

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

SAMUEL KHUDUGA..... Appellant

and

THE STATE..... Respondent

CORAM: CORBETT CJ, VIVIER JA, et VAN DEN HEEVER AJA.

DATE OF HEARING: 13 September 1991

DATE OF JUDGMENT: 30 September 1991

J U D G M E N T

CORBETT CJ:.....

CORBETT CJ:

This is an appeal against sentence. The appellant was arraigned before Solomon AJ and assessors in the Witwatersrand Local Division on the charge of having murdered one Silas Megale ("the deceased") on 19 April 1988. Appellant pleaded not guilty, claiming that he had acted in self-defence. The Court a quo found him guilty of culpable homicide and he was sentenced to 8 years imprisonment, of which 3 years were suspended for 5 years on condition that during the period of suspension the accused was not found guilty of an offence involving violence for which a term of imprisonment was imposed without the option of a fine. With the leave of this Court the appellant now appeals against the sentence imposed on him.

The deceased met his death as a result of loss of blood through having been stabbed in the vicinity of his right shoulder. There appear to have been three stab

wounds. At the time of the stabbing he was working at his place of employment, i e Ziman's clothing shop in Luipaardsvlei, in the district of Krugersdorp. It is not disputed that the appellant was the person who inflicted the stab wounds, using a large knife (blade 18 cm in length). There were several persons in the shop at the time of the stabbing and four of them (including the proprietor) were called to give evidence. None of them, however, was able to give a coherent account of what immediately preceded the stabbing.

The account given in evidence by the appellant was shortly to the following effect. For more than a year prior to this occurrence the appellant and his wife had been estranged and early in 1988 she left him and instituted proceedings for divorce. He ascertained that she had formed a relationship with the deceased and on being served with the divorce papers he decided to go to speak to the

deceased about the matter. He spoke to the deceased on the telephone and the latter suggested that they meet at the shop, the deceased's place of employment. The appellant went to the shop at about 13h00 on 19 April, but the deceased was busy and it was agreed that appellant should return the same day at about the time when the shop was due to close and the deceased about to go off duty. This the appellant did, arriving back at the shop at about 17h15. He entered the shop and stood by one of the counters. The deceased came straight to him. The deceased had in his hand a folded newspaper which he placed on the counter. A short altercation followed. The appellant then noticed that "something sharp" was protruding from the newspaper. His evidence continued:-

"After seeing this I looked at him quickly, from there it was when I saw his eyes running round. From there he moved his hand to the direction of the paper. Well, I had

concluded in my mind, that what was in the paper was a weapon. Then both of us went for the knife. I took my hand - I moved my hand towards the knife. Well, I am not quite sure as to what happened at the time, but I think something could have unfolded this paper. That is when I found it is my hand holding the handle of the knife, and he was holding the blade. And then a struggle ensued, it was something that happened quickly, and I found myself in possession of the knife. The deceased then advanced towards me as a person that was going to hit me with a karate blow."

The deceased aimed such a blow at the appellant; the appellant blocked the blow and "swung" with his right hand in which he was holding the knife. In so doing he stabbed the deceased. He could remember only one blow on the deceased's right shoulder. He stated that he was frightened when the deceased aimed the karate-type blow at him because -

".... he could have hit me with that blow, and maybe taken the knife out of my hand."

He then turned to go. There were two men standing between him and the entrance to the shop. He felt that he was possibly in a trap. He "scared" them with the knife and fled. He ran to the nearest police station where he reported the incident and handed over the knife.

An important issue was whether the folded newspaper containing the knife was produced at the scene of the stabbing by the deceased, as alleged by the appellant, or whether it was brought to the shop by the appellant, as suggested in the State evidence. The trial Court was unable to make a definite finding on this issue and consequently gave the appellant the benefit of the doubt and proceeded on the basis that the appellant's version was the correct one. The Court, though indicating certain doubts about the appellant's evidence, held that in the absence of

explicit State evidence regarding the stabbing and the reason therefor the account and explanation given by the appellant, which could "reasonably possibly be true", had to be accepted.

On this basis there was, so held the Court, no evidence of an intention to kill and the appellant was not guilty of murder. The Court's judgment proceeded:

"The question is, is he guilty of any crime? Undoubtedly, if he saw and believed that the deceased was going to use this weapon on him, he could and should have tried to get away. He did not do so. Instead he grabbed the weapon himself and he must have used it to some effect, although, as he claims, he may not have intended to do so.

In our view he was responsible for the death of the deceased and is therefore guilty of culpable homicide."

The basis of the verdict of culpable homicide would thus

seem to be that the appellant exceeded the bounds of self-defence, but did not subjectively have the intention to kill.

With regard to the question of sentence the following personal and other factors seem to be of relevance. At the time appellant was 42 years of age and had no previous convictions. After his wife left him, the three children of the marriage remained in his care and he was supporting them. He was at the time an insurance salesman with a stable work record. Clearly at the time the offence was committed he was emotionally upset. And immediately thereafter he went to the police and handed himself over.

In his judgment on sentence Solomon AJ rightly emphasized the fact that as a result of the appellant's action a man had lost his life and stated:

"..... and the public expects that any person who caused another man to lose his life, either deliberately or negligently, must be properly punished....."

The learned Judge concluded that he would not be doing justice if he did not send the appellant to gaol.

I agree that in all the circumstances a wholly suspended prison sentence would not be appropriate, but at the same time I consider that the effective sentence of 5 years in gaol is far too severe. Having regard to the cogent mitigating factors arising from the appellant's personal circumstances and from the unusual circumstances under which, according to the findings of the trial Court, the crime was committed, I am of the view that a proper sentence would be 5 years imprisonment of which three years are suspended: in other words, an effective prison sentence of 2 years. The disparity between this sentence and that imposed by the trial Judge is sufficient to warrant

interference by this Court. I shall also modify the terms of the suspension.

The appeal against sentence is accordingly allowed and the sentence of the Court a quo is altered to read:

"Five years imprisonment, of which three years are suspended for a period of five years on condition that the accused is not found guilty of an offence involving physical violence towards another person committed during the period of suspension and for which the accused is sentenced to a term of imprisonment of six months or more without the option of a fine."

M M CORBETT

VIVIER JA) CONCUR
VAN DEN HEEVER AJA)