

293/86

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ATTWELL NDLOVU Appellant

and

THE STATE Respondent

CORAM : VILJOEN , JA et NICHOLAS, NESTADT, AJJA

HEARD: 20 November 1986

DELIVERED: 28 November 1986

JUDGMENT

NICHOLAS AJA:

Two persons were tried before VERMOOTEN

AJ and assessors in the Witwatersrand Local Division.

/They

They were MATTHEWS' MABILE (accused No. 1) and ATTWELL NDLOVU (accused No. 2). There were two charges: murder, and attempted robbery with aggravating circumstances. Each pleaded not guilty. The two were convicted on the second count, and sentenced to 8 years imprisonment. ATTWELL NDLOVU ("ATTWELL") was in addition convicted of murder without extenuating circumstances and sentenced to death.

With the leave of the trial judge, ATTWELL now appeals against his conviction for murder and against the death sentence.

In summary the evidence for the State was this.

/The

The late ADELINO CALDEIRA (30 years old) and his wife, Mrs GUYDA CALDEIRA (23 years old) originally hailed from Madeira. They had been in South Africa for three years, and had acquired a "fast foods" shop situated at the corner of Main and Delvers Streets, not far from the centre of Johannesburg.

On the afternoon of Saturday 4 May 1985, Mrs CALDEIRA was behind the counter in the shop, serving customers who came in from time to time. Her husband was in the kitchen behind the shop, cutting up a beef carcass. Their eleven month-old child was in the kitchen with him.

/At

At about 5 p.m. a black man - later identified as MATTHEWS MABILE ("MATTHEWS") - came into the shop and started playing electronic games on a machine there.

Mrs CALDEIRA was suspicious because he frequently looked at her, and she kept him under observation.

At about 6.30 p.m. she started counting the cash from the till, preparatory to the shop being closed at 7 p.m. Two black men entered the shop. One of them was later identified as ATTWELL. The other was not identified, but he was referred to in evidence by MATTHEWS as BABA. They bought chips, bread and a litre bottle of Sprite. This they consumed, standing at a table, and conversing meanwhile with MATTHEWS

/who

who had played his last electronic game and joined them. A little later, when they were the only customers in the shop, the three men advanced on Mrs CALDEIRA. ATTWELL and BABA, who had an open knife in his hand came behind the counter. MATTHEWS, who also had an open knife, jumped onto the counter and over it. They signed to her to keep quiet. Mrs CALDEIRA said that she was "crossmad", and she started screaming. She picked up a large knife (Exhibit 2) and brandished it to defend herself. Her husband emerged from the kitchen. The three assailants, who had presumably been unaware up to that stage that there was a man on the premises,

/precipitately

precipitately rushed to the shop door, knocking over some trays as they did so. Mrs CALDEIRA followed after them with Exhibit 2 in her hand. CALDEIRA pushed his wife aside and, taking Exhibit 2 from her, set off in pursuit of the men. They ran across Main Street and up Delvers Street towards Fox Street. Mrs CALDEIRA went to telephone the police.

The story was taken up by Constable MANDLA NDLOVU of the South African Police. At about 7 p.m. he happened to be standing on the eastern side of Delvers Street; between Fox and Main Streets, when he saw a white man chasing three black men North up Delvers Street on the western side. He said that the white man "was wearing something like a white T-shirt and I saw something red, on his chest". The four men turned West

into

into Fox Street. NDLOVU did not follow them directly.

As a member of the police "Crime Unit" he was wise

in the ways of street criminals. He ran straight up

Delvers Street. A block away, he saw one of the men

running in Commissioner Street. He followed him and

arrested him at gun-point. It was MATTHEWS. He took

him back to the CALDEIRA shop.

The next observations were made in Commissioner

Street, between the Carlton Centre and Kine Centre.

At about 7 p.m. ANGELO ANGELIDES, with his girl-friend,

Mrs LEONORA CLOETE, was on the South side of Com-

missioner Street. They were about to cross the road

/to

to go to the cinema.

From the direction of Von Wielligh Street,
the intersection immediately to the East, ANGELIDES
heard the voice of a white man crying out, "Help me,
please, somebody help me." He looked in that direction.
He saw two black men running towards him followed by
a white man, whose white shirt was covered with blood.
One of the black men broke away and ran across
Commissioner Street. The other came on towards ANGELIDES.
He was later identified as ATTWELL. He was bleeding
from the right elbow, and he had a knife in his left
hand. ANGELIDES said, "He was very, very weak, he was
even battling to run. He fell down."

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The knife (which was Exhibit 1) was covered with blood. ANGELIDES took possession of it and later handed it to the police.

