perhaps caused by falling on stony ground.

The appellant, a man of 25 or 30 years, left a friend's kraal in the company of the deceased, who was 65 years old and related to the appellant, between 8 and 9 p.m. on the 26th December 1955. They had both consumed liquor but were apparently not seriously under its influence. They were going to their respective kraals, which were only two or three hundred yards away. They would normally follow the same footpath for most of the way and then diverge. The next morning the deceased's body was found some 30 yards from the path in a donga, towards which the ground slopes from the path.

The appellant gave evidence and his account was the only direct evidence of what happened. He said that his father had died a short time previously

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and he had accordingly returned to the area from Pietermaritzburg, where he had been working. He said that his father had not died a natural death; it was said that he had been poisoned. The deceased and the appellant's father had been working on the roads in the neighbourhood. According to the appellant, as they were walking together on the night in question, the deceased said, "Why did you come "back to the kraal because you are going to die in the same "way as your father did. Oh, you, I am going to kill you "with my hands. I am the person who killed your father "and I am going to kill you too. I will kill you with "medicine." The deceased then according to the appellant barred his way and struck him several times with a stick on his left forearm, which he had raised to protect his head. The appellant seized the stick and they closed with each other and fell down. They rolled over. While the appellant was on top of the deceased he felt a knife cutting his left wrist. It was a knife like a table knife and the deceased had produced it from somewhere, the appellant did not see where. The appellant seized the blade of the knife in his right hand, the fingers of which received cuts on the inner side in consequence. This accords/.....

corded with the evidence of the district surgeon who examined the appellant on the 30th December 1955 and found a one inch long cut wound on his left wrist and shallow cuts on the inside of three of his fingers. The appellant says that he managed to get the knife into his possession and being then angry and also afraid that the deceased would injure him, stabbed the deceased repeatedly, while the deceased was hitting him with his fists. He says that he got up and ran away, the knife having slipped out of his hand. The deceased, he says, pursued him, throwing stones. He, the appellant, hid his jacket under some nearby stones because it was bloodstained and he was afraid his family would ask him about it. No knife was produced at the trial; the deceased's daughter gave evidence that her father had only one knife, a table knife used for cutting food, and that this knife was at their kraal and had not been taken with him by the deceased on the evening when he met his death.

The trial court did not find the appellant's evidence convincing but came to the conclusion that it was reasonably possible that the deceased did have a knife and was the first to use it. The court assumed the substantial correctness of the appellant's version

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but held that on that version, there was no reason to doubt that the appellant was capable of forming and did form the intention to kill the deceased. The facts that the deceased, according to the assumption made by the trial court, started using the knife and that the appellant had taken a fair amount of liquor led to the finding of extenuating circumstances and a prison sentence.

It was argued on behalf of the appellant that on the assumption that his account was correct he should have been found not guilty. But the trial court was wholly justified in concluding that there was no reasonable possibility that the appellant acted reasonably in self-defence. He was a much younger man than the deceased and once he had obtained possession of the knife there was nothing to prevent him from escaping without risk to himself. His stabbing of the deceased was, even on his own version, undoubtedly unlawful.

But the question remains whether the appellant should have been found guilty of murder, and not of culpable homicide only. No doubt a case may conceivably be one of murder even where the deceased person was the original aggressor and even when his aggression took the form of using against an unarmed person a lethal

weapon/.....

weapon like a knife. But such cases would be exceptional, as, for instance, where it could be inferred with reasonable certainty that the killer, having disarmed the deceased, not only was no longer in fear of death or serious injury, but also had sufficiently recovered his composure, after being dangerously attacked, to be able to form the intention to kill.

The trial court, after finding it reasonably possible that it was the deceased who first used the knife, summarised the appellant's evidence as follows :- "The accused says that he was attacked by "the deceased, that the deceased struck him with a stick, "that he took the stick away from the deceased, that they "grappled with each other, and that they fell to the "ground. The accused says further that after they fell "to the ground the deceased was lying on his back and the "accused was sitting on top of him. While they were in "that position, the deceased drew a knife and attacked "the accused. The accused says that he then became angry "and inflicted the wounds on the deceased." The evidence of the appellant is to the effect that, while he may have been sitting on the deceased's chest at the time when the latter first used the knife, they then grappled and

rolled/.....

rolled over, presumably on the sloping ground. What their exact positions were at the time when the appellant gained possession of the knife does not appear; there is, however, no reason to interpret his account as showing that at any stage he was sitting on the deceased's chest holding the knife and stabbing him. The position of the stab wounds would make this unlikely, and, if the appellant's account is, generally speaking, to be assumed to be correct, it should also be assumed that the stabbing took place while both were lying on the ground and struggling, the deceased using his fists and the appellant the knife.

