

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

(Appellant)

DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN KRIMINELE SAAK.

BEAUTY XABA

Appellant.

versus

THE QUEEN

Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate *J.P. Pegden*
Advokaat van Appellant

Respondent's Advocate *S. Berman*
Advokaat van Respondent

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

Tuesday, 17th November, 1959.

Berman: de Beir, Bayers et Ramsbottom.

Conviction altered to one of culpable homicide and the sentence reduced from 5 years I.C.L. to 2 years I.C.L., 6 months suspended for a period of 3 years on condition that during that period the accused is not convicted of the a crime involving violence.

S. Berman

17/11/59

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

BEAUTY XABA

..... Appellant

versus

REGINA

..... Respondent.

Coram: De Beer, Beyers et Ramsbottom JJ.A.

Heard: 17th November, 1959. Delivered: 17th November, 1959.

J U D G M E N T

BEYERS J.A.:

The appellant was found guilty in the Durban and Coast Local Division of having murdered one Solomon Ntombela by stabbing him to death with a knife. Extenuating circumstances having been found, she was sentenced to 5 years imprisonment with compulsory labour. She now appeals to this Court, with the leave of the trial judge, on the ground that she stabbed the deceased in self-defence and ought to have been acquitted, or alternatively, assuming the force used by her in defending herself to have been excessive, the verdict ought to have been ~~an~~ one of culpable homicide.

The account given by the two Crown witnesses of the

events /2

events leading up to the stabbing differed radically from the account given by the appellant. In view of the many differences in the versions of the two Crown witnesses, the trial court considered that it would be unwise to place any reliance on their evidence. ~~There~~

There is evidence that the deceased had consumed a great deal of alcohol, and there was corroboration of the appellant's statement that she, too, had consumed alcohol.

The weakness, as I see it, in the evidence of the two Crown witnesses, whose evidence was thus disregarded, is not so much that they gave different versions of what happened, but that they would not admit that the deceased and the appellant had had something to drink. They also said that the appellant stabbed the deceased without rhyme or reason, which is also rather difficult to understand.

The Court therefore found itself in the position that, although it was not entirely satisfied that the appellant had told the whole truth, her evidence ought nevertheless to be accepted, and the question of her guilt or innocence decided on the assumption of its truth. On her own evidence the appellant was found guilty of murder, and the question

before this Court is whether that was ^{the correct} ~~a proper~~ verdict.

Counsel for the Crown conceded that this was the ^{proper} ~~correct~~ approach.

The appellant's evidence is to the following

effect:

She says: " I then asked Reggie (i.e. the one Crown witness) for tobacco. He told me that he did not have any cigarettes but that he had some loose tobacco from which one could make a cigarette. He then took some loose tobacco out of his pocket and put it on the table. At that time the knife also came out of his pocket when he took the tobacco out. He wrapped a cigarette for me to smoke. I placed the knife in the pocket of my skirt. I did that because Reginald had said I should hand it to Roy as Roy used this knife to eat his food at work. I then went to the room and found Roy sitting there on the bed. I then started to get undressed. I took off my skirt and took the knife out of it and placed it underneath the pillow. I took off my shoes, I did not take off my blouse. I then lay down and fell asleep. Later, I was awakened by the door being struck. I then saw the deceased enter. I did not recognise deceased at that time, I just saw a person entering the room. When that person entered Roy jumped up and went through the window. Deceased said to me: 'Where is that bushman, produce that bushman'. I did not know what had happened. I then took the knife from underneath the pillow and I put it down my breast. Deceased did not strike me but caught me by the strap of my brassiere. I asked him where he was taking me to and he said 'Produce the bushman'. He pulled me along through the dining room to the kitchen door - the

