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G.P.S. Tu/p 14/11 J. 445.

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

~~ALFRED NTULI~~ THE STATE

Appellant.

versus/teen

ALFRED NTULI

Respondent.

Appellant's Attorney A.G.(Pmbg.) *Respondent's Attorney* B.T.Dalling (Amicus Curiae)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate P.Yutar & M.Lazarus *Respondent's Advocate* B.T. Dalling.
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on - 4 -11- 1974
Op die rol geplaas vir verhoor op

(N.P.D.) 30,10. Coram: Holmes Hofmeyr ARR van Zyl WJP

Maandag 4 November 1974

Dalling 9·50 - 10·10; 10·30 - 10·40, 11·15 - 11·37;

Yutar 10·13 - 10·30; 10·40 - 11·00;

C.A.V.

The Court answers the question of law reserved as follows:-

(1) See judgment.

(Judgment per Holmes, JA)

Registrar

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between -

THE STATE ..... Appellant.

and

ALFRED NTULI ..... Respondent.

Coram: Holmes et Hofmeyr, JJ.A., et Van Zijl, A.J.A.

Heard: 4 November 1974.

Delivered: 14 November 1974.

J U D G M E N T.

HOLMES, J.A., :

The accused was charged with the crime of murder before Fannin, J., sitting with assessors in the Zululand and North Coast Circuit Local Division at Eshowe. He was convicted of culpable homicide on the ground that he

"exceeded /.....

"exceeded the bounds of reasonable self-defence".

Before passing sentence, the learned trial Judge expressed the view, after hearing submissions from counsel on both sides, that there was no evidence that the accused assaulted the deceased, i.e. to say, there was no proof of the dolus required for an assault. Accordingly, he sentenced the accused to imprisonment for three years.

Thereafter, on application by the State, and having heard opposition by counsel for the defence, the learned Judge reserved the following question of law -

> "There having been a verdict of culpable homicide upon a finding that the accused had exceeded the bounds of reasonable self defence, can it properly be said that such culpable homicide involved an assault as envisaged by Group 1 of Part 1 of the Third Schedule to Act 56 of 1955, as amended, and that the accused therefore qualified for the sentence of imprisonment for the prevention of crime in terms of section 334 quat (2)(b) of the said Act."

If the question is answered affirmatively the accused must be sentenced to imprisonment for the prevention

of crime, because of his record of previous convictions and the provisions of sections 334 quat 2(b) of Act 56 of 1955 as amended, read with Group 1 of Part 1 of the Third Schedule thereto. It is common cause that this would be a more onerous sentence than the one imposed.

With that prelude I turn to the facts, culled from the judgment -

(i) The accused is a strong and healthy Zulu in early manhood.

(ii) The deceased was his mother-in-law, an elderly woman.

(iii) The accused had recently registered his marriage to the daughter of the deceased, and had paid her "lobola".

(iv) On the evening of 18 July 1973 the accused called to see his wife, who was living at the deceased's kraal in the district of Nkandla. The deceased told him that his wife had gone to Johannesburg. This was meant and understood to mean that she had decamped.

(v) In the course of this conversation the deceased took a knife and injured the accused on his shin. At a later stage

she took hold of an assegai and tried or threatened to stab him with it. They struggled for its possession. The blade came off and was retained by the deceased. The accused got hold of the shaft, and he struck her with it. It is plain that they were not getting on well.

(vi) Thereafter the two of them repaired to a half-built hut where the accused's possessions had been stored by the deceased. There she behaved extremely provocatively and took up a piece of firewood and threw it at him. By way of riposte, he threw it back at her, and she fell down. He tried to run off, but he was caught up in the thorn fence around the kraal. In this predicament the deceased came upon him again and, according to the accused, he belaboured her with the shaft of the assegai, and then left.

(vii) The post mortem examination revealed a number of apparently minor injuries on the deceased's body and head. There were, however, two major injuries: her skull was cracked at the back, and her upper jaw was broken.

(viii). /.....

(viii) Pieces of wood and also pieces of a broken stick were found at the scene of the affray.

(ix) The trial Court was not satisfied that it had heard the whole truth, and it eschewed a verdict of murder on the ground that it could not exclude the reasonably possible inference that in the kraal there was a running fight between the deceased and the accused, in which the former, who had acted very aggressively already, made repeated attacks on the accused which he beat off.

