12/75

G.P.A. A. 668

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

(Natal DIVISION).
AFDELING).

**APPEAL IN CRIMINAL CASE.**
**APPÈL IN STRAFSAAK.**

E. MOTLELENI

**Appellant.**

*versus/teen*

DIE STAAT

**Respondent.**

*Appellant's Attorney* Pro Deo *Respondent's Attorney* P.G.(Bmftn.)
*Prokureur van Appellant* *Prokureur van Respondent*

*Appellant's Advocate* A.D. Botha *Respondent's Advocate* J.R. Erasmus
*Advokaat van Appellant* *Advokaat van Respondent*

*Set down for hearing on* 25:9:75.
*Op die rol geplaas vir verhoor op*

(O.P.A.)

4.6.10:
Coram: Wessels, Trollip, ARR, Galgut Wn. AR
Botha - 9.49 - 10.45. 11.45 - 12.50.
Erasmus - 10.45 - 11.00, 11.15 - 11.45.
C.A.U.

Verlof deur Galgut Wn.A.R. (286/74)

Pro Deo Adv.A.D.Botha.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

EBINEZER MOTLELENI Appellant

and

THE STATE Respondent

Coram: Wessels, Trollip, JJ.A. et Galgut, A.J.A.

Heard: 25th September 1975.

Delivered: 6th November 1975.

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JUDGMENT

GALGUT, A.J.A.:

The appellant, to whom I will refer as the accused, was found guilty in the Orange Free State Provincial Division, by a Judge and two assessors, of murder with extenuating circumstances. He was sentenced to nine years imprisonment. He appeals to this Court,

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with leave granted under section 363 (6) of Act 56 of 1955, against the conviction and sentence.

The victim, to whom I will refer as the deceased, died as a result of a stabwound in his chest which penetrated his left lung and the pulmonary artery. He also had a fractured skull, but this injury did not contribute to his death. The stabbing took place, on a Sunday afternoon, in the main room of a house in the Tweespruit Bantu Township. There is another room in the house. There is, however, only one door giving access to or providing an exit from the house. The evidence indicates further that there is a large window in the house. The situation of the window and door does not appear from the evidence. It would appear that the door opens inwards, i.e. into the room.

Several witnesses were called for the State. Of these only the evidence of the two eye-witnesses, Makoeme and Motakane is relevant to the issues in this

appeal.../3

appeal. They were at the time sitting and drinking and talking to each other in the main room of the house.

Makoeme testified that, when he arrived that afternoon, the accused was already there; he was in the room sitting, as he put it, behind the door on a bag of coal or some such article. The extent to which the door was open does not appear from his evidence. He then went on to say that the deceased thereafter appeared in the doorway; that he leaned against the doorframe with his right hand in his pocket; that the deceased then asked if one Mapopo had arrived; that the accused suddenly stood up and stabbed the deceased; that this caused the deceased to fall over onto the two women who were sitting there against the wall; that he went to the deceased's assistance and helped him up; that he then saw an open clasp knife in the deceased's right hand; that he immediately thought the deceased and accused might want to stab each other; that he took

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hold of the deceased's right arm and also helped the deceased up and checked the accused; that the deceased then went out of the door to the outside; that he took no further notice of what the deceased did thereafter. He later also said he had taken hold of the accused's arm and when asked why he had done so, he said he thought the latter might wish to attack the deceased. In cross-examination Mokome said that because the deceased did nothing to ward off the blow he thought that the latter had not seen the accused before the stabbing.

Matakane's evidence is in the main the same as that of Makoeme. He, however, did not see the knife in the deceased's hand and further, he was not asked and did not testify as to whether or not the deceased had seen the accused before the stabbing. He went on to say that he and Makoeme had been talking and drinking before the incident. It would seem from his evidence that they had had quite a lot of liquor. Both Makoeme

and.../5

and Motakane said that the accused was also sitting and drinking. Motakane testified that he had seen the deceased and Mapopo together that morning.