" kitchen door was open - and he kept on pulling me saying 'Produce the bushman'. He dropped his sticks and slapped me with his open hand in my face. I don't know how I took the knife out and how I stabbed him. Deceased wanted to sit down on the bench but missed it and fell down over on to his back striking the back of his head. I did not know that the deceased was injured. I shook him and said: 'What are you doing to me?' I then stopped shaking him and as I stood there close to the dining room door Roy entered and said: 'Beauty, what has happened'? I said: 'You are asking me what has happened. Another man was assaulting me and you ran away'. Shortly after that Reggie entered. He came in from the outside and he asked me: 'Why have you stabbed an old person'. Reggie wanted to hit me but he did not. He then left to wake up his father. I threw the knife outside through the door. It was dark and Reggie's father arrived carrying a lamp. I then went to my room. Reggie's father asked me why I had I stabbed an old person. I said: 'You are asking me that question, the person was assaulting me and I cried out but no one responded, no one spoke up'."

I should add here that the appellant stabbed the deceased twice, once in the neck and once in the arm.

As to the liquor consumed by her the appellant admits that although she had been drinking she was not drunk, and that she was able to remember quite well everything that happened that evening. That she had had something to drink is confirmed by Const. Lombard. He says that when he arrested

her the next morning she smelled strongly of liquor.

The trial court expressed the conclusion arrived at by it on this evidence, in the following words:

" In the kitchen the deceased dropped his ~~STICKS AND HIT HER WITH HIS OPEN HAND~~ sticks and hit her once with his open hand, again demanding the production of her lover. She would have us believe that she does not really know how this happened, and how she got the knife out and opened it - but we find ourselves unable to accept that.

In all these circumstances, we feel that she was not sufficiently under the influence of liquor to be unable to form an intent to kill. She must, therefore, be presumed to have intended the reasonable and probable consequences of her act. The provocation which she received was very minor indeed, and, taking into account the provocation and the effect of the alcohol upon her, we feel that they are not enough to reduce the offence from murder to culpable homicide."

As to the suggestion that the appellant acted in self-defence, the trial judge, in considering whether leave to appeal ought to be granted, says this:

" The Court came to the conclusion that in this case in view of the fact that the deceased dropped his sticks and that his anger was directed at the accused's lover and not the accused, the force she used was so excessive that she was not lawfully defending herself."

In considering this aspect of the case one must, I think,

also take into account what the appellant said in an extracurricular statement made by her to a magistrate viz. that she had stabbed the deceased on account of being angry with him because he had struck her with his flat hand. She ~~said~~ said the same thing at the close of the preparatory examination. She told the magistrate:

" I admit killing the deceased, I was annoyed because the deceased was hitting me with his open hand."

In grasping hold of the appellant the deceased does not appear to have used a great deal of force. While it is true that she says he tore some buttons from her blouse, the strap of her brassiere, for instance, was not broken. He was not threatening her with dire injury - it ought to have been clear to her that the object of his rage was the "bushman". Whilst protesting loudly at the treatment which she was receiving at his hands, she did not in so many words call out for help. The deceased had discarded his sticks, and was assaulting her with his hands only at the time when she produced the knife. In addition to grabbing her and pulling her along by her clothes, he slapped her in the face with the open hand. She was able to produce the knife, without apparent

difficulty, from the place where she had secreted it, and to open it whilst he had hold of her in ~~him~~ this fashion. She then stabbed him. Her statement that she did not know how she came to open the knife and stab him was not accepted by the Court. While it is true that she says

" I was afraid. He was a man. He was pulling me along. I don't know what he intended doing to me outside,"

She does not say that she stabbed him because she was frightened that he might kill her or do her serious bodily harm. She says she stabbed him because she was angry.

In these circumstances it cannot be said that she was justified in killing the deceased. In my opinion the Crown has succeeded in establishing that the killing was unlawful.

It does not necessarily follow, however, that she is guilty of murder.

A person has the right to offer reasonable resistance to an unlawful aggression upon his person. The deceased had invaded the privacy of the appellant's bedroom in the middle of the night, and had grabbed hold of her. Despite her protestations he would not release her. It is true that

she said she stabbed him in anger, but it may have been that she was angry because he had her at his mercy and those nearby who must have heard the commotion were doing nothing about it. This would explain her bitter ^treport to those who asked her why she had stabbed an old person. Her retort was:

" You are asking me that question, the person was assaulting me and I cried out and no one responded, no one spoke up."

