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CASE NO. 117/84
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

JULIO ALBERTO DA COSTA CERQUEIRA

APPELLANT

and

THE STATE

RESPONDENT

CORAM: TRENGOVE, BOTHA JJA et GALGUT AJA

HEARD: 9 MAY 1985

DELIVERED: 24 MAY 1985

J U D G M E N T

TRENGOVE JA:

The appellant, a young man of 22 years of age,

was/

was tried on a charge of murder before Heyns J in the Witwatersrand Local Division. The State alleged that on 18 September 1982, and at or near Honeydew, in the district of Roodepoort, he unlawfully and intentionally killed one Gabriel Goncalves by stabbing him with a knife thereby inflicting certain wounds as a result of which the said Goncalves died. The appellant pleaded not guilty and in a statement indicating the nature of his defence, in terms of section 115(1) of Act No 51 of 1977, he said that "during the course of a violent assault upon him by the deceased he defended himself by the use of a knife and did so in lawful self-defence." He was, however, convicted of culpable

homicide/

homicide on the ground that "he exceeded the bounds of lawful self-defence" and he was sentenced to imprisonment for 3 years of which 2 years was suspended conditionally for 5 years. By leave of this court, granted in terms of section 316(8)(c)(ii) of the Act, he now appeals against both the conviction and the sentence.

I shall first consider the appeal against the conviction. The learned judge's reasons for holding that the appellant had exceeded the bounds of lawful self-defence appear from the following passage in his judgment:

"The accused explained that he kept this small pocket knife as a personal possession and that he always carried it in his pocket. When he was assaulted by

the/

the deceased, he had nothing else with which to defend himself, he decided to take out this knife and defend himself with it, and just stab at his assailant to ward off the assault. Accused was attacked by a man, at least as big and as strong as he is, who hit him with his fists. Would a reasonable man make use of a knife to defend himself under these circumstances? I know it has been said that I must not measure the situation with nice intellectual callipers to determine the precise balance of legitimate self-defence, but I must judge here what a fictional reasonable man would do. I am of the view that a knife should not be used under these circumstances to defend oneself against this assault. Where there is an assault upon a person with fists as here, and even if you run the risk that after you are overpowered by your assailant his friends may come up and assault you, I hold that you may not

legitimately/

legitimately make use of a knife.

If one were set upon by a person wielding a weapon, different considerations could apply. But where a person assaults you, under these particular circumstances, and he uses his fists, I am of the firm view, that the use of the knife in these circumstances is not justified and is an excessive use of force. In my view, the use of the knife was unlawful. Accused was entitled to defend himself but he exceeded the bounds of lawful self-defence"

The only issue in the appeal against the conviction is whether the trial court erred in finding that the appellant had exceeded the limits of justifiable homicide. This issue must be decided mainly on the basis of the appellant's own version of his fateful

encounter/

encounter with the deceased. The court a quo accepted his account of the events, it was corroborated in several respects by certain of the State witnesses, and it has, quite rightly, not been challenged by counsel for the State. The evidence relating to the circumstances in which the appellant came to be engaged in a fight with the deceased can be summed up as follows. On Saturday evening, 18 September 1982, a member of the deceased's family held a party at his market gardening farm, Weltevrede No 4, in Honeydew. The deceased and several of his brothers were at the party. There were a large number of guests, including the appellant and his friend, Abel Fernandes Couto. They did not know

the/

the deceased or the members of his family and had not been personally invited. They accompanied certain young women who had been invited. One of them was a Miss Karen Ebersey who appears to have known the deceased quite well. At about midnight, the appellant and his friends were about to leave for home. However, at the last moment, Miss Ebersey changed her mind and insisted on staying behind, much to Couto's annoyance. As a result, he and Miss Ebersey had a heated argument which culminated in her telling him that she was going to call Gabby, i e the deceased, "to come and beat him up". She thereupon went back to the house, apparently intent on carrying out her threat/

threat. Couto told the appellant, who had witnessed

the incident, what Miss Ebersey had said, and they

decided to go after her to try to persuade her to

come with them. They found her somewhere at the back

of the house - it is not quite clear from the record

exactly where this was - talking to the deceased. It

appears that she was telling him of her argument with

Couto and that he became very angry. The appellant

overheard the deceased asking Miss Ebersey who "the

guy" was that had caused the trouble, and he, somewhat

unwisely, replied, "it doesn't matter who the guy was."