The accused gave evidence as to the events which led up to the incident on the Sunday afternoon. He said that he and the deceased had been drinking in the beerhall on the previous Friday; that they had then quarrelled and having gone outside he and the deceased fought each other; that the deceased struck him in the eye and also caused his nose to bleed; that thereafter the deceased pulled out a knife but the bystanders intervened and stopped him; that he, the accused, became afraid and ran off; that he did not go out on the following day, viz., Saturday because his eye was black and closed; that on the Sunday morning he met the deceased in the street; that the latter then said to him that he had heard that the accused had made threats against him and his family; that the deceased then added that

he, .../6

he, the deceased, would stab the accused and the latter's family; that thereupon he, the accused, went home. He then went on to say that that afternoon he went to the house where the stabbing took place; that it was his grandmother's house and is opposite his own home; that he sat on a wooden stump next to a bag of coal behind the door but not right against the wall but a little forward thereof; that the deceased came in and stood at the door and looked directly at him; that the deceased had his right hand in his pocket; that he thought the deceased had a knife in that hand; that he was surprised that the deceased had come there as he had never been to that house before; that he believed that the deceased had come there to carry out his threat and stab him; that, because he believed and feared that the deceased would stab him, he jumped up and stabbed the deceased before the latter could stab him; that he did not intend to kill the deceased but hoped that this would cause the deceased to leave. He was asked whether

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he had heard the deceased asking for Mapopo, to which he replied that he had heard the name Mapopo but did not know who had uttered it.

There was some evidence as to what happened outside after the deceased and the accused had left the house. This evidence need not be discussed. It does not take either the State or defence case any further. It is only necessary to add that the medical evidence suggests that the fracture of the deceased's skull could have been caused by the back of his head striking the wall when he fell backwards over the two women.

The court a quo did not accept the accused's evidence that he had stabbed the deceased, because of his fear, in self-defence. Before discussing its reasons for/so doing it is necessary to set out certain extracts from the evidence of the accused.

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In regard to the events when the deceased came into the house and stood in the doorway he said the following:-

"Die oorledene het daar ingekom met sy regterhand in sy regterbroeksak en het in my rigting gekyk. Ek het toe gedink die oorledene het na my toe gekom soos hy my gesê het en ek sien toe dat in sy broeksak hou (hy) 'n mes in sy hand.

Het jy dit gesien of het jy dit gedink dat hy iets in sy sak het, vashou?---Ek het gedink daar is 'n mes in sy sak want hy het pas vantevore vir my gesê hy sal my kom steek.

Wat het jy toe gedoen toe jy dink hy het 'n mes in sy sak?---Ek het opgestaan om vir hom eerste te steek omdat ek weet hy kom vir my steek."

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"Ek het hom gesteek omdat ek geweet het, hy het my gesê, hy sal my kom steek saam met my familie, hy sal na my gaan soek."

.....

"Ek het hom nie gesteek met die bedoeling om hom dood te maak nie, ek wou hom net beseer sodat hy kan weggaan van my af."

.....

"Ek het nie gedink ek sal hom raaksteek naby sy lewe nie."

.....

"... ek het net geglo dat hy na my toe gekom het - hy soek vir my, want hy gaan nooit daar na my ouma se plek nie en dit was die eerste keer wat ek hom ooit daar sien."

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The learned Judge a quo asked the accused questions as to the knife he was carrying. In this regard his evidence reads:-

"Dra jy gewoonlik n mes?---Nee.

Hoekom het jy die dag n mes gedra?---Om myself te beskerm wanneer hy kom as hy sal kom. Om myself te beskerm omdat hy sê hy sal my kom steek.

Waar woon jy, by jou ouma?---Ons huise is daar teenoor mekaar.

Maar jy het hom nie by jou ouma verwag nie en jy het die mes by jou gehad?---Ek het hom nie daar verwag nie.

Hoekom het jy die mes dan daar gehad?---Ek het die mes gevat dinkende dat ek myself moet verdedig wanneer die persoon kom.

Dit maak nie saak waar nie?---Ja, ek het nie weggeloop nie, ek het daar gesit, nie gedink hy sal kom nie."