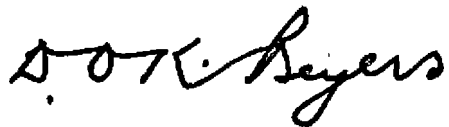
She was a woman who was being molested and it is possible, even probable, that she was desperate. As Miss Pegden, who appeared on behalf of the appellant, asked the Court: What is a woman to do in these circumstances?

In my opinion she was, in the situation in which she found herself, entitled to defend herself, and the use of the pocket-knife, although excessive in relation to the injury threatened, was not in the circumstances so excessive as to justify a conviction of murder.

In the result I consider that the proper verdict ought to be that she is guilty of culpable homicide (see R. v. Molife 1940 A.D. 202; R. v. Koning 1953 (3) S.A. 220; R. v. Mathlau 1958 (1) S.A. 350(A); cf. also R. v. Krull

1959 (3) S.A. 392(A) at p.400).

The appeal succeeds to the extent that the conviction is altered from one of murder to one of culpable homicide. The appellant had been in custody for 8 months before conviction and that fact will be taken into account in determining the sentence. The sentence is reduced from five years to two years imprisonment with compulsory labour, of which six months imprisonment is suspended for three years on condition that the appellant is not convicted during that period of a crime involving violence.



(Signed) D.O.K. BEYERS.

DE BEER J.A.: I agree

RAMSBOTTOM J.A.: I agree.

Then a person came in and grabbed you by the blouse and the brassiere strap? --- Yes.

Did you then see who this person was who got hold of you? --- When he spoke and said: "Produce the bushman" then I ^{who} knew/it was, and there was a bit of light because the moon was up shining.

You have seen people who have had some liquor whom you say are not drunk? --- Yes, some cases they fall down, others you cannot tell whether they have been drinking or not.

10 Do you say a person is not drunk until that person falls down? --- It all depends, some fall down, some stagger - but some don't even stagger.

If you see a person who is not even staggering you would not say that that person is drunk? --- It all depends whether you know that person or not.

(Case for the Defence).

Counsel for the Crown addressed the Court.

Counsel for the Defence addressed the Court

(Luncheon Adjournment)

20 On resuming at 2.15. p.m.:

J U D G M E N T.

WARNER, A.J.:

In this case we find there are too many differences between the evidence given by the witness, Christopher, and the evidence given by Reginald, for us to be able to rely on the Crown version of the happenings on that particular night. We are, therefore, left with the version given by the accused. We are not entirely satisfied

/that...

that the accused told us the whole truth but we accept her version. The position then is that the accused had had some liquor that night. She herself says, and Mr. Lombard agreed, that she was not really under the influence of liquor. She went to bed and curiously enough did not give the knife to her lover, Roy, as she was supposed to do. She put it under her pillow and went to sleep. She was awakened by a bang on the door and recognised the voice of the deceased calling upon her to produce "that bushman" - referring to her lover, Roy. The deceased was one of the people who had been drinking in the accused's company earlier in the evening. The accused then rose and put the knife into the bosom of her dress. She was then pulled by the deceased through the dining room into the kitchen. During this time she apparently made no real appeal for help.

In the kitchen the deceased dropped his sticks and hit her once with his open hand, again demanding the production of her lover. She says that she then stabbed him twice. She would have us believe that she does not really know how this happened, and how she got the knife out and opened it - but we find ourselves unable to accept that.

In all these circumstances, we feel that she was not sufficiently under the influence of liquor to be unable to form an intent to kill. She must, therefore, be presumed to have intended the reasonable and probable consequences of her act. The provocation which she received was very minor indeed, and, taking into account the provocation and the effect of the alcohol upon her, we feel that they are not enough to reduce the offence from murder to culpable homicide.

I may say we are unanimously of the opinion that there are extenuating circumstances.

A verdict of guilty of murder with extenuating circumstances will, therefore, be entered.

/Counsel...