(x) "On that view of the matter", said the trial Court, "it is clear that the accused inflicted two extremely heavy blows to the head of the deceased. It is true that he had been attacked by the deceased with two lethal weapons earlier, but had come to no serious harm, and had indeed succeeded quite easily in avoiding any serious danger to himself from those attacks. The deceased was a very old woman, and could constitute no serious danger to the accused, who is a strong, healthy man, in early manhood, and it is perfectly clear in our opinion, on the facts which we have before us, that

there was no need for the accused to have used any great force to avoid any attack which may have been made upon him by the deceased. He could easily have fled, and it would clearly be easy for a man of his strength and age to have done that when attacked by this old woman, even though she may have been a strong healthy woman for her age. Thus it is clear that the accused exceeded the bounds of reasonable self-defence, and that he is guilty, as he pleaded, of culpable homicide, that is to say of having unlawfully killed the deceased."

In this Court, as at the trial, Mr. Dalling appeared for the accused at the request of the Court; and we are indebted to him for his assistance. He took the point, in limine, that when an accused has been convicted, the State cannot ask for the reservation of a question of law under section 366(1) unless this is in favour of the accused. Accordingly, he asked that the matter be removed from the roll. Section 366(1) is in the following terms -

"(1) /.....

"(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may, of its own motion or at the request either of the prosecutor or the accused, reserve that question for the consideration of the court of appeal, and thereupon the first-mentioned court shall state the question reserved, and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the court of appeal."

In support of his contention, Mr. Dalling cited a line of decisions in this Court, culminating in R. v. Adams and Others, 1959(3) S.A. 753, in which Steyn C.J., after considering them, said at page 764 G -

"In my view the only right conferred upon the prosecutor is ~~the~~ to apply for a reservation in his own favour in the case of acquittal or in favour of an accused in the case of a conviction."

Counsel for the State, asked us to hold that those decisions were wrong. He took his stand on what he submitted was the plain meaning of section 366(1). He also argued that section

369(3), /.....

369(3), which reads -

> "Where a question of law has been reserved on the application of a prosecutor in the case of an aquittal, and the court of appeal, has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in section three hundred and seventy be taken as the court may direct" -

was only inserted to provide for a re-trial in certain circumstances, and that it did not support the limitation just stated.

In my view it is not necessary to say more about the judgment in Adams's case, supra, than this: in stating that the Court cannot reserve a question of law, adverse to the accused, where there has been a conviction, the judgment had in mind a question of law in relation to the conviction. It was not there dealing with the question of the right of the State to ask for the reservation of a question of law, adverse to the accused, in relation to sentence.

Furthermore /.....

Furthermore, one of the factors which influenced the Court in Adams's case, at page 764 C, was that it was "foreign to the spirit and practice of the Courts of law in South Africa as well as in England that there should be an appeal from the judgment of a competent criminal Court acquitting a person". (This was a quotation from the judgment of Solomon, J.A., in R. v. Gasa and Another, 1916 A.D. 241 at page 245). That consideration does not apply in the present case, where the accused has been properly convicted and should be sentenced. If his existing sentence is de jure a nullity, it is proper that it should be put right.

The following examples illustrate the point -

(i) A court convicts a man of murder without extenuating circumstances; and the judge wrongly sentences him to imprisonment instead of to death.

(ii) A court convicts a person under the Terrorism Act in respect of which a minimum sentence of imprisonment for five years is mandatory; and the judge sentences him to imprisonment for four years.

Other examples readily come to mind.

In such cases the conviction is in order, but the sentence is, as a matter of law, incompetent. It would be surprising if section 366 (1) meant that the Court had no power to reserve a question of law as to the validity of such sentences; and I do not read the Adams judgment as deciding this. In the present case the State is contending that the sentence is, as a matter of law, incompetent; and I hold that the Court a quo was right in reserving it. I therefore hold against the point in limine, and I proceed to consider the question of law reserved.