Having found that there was provocation, and going on to inquire whether the appellant nevertheless had been proved to have intended to kill the deceased, the trial court proceeded," The "court is satisfied beyond reasonable doubt that, notwithstanding any provocation which the accused might "have received, he was capable of forming and did form "such an intention. He himself merely says that he be-"came angry and inflicted these injuries on the deceased. "Anger alone is not sufficient to reduce the crime of "murder to one of culpable homicide. If it were there

"are/.....

"where there are few cases in which an accused person would "be found guilty of murder. The accused himself does not "say that he was deprived of his power of self-control, and "the injuries which he inflicted on the deceased are not "such as to raise any doubt that he was, when he inflicted "the injuries, deprived of his power of self-control."

I do not find this reasoning wholly convincing. It is true that the appellant did not describe his anger in such a way as to indicate that he was beside himself with rage, but he did say that he was very angry and the degree of his anger was not further explored. One must remember that according to his account the deceased had just told him that he had caused his father's death and would cause his death too. The nature of the injuries suggest to me a lack of control; if he had been at all clear in his mind and had been seeking to kill the deceased one would have expected no more than one or two deep stabs instead of the large number of relatively shallow ones. If, as he says, the deceased was holding him and hitting him with his fists, as they rolled over each other, it seems to me to be difficult to reject, as not reasonable in the light of the evidence, the possibility that the appellant did, indeed, for a time lose all self-control, in

consequence/.....

consequence of the deceased's using the knife against him.

I fully appreciate the trial court's scepticism as to the truth of the appellant's account, for there were a number of factors which rendered it decidedly improbable. But, having concluded that it had to assume that the circumstances of the killing were substantially as stated by the appellant, the court should have gone on to hold that the appellant was guilty only of culpable homicide. The sentence should, on this view, have been less severe.

The appeal is allowed and the conviction altered to one of guilty of culpable homicide, the sentence being altered to one of imprisonment with compulsory labour for five years.

Steyn, J.A.
de Beer, J.A.
Reynolds, J.A.
de Villiers, J.A. } Concur

O.D. Schreiner
3.11.56

REGINA vs. MTWANA NGCOBO. 18/7/1956.

J U D G M E N T .

FRIEDMAN, A.J.

The Court unanimously finds you guilty of murder, with extenuating circumstances.

Briefly the reasons for this finding are as follows:- The accused in this case is charged with murder in that, upon or about the 26th December, 1955, and at Location 2 in the district of Polela he did wrongfully, unlawfully and maliciously kill and murder MJANTSHI HLONGWANE, a native male. The main facts of this case are not in dispute. It appears that on the evening of the 26th December, 1955, the accused and the deceased were at the hut of the witness Jameson drinking beer, and that they appeared to be perfectly friendly. They left Jameson's hut together. Jameson stated that the accused suggested to the deceased that they should leave together. While there is no reason to disbelieve Jameson - he gave his evidence well and was not shaken in cross-examination - the Court is not satisfied that he would necessarily have remembered that the accused asked the deceased to go home with him. The Court, therefore, places no reliance on this statement of Jameson. It is common cause that after they left Jameson's hut and while they were on their way home, the accused stabbed the deceased eight times, and that the deceased died as a result of the injuries which he sustained. His body was found the next day in a donga near the footpath along which the accused and the deceased were walking home. Counsel for the Crown admits that the deceased's body could have rolled into this donga and does not suggest that it was placed there by the accused.

The deceased's body was found the next day

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by his daughter, Rosina Ngcobo, who gave evidence. She stated that the deceased never carried a knife, that he had only one knife and that he always kept that knife at home. On being re-called by the Court, she stated that that knife was still at the deceased's home. There is no reason to disbelieve the evidence of this witness, but the Court is not satisfied that the deceased might not have had another knife, and that she might have been unaware of the fact that he carried that knife with him.