The deceased, who had been sitting down, then came

towards the appellant in a very aggressive and threatening

manner/

manner and he would, no doubt, have attacked him there and then had he not been forcibly restrained by his brother, Sylvester, and Miss Ebersey. In order to avoid any further trouble, the appellant and Couto decided to leave without further delay. They collected their lady friends, whom they had escorted to the party, and as they were walking along the driveway, in front of the house, towards the gate where their cars were parked, the appellant suddenly heard someone scream. He turned round and saw the deceased, followed by 4 or 5 men, running towards them. (I should at this stage, perhaps, point out that the area in front of the house was lit up by means of two

floodlights/

floodlights attached to two huge palm trees standing

on the lawn). The appellant became alarmed, he ran

and hid behind a bush in the vicinity of the palm trees.

The deceased went past, he spotted the appellant, turned

round, and then came straight at him. The appellant

again tried to get away but the deceased got hold of

him and struck him in the face. According to the

appellant it was a severe and violent blow which left

him stunned for a few moments. He could not say

whether the deceased had hit him with his fist or

with some other object, but according to Couto the

deceased had some dark-looking instrument in his hand

which he could not positively identify. He said it

could/

could have been a piece of rubber or iron piping or even a stick. However, on being struck in the face, the appellant staggered backwards. He said that he sensed that the deceased, or perhaps one of his friends, who had joined him, was going to strike him again. He wanted to get away, but was unable to do so. The deceased had again laid hold of him, two of the deceased's friends, who appeared to be prepared to come to his aid, were at his (the appellant's) side, and there was also someone behind him. Referring to his state of mind at that moment, the appellant said "I was so scared I could feel I was going to die." Then, taking his penknife from his trouser pocket,

he/

he struck out wildly in a desperate attempt to ward off a further attack. Suddenly, the deceased cried out "I've been stabbed", or words to that effect, he fell to the ground and the appellant then made for the gate. He was immediately pursued by José and Joao Goncalves, brothers of the deceased, and some of their guests. He was then apprehended, and disarmed, and also beaten up and manhandled by a number of people who, as one can well understand, were very upset as a result of the stabbing of the deceased. The appellant was later handed over to the police. The deceased was taken to the hospital where he died a few minutes after his arrival.

Dr/

Dr Grobler, a district surgeon of Roodepoort, who performed a post-mortem examination on the deceased, attributed his death to multiple stab wounds. He found seven wounds in all, three of which he described as penetrating wounds. There were two stab wounds near the inner side of the elbow of the right arm; one stab wound just below the right armpit; one stab wound in the middle of the back of the deceased; and three stab wounds in his chest - these were the penetrating wounds. Dr Grobler also examined the appellant at the Roodepoort Police Station on 20 September 1982. According to his report there were numerous abrasions, bruises and lacerations on various parts of the

appellant's/

appellant's body. Referring to these injuries the learned trial judge observed that, in his view, they were not sustained "when he (the appellant) was engaged in a fight with the deceased, but were inflicted when, after his fight with the deceased, he was set upon by the brothers of the deceased and other guests, and was badly mauled." The report contains no reference to any facial injuries but photographs which were handed in as exhibits showed there were some lacerations and bruises on the appellant's face. In view of this evidence the trial judge said that he could not find, as a fact, "that when the accused was assaulted by the deceased, the deceased did not strike him any blow in

the/

the face."

So much for the factual background against which the point at issue in this appeal must be considered.