One is familiar with cases of culpable homicide where no assault is involved, e.g., death caused by a negligent driver of a motor vehicle, who ought reasonably to have foreseen the possibility of resultant death. One is also familiar with cases where A assaults B in circumstances in which he ought reasonably to have foreseen the possibility of B's resultant death, and such death ensues. The latter is a case of culpable homicide involving assault, although the mens rea, quoad the homicide, is culpa - his negligent failure

to realise that he was endangering B's life; S. v. Bernardus, 1965 (3) S.A. 287 (A.D.).

In the present case, however, counsel for the State contended that a conviction of culpable homicide, on the grounds that the bounds of self-defence were exceeded, means that inevitably, as a matter of law, an assault was involved. In order to answer this contention it is necessary to tabulate certain general principles relating to assault, self-defence, and culpable homicide, applicable to the instant case.

1. Assault is the intentional application of unlawful force to the person of a human being. For example, if A assaults B by striking him, this comprises -

   (i) the unlawful application of force; and

   (ii) the intention to do that unlawful act. (Dolus).

2. Culpable homicide is the unlawful negligent killing of a human being. Thus, culpa is an essential element of this crime. See S. v. Thenkwa en n Ander, 1970 (3) S.A. 529 (A.D.) at page 534 E; S. v. Mtshiza, 1970 (3) S.A. 747 (A.D.) at page 752, C - D; and S. v. Ngobozi, 1972 (3) S.A. 476 (A.D.) at page

478 C. And I agree, with respect, with the view of the writer of an article in the 1971 South African Law Journal, (vol. 88) at page 150, that section 196 of the Criminal Procedure Act, 56 of 1955, which deals with competent alternative verdicts on various charges, does not have the effect of defining culpable homicide in sub-section (1). Nor is the definition propounded herein at odds with section 323 of the Code, which provides inter alia that it shall be sufficient in a charge for culpable homicide to allege that the accused did "wrongfully and unlawfully kill" the deceased. This provision, being merely procedural, should not be read as defining all the elements of the crime. Particulars could be sought under section 179.

3. (i) A may intentionally and lawfully apply such force as is reasonably necessary in the circumstances to protect himself against unlawful threatened or actual attack at the hands of B. The test whether A acts reasonably in defence is objective; see Burchell and Hunt, S.A. Criminal Law and Procedure, Vol. 1 page 278; and S. v. Goliath, 1972 (3) S.A. 1 (A.D.) at page 11.

(ii) If A's defence, so tested is reasonable, both his application of force and his intention to apply it, are lawful: so there is no question of dolus or assault on his part. Dolus consists of an intention to do an unlawful act.

4. Continuing with the situation in paragraph 3 (i), supra, if -

(i) the stage is reached at which A ought reasonably to realise that he is using more force than is necessary to protect himself against B ; and

(ii) he ought reasonably to foresee the possibility of the resultant death of B ; and

(iii) such death ensues,

A will be guilty of culpable homicide based on culpa. No dolus is involved and no assault. The death has resulted from his negligence, i.e., culpa, and not from any unlawful intention, i.e., dolus. To put it another way, when he was negligently failing to realise that his defence was

excessive, it cannot be said that he was unlawfully intending to use such excessive force. Furthermore, one must distinguish between the negligence quoad the injury to B, and the negligence quoad his death. See S. v. Bernardus, 1965 (3) S.A. 287 (A.D.) at page 298 lines 17-18. Proof of the first does not necessarily provide proof of the second. In our common law there is no crime of negligently injuring another. Assault involves unlawful intention.

5. If A realises that he is using more force against B than is necessary, he is both applying force unlawfully and intending to do this,

(dolus); /.....

(dolus); and he is then guilty of assault. Principles of self-defence no longer apply. Whether A realised that he was using excessive force is a question of fact, involving an inquiry into his state of mind.

6. (i) A is guilty of culpable homicide if, in so assaulting B, he ought reasonably to have foreseen the possibility of resultant death, and such death ensues. See S. v. Bernardus, 1965(3) S.A. 287 A.D. His mens rea, quoad the homicide, is culpa - his negligent failure to realise that he was endangering B's life. His assault is a factor (and an aggravating one) leading up to the death. In that sense the culpable homicide can be said to be one "involving an assault" within the meaning of that expression in Part 1, Group 1, of the Third Schedule of Act 56 of 1955.