At the end of the preparatory examination when asked if he wished to plead, his reply was recorded by the magistrate. It reads: "Ek pleit skuldig

omdat.../11

omdat hy doodgegaan het". He was cross-examined and asked why he had said this. His replies to the questions put on this aspect read:-

> "Die landdros het my gevra, ek het nie gesê ek is skuldig nie. Ek het gesê dit is 'n saak omdat die persoon dood is."
>
> .....
>
> "Dit is 'n saak, 'it is a case because this person is dead'."
>
> .....
>
> "Ek sê dit is 'n saak omdat hy dood is, maar ek is nie skuldig nie, ek het myself beskerm."

The learned Judge when delivering the court a quo's reasons for judgment accepted that the accused and deceased had fought on the previous Friday but then went on to say that the court rejected the accused's evidence for the following reasons:- (the division into paragraphs is my own)

(a) that as the deceased had had the better of the fight on the Friday there would have been no need for

him to draw a knife;

(b) that the finding in (a) above was important because this was the reason given by the accused for his fear of the deceased and his decision to carry a knife.

(c) That if the deceased had threatened him and his family on the Sunday morning it was unbelievable (on-denkbaar) that :-

i. the accused would not have told them of this when he went to his grandmother's house, and

ii. would not have reported it to the police.

(d) That the deceased had been seen that morning with Mapopo and hence it was quite probable that he was looking for him in that house.

Having rejected the accused's evidence on the grounds set out above, the court a quo decided that the accused had armed himself with a knife in order to wreak

vengeance.../13

vengeance and not because he feared the deceased might attack him.

As to (a) above. The logic of this conclusion escapes me. The fact that the deceased had inflicted a black eye and a bleeding nose on the accused does not mean he would not draw a knife. It must be remembered also that the accused said when the knife was drawn the others in the party sought to restrain the deceased from using it and that he, the accused, ran away.

As to (b) above. The evidence of the accused when read as a whole shows that his fear of the deceased and the decision to arm himself arose because of the threat issued by the deceased on the Sunday morning. The fact that a knife was drawn on the Friday would lend weight to the threat made on the Sunday.

As to (c)(i) above. In view of the fact that the deceased had never previously been in the grandmother's house, there would be no reason to expect the deceased to come there and thus there would be no reason for

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the accused to tell the people there that the deceased had made these threats. The fact that he did not tell them after the stabbing is also not strange. The accused went out after the stabbing and went to his own home where he was arrested that evening. Shortly after his arrest he, of his own free will, handed over the knife to the police. It also appears from the record that he made a statement to a magistrate. This statement was clearly not a confession. I say this because it was not put in by the State and at the end of the State case counsel for the accused asked that it be put in by consent. This was refused. It seems a fair inference that if it had contained anything inconsistent with his version given in court, he would have been cross-examined on the inconsistency. This was not done. The fact that this statement was made cannot be used to corroborate the accused's evidence. The circumstances do, however suggest that the accused's version is not an afterthought.

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In the light of all the above it cannot be said that the accused's failure to tell his story to the people in the grandmother's house, either before or after the stabbing, is unbelievable.

As to (c)(ii) above. There is nothing strange in the accused's failure to report the threats to the police. Moreover, experience in our courts has shown that these unsophisticated persons often do not report such threats.

As to (d) above. The deceased had never been to this house before. There was no evidence to suggest that Mapopo had ever visited this house. Hence there was no reason to find that it was probable that the deceased came to the house for the purpose stated.

It follows from what has been said above that the court a quo's reasons for rejecting the evidence of the accused cannot be sustained. The evidence of the accused reads well. There is no reason to find

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that his version of the facts is not the correct one; there is no reason to find that his version of the events is an afterthought.

It follows from the above that the case must be decided on the facts as given by the accused. A summary of these facts is:-

i. The accused and deceased fought on the Friday and the deceased drew a knife causing the accused to run away.

ii. On Sunday morning the deceased threatened that he would kill the accused and members of his family.

iii. On Sunday afternoon the accused went to his grandmother's house and to his surprise the deceased, who had never visited that house, entered the only doorway of the house.

iv. The deceased looked directly at the accused and kept his right hand in his pocket. This attitude conveyed to the accused that the deceased had a knife in that hand and was about to carry out his threat of the morning.