The nature of the injuries inflicted on the deceased are such that, in the absence of any other evidence, the Court would be justified in drawing an inference of an intention to kill, because any person inflicting wounds of that nature must be presumed to have intended the probable consequences of his conduct. There were no eye-witnesses to the stabbing.

The accused himself gave evidence as to what occurred. His evidence was certainly not convincing. There are a large number of improbabilities in his evidence one of which is, in fact, conceded by Mr.Boshoff, who appeared on behalf of the accused, and that is the accused's statement that after he inflicted these injuries on the deceased and ran away, the deceased ran after him and threw stones at him. It is, however, unnecessary to consider whether the accused has actually been untruthful in his main outline of what occurred, because even on his own evidence the Court is satisfied beyond any reasonable doubt that the Crown has proved an intention to kill.

The Court finds that it is reasonably possible that the deceased had a stick and that the deceased was

the first to draw a knife. So far as the stick is concerned, the evidence is all one way and that is that the deceased had a stick when they left Jameson's hut and that the accused did not have one. So far as the knife is concerned, the injuries suffered by the accused on his hand render it reasonably possible that at one time the deceased had a knife in his possession and that the accused took it away from him. Once that possibility exists, the Court must also find that it is reasonably possible that a knife was first used by the deceased and not by the accused. The accused says that he was attacked by the deceased, that the deceased struck him with a stick, that he took the stick away from the deceased, that they grappled with each other, and that they fell to the ground. The accused says further that after they fell to the ground the deceased was lying on his back and the accused was sitting on top of him. While they were in that position, the deceased drew a knife and attacked the accused. The accused says that he then became angry and inflicted the wounds on the deceased.

Mr.Boshoff has stated, and the Court agrees with him, that in the circumstances outlined by the accused there is no question of justifiable homicide, because the accused quite obviously, even on his own story, exceeded the bounds of self-defence. The question which arises in the first place is whether it is reasonably possible that the provocation which the accused received was such as to cause him to lose his power of self-control, or to put it in another way, where the Crown has proved beyond any reasonable doubt that notwithstanding the provocation he received the accused was capable of forming an intention

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to kill.

The Court is satisfied beyond any reasonable doubt that, notwithstanding any provocation which the accused might have received, he was capable of forming and did form such an intention. He himself merely says that he became angry and inflicted these injuries on the deceased. Anger alone is not sufficient to reduce the crime of murder to one of culpable homicide. If it were, there are few cases in which an accused person would be found guilty of murder. The accused himself does not say that he was deprived of his power of self-control, and the injuries which he inflicted on the deceased are not such as to raise any doubt that he was, when he inflicted the injuries, deprived of his power of self-control.

In these circumstances, therefore, and even on the accused's own evidence, which as I have said is by no means convincing, the Court is satisfied beyond any reasonable doubt that the provocation which he received did not deprive the accused of his power of self-control.

It remains to consider whether having regard to the fact that the accused had consumed liquor before he received the provocation referred to, the Crown has proved that the intention to kill was present. The evidence in this regard is all one way, and that is that, although they consumed a certain amount of liquor that day, neither the accused nor the deceased were under the influence of liquor. In fact the accused himself says that he was not under the influence of liquor when the fight between him and the accused took place.

In all the circumstances, therefore, the Court is satisfied beyond any reasonable doubt that

the accused is guilty of murder.

The Court finds the following extenuating circumstances:-

(a) It is reasonably possible that the deceased attacked the accused.

(b) It is reasonably possible that the deceased was the first to draw a knife.

(c) The murder was not premeditated.

(d) There is no evidence of any motive.

The accused has no previous convictions.

Mr. BOSHOFF addresses in mitigation of sentence.

FRIEDMAN, A.J. (addressing Accused)

The Court has found you guilty of a very serious offence. If the Court had not found that there were extenuating circumstances I would have had no option but to sentence you to death. As it is, I propose to exercise the discretion vested in me to impose a sentence other than one of death. Offences of this nature are not to be treated lightly. There are far too many cases prevalent today in this area, which come before this Court, where people lose their lives as a result of stabbing with knives. On your own evidence, you inflicted a number of serious wounds on this man, who was very much older than yourself, at a time when you had him at your mercy. The fact that you lost your temper does not make the offence a less serious one. In fact, the number of wounds you inflicted show that the assault was a very