(ii) He is guilty of murder if he foresaw the possibility of such resultant death, but persisted, ~~regardless~~ /.....

regardless whether it ensued or not. S. v. Sigwahla, 1967 (4) S.A. 566 at page 570 B - E. (He would, of course, also be guilty of murder if, in the circumstances of 5, supra, and the resultant death, he directly intended to compass B's death).

7. In applying these formulations to the flesh-and-blood facts, the Court adopts a robust approach, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death. See R. v. Patel, 1959 (3) S.A. 121 (A.D.) at page 123, D - H; and S. v. P., 1972 (3) S.A. 412 (A.D.) at page 416.

8. Where the question of self-defence is raised, or is suggested by the evidence, the onus nevertheless remains on the State to prove beyond reasonable doubt that the accused acted unlawfully, and that he realized or ought reasonably to have realized that he was exceeding the bounds of self-defence; and that he foresaw or ought reasonably to have foreseen the possibility of resultant death - all as the case might be, See, generally, R. v. Ndhlovu, 1945 (A.D.) 369 at page 381.

I would /.....

I would add that there are other tests which have been propounded by this Court. For example, in R. v. Krull, 1959 (3) S.A. 392 (A.D.) at page 399 C - D it was said -

> "If you kill intentionally within the limits of self-defence, you are not guilty. If you exceed those limits moderately you are guilty of culpable homicide; if immoderately, you are guilty of murder. No greater precision is possible as a matter of law."

Hunt, /.....

Hunt, in S.A. Criminal Law and Procedure, Vol 11 pages 373 and 384, deals with such cases under the heading of "intent with partial excuse".

It must be remembered, however, that these tests were propounded before the milestone judgment in S. v. Bernardus, 1965(3) S.A. 287 (A.D.). And their validity must now be assessed by reference to that decision. To the extent to which they cannot be reconciled with that decision, their ratio is no longer applicable.

Returning to the instant case, it will be seen, from the tabulation set out above, that convictions of culpable homicide, where the bounds of self-defence are exceeded, may fall either under paragraph 4 (where no assault is involved); or under paragraph 5 read with 6(i) (where an assault is involved, because the accused realised that he was overdoing things). In the latter case it is "Culpable Homicide involving an assault" within the meaning of that expression in Group 1 of Part 1 of the Third Schedule to Act 56 of 1955.

It /.....

It follows that I cannot uphold the contention on behalf of the State that, in all cases of culpable homicide on the ground that the limits of self-defence were exceeded, inevitably an assault was involved. I repeat that no assault is involved in cases falling under paragraph 4, supra.

On that footing it was further contended that, ex facie the judgment, the case plainly fell under paragraph 5 read with 6(i) of the foregoing tabulation, and an assault was involved. As to that, the judgment of the Court a quo does not refer to an assault. And the remarks of the learned trial Judge, during the discussion before sentence, indicate plainly that he did not regard the case as being one "involving an assault".

Finally, although the learned Judge indicated that, in the circumstances, there was no dolus or assault, it was contended that, on the merits ex facie the judgment, this was indeed a case "involving an assault", since on the facts the trial Court should have held that the

accused /.....

accused realised that he was overdoing things. "This strapping young man versus this elderly woman!", exclaimed counsel for the State eloquently. That may be so, but I express no opinion, for we cannot wander down that tempting byway of factual inquiry in answering this question of law, as reserved. I set it out again here for the convenience of the patient reader -

> "There having been a verdict of culpable homicide upon a finding that the accused had exceeded the bounds of reasonable self-defence, can it properly be said that such culpable homicide involved an assault as envisaged by Group 1 of Part 1 of the Third Schedule to Act 56 of 1955, as amended, and that the accused therefore qualified for the sentence of imprisonment for the prevention of crime in terms of section 334 quat (2) (b) of the said Act."

In the result, the question of law reserved is answered as follows -

(i) Not necessarily. On a conviction of culpable homicide for exceeding the bounds of self-defence, an

assault will have been involved if it is found that the accused realised that he was applying more force than was necessary.

(ii) In such a case the accused, with the required previous convictions, would qualify for the sentence referred to.

G. N. HOLMES,
JUDGE OF APPEAL.

HOFMEYR, J.A.)
VAN ZIJL, A.J.A.) Concur.