Mrs CLOETE described how she saw a white man (it was CALDEIRA) running after two black men from the direction of Von Wielligh Street and shouting, "Help, help, I have been robbed." She saw one of the black men fall to the ground. CALDEIRA collapsed next to her. She assisted him across the road into the Kine Centre where he received first aid. He was bleeding profusely, and was holding a knife (Exhibit 2) clutched to his chest.

/After

After the police arrived they took ATTWELL to the CALDEIRA shop, where his injury was treated by paramedics. CALDEIRA died in hospital the same night.

The distance covered by CALDEIRA from the shop to the place where he collapsed was about 330 paces.

On post mortem examination it was found that the cause of death was a "penetrating wound of the chest and haemorrhage." The wound entered the front of the chest through the second left intercostal space and stopped in the left lung. An artery had been cut, resulting in extensive bleeding. The medical evidence

/was

was that the wound could without doubt have been caused by the knife (Exhibit 1).

Exhibit 1 was an Okapí knife with a handle some 15 cm and a blade some 10 cm in length, and ending in a very sharp point. Exhibit 2 was a home-made knife. Its 35 cm blade had parallel sides, one of which had a sharp edge, and the end of the blade was rounded, not pointed.

On scientific examination, human blood stains were found on Exhibits 1 and 2. They all belonged to group "A" - CALDEIRA's blood group. There was no mention in the report of the finding of blood belonging to group "O" - the blood group of both ATTWELL and MATTHEWS.

For the defence, each of the accused gave evidence.

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It is unnecessary to refer to the evidence of MATTHEWS.

In his evidence ATTWELL denied that he was in any way involved in the events described by the State witnesses. His story was that on the evening of 4 May 1985 he was innocently walking near the Carlton Centre when two white men set upon him unprovoked, assaulted him with a stick, and kicked him. As a result he sustained an injury to his right elbow, the scar from which he exhibited to the Court. It was 5cm long and about $1\frac{1}{2}$ cm wide. The two white men took him to the CALDEIRA shop.

The trial Court found that ATTWELL was a lying witness and rejected his evidence. It accepted the evidence of Mrs. CALDEIRA that MATTHEWS and ATTWELL were two of her

three

three assailants and it found that the inference was irresistible that their motive was robbery.

It also found that there could be no doubt that ATTWELL stabbed CALDEIRA to death with Exhibit 1 and that, having regard to the nature of the weapon and the location of the wound, the only reasonable inference was that he had an intention to kill. He was accordingly convicted of murder.

After conviction ATTWELL gave evidence in extenuation.

He now admitted that he was in the CALDEIRA shop, where he was dealing with BABA and MATTHEWS. They saw the woman counting money, and when BABA said, "Here is money, let us take it," he agreed. ATTWELL stood guard at the door.

BABA

BABA took out a knife and went round the counter. The woman's husband came from the back and went up to BABA who stabbed him. MATTHEWS ran out of the shop with ATTWELL following him. ATTWELL stopped and turned round to wait for BABA. He saw BABA grappling with the white man. ATTWELL ran back and separated them. BABA stabbed ATTWELL in the hand and the knife fell to the ground. BABA ran away. ATTWELL picked up the knife and he too ran away. "In the process" he fell down and was arrested. The knife was found in his possession. He was afraid of being found guilty of murder and for that reason had originally denied everything.

The trial Court rejected this evidence. VERMOOTEN AJ said that it was "a lot of lies, worse than before".

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The verdict was accordingly one of guilty of murder without extenuating circumstances.

In arguing the appeal, ATTWELL's counsel did not challenge the trial Court's findings that ATTWELL caused the death of the deceased, and that he was a lying witness in respect of both his versions. The only argument on the merits of the conviction was that the State did not exclude the reasonable possibility that ATTWELL acted in self-defence.

ATTWELL did not himself raise a plea of self-defence. It was raised by his counsel for the first time at the argument stage. But that does not of course preclude the raising of the point if there was evidence before the Court which went to show, or from which it might reasonably be inferred, that

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the killing might have been committed in self-defence. See

R v Ndlovu 1945 AD 369 at 381.

It is not clear at what stage either the fatal injury to CALDEIRA or the injury to ATTWELL's arm was inflicted, nor does it appear from the evidence in what circumstances those injuries were sustained.

Where an accused person has in his evidence given an account which is not true, it is not for the Court, to speculate about possible defences not advanced by the accused himself

self. So, in a case where a person, who has dealt with recently stolen goods, has given an explanation which has been rejected,

"The Court should not ... find on his behalf some explanation which, if given, might perhaps have been true, but which he himself has not given."