The onus was on the State to prove beyond reasonable doubt either that the appellant had not acted in self-defence or that he had exceeded the bounds of lawful self-defence. As appears from the passage in the judgment quoted above, the learned judge found that the appellant was entitled to defend himself against the deceased, but that he had exceeded the bounds of lawful self-defence. He came to this conclusion because, in his view, it was not lawful for the

appellant/

appellant to use his penknife to ward off the
attack by the deceased. The learned judge held,
in effect, that if an assailant were to use only
his fists in attacking his victim, the latter would
not, under any circumstances whatsoever, be entitled
to use a knife to repel the attack. I am unable
to subscribe to this view which is not supported
by authority. The question whether the victim of
such an assault would be entitled to make use of
a knife to defend himself would, in each instance,
depend entirely upon the circumstances of the particular
case. There can be no hard and fast rule as to when a
knife may lawfully be used in self-defence. It is

trite/

trite law that the question whether an accused acted in lawful self-defence must be judged by objective standards. In applying these standards, the court must decide whether a reasonable man in the circumstances of the accused would have thought that he was in danger of death or serious injury, and what he would then have done. See generally: R v Zikalala 1953(2) S A 568 (A); R v Patel 1959(3) S A 121 (A); and S v Motleleni 1976(1) S A 403 (A).

In my view, the fictitious reasonable man, in the circumstances of the appellant, would have had every reason to believe that he was in imminent danger of serious injury. What are these circumstances?

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In short, they are the following. Although the deceased was a little shorter than the appellant, he appears to have been a strong and powerfully built young man. When he and the appellant first met behind the house, he was clearly in an angry mood and he left the appellant under no illusions as to his aggressive intentions. He would have attacked the appellant at that stage had his brother not intervened. And despite the fact that the appellant was trying to avoid any further confrontation, the deceased persisted in his aggressive intentions. After the appellant had returned to the front of the house, the deceased went to look for him, and when he spotted the appellant crouching/

crouching behind the bush on the lawn, he went straight at him. He grabbed hold of the appellant and before he could do anything to defend himself, the deceased struck him in the face. On the evidence, the blow was sufficiently severe to cause the appellant to feel dazed. Before the appellant had recovered fully from the blow, the deceased was at him again. The appellant had every reason to expect a further attack. He was clearly in a critical situation - not of his own making - from which he could not escape without having recourse to some kind of violent action. And he had to act quickly. He then opened the small penknife, which he ordinarily carried with him, and struck out at the

deceased/

deceased. The vital question is whether he was entitled, in the circumstances, to use this penknife, which had a 5 cm blade, to repel a further attack, or whether he should have used his fists to do so, as the trial judge held. In considering this question, the court must bear in mind, as has often been pointed out, that "men faced in moments of crisis with the choice of alternatives must not be judged as if they had both the time and opportunity to weigh the pros and cons" (see Union Government (Minister of Railways and Harbours) v Buur 1914 AD 273 at 286). Or, as Holmes JA observed in the well-known passage in his judgment in R v Patel 1959(3) S A 121(A) at 123 D-E "... the Court must

beware/

beware of being an arm-chair critic, and must take into account the exigencies of the occasion." When asked why he had used the penknife, and not his fists, to defend himself, the appellant said: "I used my knife because I was scared of what was going to happen to me. I wanted to get him away from me. Get everyone away from me" and "... I wasn't in a fit state to use my fists. I was so groggy, I was just about out." It is also important, in considering this question, not to overlook the fact that the appellant made the slashing movements with the knife while the deceased was holding on to him. The appellant stated that he had no intention of fatally

injuring/

injuring the deceased, but that he was fighting to get away. This was corroborated by some of the State witnesses, particularly the deceased's brother, Sylvester Golcalves, who said that he saw the deceased holding onto the appellant who was "fighting to get away."

To sum up. The appellant was the victim of an entirely unprovoked assault. At the time of this assault, he justifiably feared that he was in danger of serious bodily injury. After he had been struck in the face, he had reasonable grounds for believing that the deceased was determined to continue with the assault upon him. The deceased also appeared to be supported by a number of his friends. The appellant became

terrified/

terrified and in his sudden panic he slashed out with his knife to get away from the deceased who was holding on to him. It may well be that it was not necessary to strike out as wildly as he did but, as already mentioned, one must beware of being an arm-chair critic. Having regard to all the surrounding circumstances, I am of the view that the State did not prove beyond reasonable doubt that in using his knife, instead of his fists, to defend himself against the deceased, the appellant exceeded the bounds of justifiable homicide. That being so, it is of course, not necessary to deal with the appeal against the sentence.

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In the result the appeal is allowed, and

the conviction and sentence are set aside.

TRENGOVE, JA

BOTHA, JA)
)
GALGUT, AJA) CONCUR