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v. Although there was a window in the house it seems that the only available exit was the doorway which was occupied by the deceased. It certainly has not been shown that there was any ready means of escape available to the accused.

For the State it was urged that the accused was not in fear of his life or of an attack and that he had in any event exceeded the bounds of self-defence. For the accused it was argued that, having regard to all that had gone before, the accused was justified in believing that the deceased had sought him out and therefore justified in fearing that he was about to be stabbed and that accordingly he was entitled to stab the deceased and his conduct was lawful.

The question whether an accused, who relies on self-defence, has acted lawfully must be judged by objective standards. In applying these standards one must decide what the fictitious reasonable man, in the position of the accused and in the light of all

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the circumstances would have done. In S. v. Goliath, 1972 (3) S.A. 1 (A.D.) p. 11, RUMPFF, J.A., said:-

> "...Wat ook al die benadering is, moet gekonstateer word dat by die beoordeling van wat die beskuldigde in bepaalde omstandighede behoort te gedoen het of nie te gedoen het nie, die fiktiewe normale mens in die posisie van die beskuldigde geplaas moet word onderhewig aan al die uitwendige omstandighede waaraan die beskuldigde blootgestel was en ook in die posisie waarin die beskuldigde fisies verkeer het. Die posisie van 'n normale volwassene sou dus 'n ander benadering vereis as 'n normale kind en 'n normale liggaamlike gesonde persoon sou ook anders benader word as 'n normale liggaamlike siek persoon. ...."

And at page 25 of the same report, RUMPFF, J.A., went on to say:-

> "By die toepassing van ons strafreg, in die gevalle wanneer die handeling van 'n beskuldigde volgens objektiewe standaarde beoordeel word, geld die beginsel dat aan die beskuldigde nooit hoër eise gestel

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word nie as wat redelik is en redelik beteken in hierdie verband dit wat van die gewone deursnee-mens in die besondere omstandighede verwag kan word."

In S. v. Ntuli, 1975(1) S.A. 429 (A.D.) at p. 436, HOLMES, J.A. said:-

"(i) A may intentionally and unlawfully 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, p. 278; S. v. Goliath, 1972 (3) S.A. 1 (A.D.) at p. 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."

And at p. 437 HOLMES, J.A., went on to say:-

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> "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 p. 123 D - H; S. v. P. 1972(3) S.A. 412 (A.D.) at p.416."

Having regard to the above principles and seeking to place oneself in the position of the accused one cannot say that in the light of the events, which had gone before, that the accused was not justified in his fears. He is an unsophisticated Bantu. The fact that a knife was drawn on the Friday which was followed by the threat on the Sunday morning which in turn was followed, in the afternoon, by the unexpected appearance of the deceased, keeping his hand in his pocket, might well have caused many another person in his position to have the fears he did have.

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It was urged on behalf of the State that even if the accused had feared that he would be attacked he had acted too hastily and should have waited to see what the deceased's intentions were before resorting to stabbing the deceased. There is much to be said for this point of view. On the other hand it can be urged with equal force that, had the accused waited, the deceased may well have carried out his threat and stabbed the accused. I find myself in grave doubt as to whether the accused acted too hastily. It was also urged that there was no need for the accused to turn aggressor and that he should have fled. This submission loses sight of the fact that there is no evidence to show where the only window was or whether it was open or closed or whether the accused could have reached it, and left the house thereby, before the deceased could inflict blows on him. The only other exit was the door which was occupied by the deceased.

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It must be remembered that 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 realised or ought reasonably to have realised that he was exceeding the bounds of self-defence. See S. v. Ntuli op. cit. at p. 437. In the light of all the circumstances discussed above, I am of the view that the State did not discharge this onus.

In the result the conviction and sentence are set aside.

O. Galgut.
O. GALGUT, A.J.A.

WESSELS, J.A. }
TROLLIP, J.A. } Concur.