(Rex v Bhardu 1945 AD 813 at 823; and see S v Rubenstein 1964 (3) SA 480 (A) at 487-8). See also the well-known statement by MALAN JA in his dissenting judgment in S v Mlambo 1957 (4) SA 727 (A) at 738 C (which has been quoted with approval in S v Nkomo 1966 (1) SA 831 (A) at 833 D-F; S v Rama 1966 (2) SA 395 (A) at 401 B-C; and S v Sauls and Others 1981 (3) SA 172 (A) at 182 H - 183 B):

"Moreover

"Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so."

If , therefore, a plea of self-defence is to be sustained in the present case, a basis for it must be found within the four corners of the proved facts. The Court is not entitled to speculate as to the possible existence of other facts. Nor was there any obligation upon the prosecution to close every avenue of escape which might be said

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to be open to an accused. (See Mlambo (supra) at 738 A).

See also Sauls (supra) where DIEMONT JA said at 182 G-H:

"The State is ... not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating."

Here the only relevant facts were these.

ATTWELL was one of three men who attempted to commit robbery in CALDEIRA's shop. When CALDEIRA emerged from the kitchen, the three men fled, and he pursued them, plainly with the object of preventing them from escaping. That was still his object when he had entered Commissioner Street and besought assistance, crying "Help me please, somebody help me", or

"Help

"Help, help, I have been robbed." In these circumstances CALDEIRA was authorized by s. 42 of the Criminal Procedure Act, No 51 of 1977 to arrest them without warrant; and in terms of s. 49(1) he was entitled to use such force as might in the circumstances reasonably be necessary to prevent them from fleeing.

A plea of self-defence is only available to an accused if he was the object of an attack which was unlawful.

(See the authorities cited in Burchell and Hunt's South African Criminal Law and Procedure , 2nd ed., Vol I p. 323.)

Unless, therefore, there was an unreasonable use of force by CALDEIRA, there was nothing in the nature of an unlawful

lawful attack against which ATTWELL was entitled to defend himself. See R v Ndara 1955 (4) SA 182 (A) at p. 184.

In my opinion there was no evidence to suggest that CALDEIRA used unreasonable force to prevent ATTWELL fleeing.

ATTWELL's counsel submitted that the only reasonable inference from the fact that CALDEIRA armed himself with a knife was that he had more in mind than simply to chase ATTWELL away. In my opinion, CALDEIRA, in undertaking a solitary pursuit of three robbers armed with knives, showed courage verging on the foolhardy. To have done so without a weapon would have been arrant stupidity. No doubt he intended to subdue them by force, if necessary, but that he would have been entitled to do.

Then

Then it was sought to base an argument on the fact that ATTWELL indeed sustained an incised wound on his right arm. But how and when and by whom that injury came to be inflicted was not shown on the evidence. There was no precise description of it, although ATTWELL did exhibit a scar to the trial Court. He said it was caused by a stick. No question was asked of any of the witnesses (either those who saw it at the time or the medical witness) whether it could have been inflicted with Exhibit 2. On scientific examination, bloodstains were found on Exhibit 2 which belonged to CALDEIRA's blood group; none were found belonging to group O, ATTWELL's blood group.

In my view, therefore, VERMOOTEN AJ was correct when

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he said in his judgment that there was nothing before the Court to indicate that CALDEIRA's knife was ever in contact with ATTWELL.

It is not for the Court to answer the question, how then was the injury inflicted? It may be that it was caused somehow in the mêlée in the shop, but this is speculation.

Even if it could be said that CALDEIRA did inflict this injury, there is nothing to show that it was inflicted before he himself was stabbed. And if it was so inflicted, I do not think that it could be said that in the circumstances it constituted an unreasonable use of force which entitled ATTWELL to counter-attack.

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In my opinion VERMOOTEN AJ was right in holding that there was nothing in the evidence which afforded a basis for a plea of self-defence. The conclusion is that the verdict of guilty of murder cannot be disturbed.

Finally, there is the question whether extenuating circumstances were proved.

If there had been evidence that ATTWELL was at the end of his tether, that he felt his capture to be imminent, and in a state of desperation he turned on his pursuer like a cornered animal, there might have been room for a finding of extenuating circumstances. But there was no such evidence. Instead ATTWELL told a story which the trial Court rightly rejected, and there was nothing before the trial Court on

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which a finding could be based that extenuating circumstances were present.

The result is, therefore, that the appeal must be dismissed.

H C NICHOLAS, AJA

VILJOEN, JA } Concur
NESTADT, AJA }