

IN THE COURT OF APPEAL FOR BOTSWANA HELD AT LOBATSECRIMINAL APPEAL NO. 6/94

In the matter between:

CHRISTOPHER SEDIKWA SELEKE - Appellant

vs.

THE STATE - Respondent

Mr. C. Dahayanake for the Appellant
Miss Matrous for the State

J U D G M E N T

CORAM: T.A. AGUDA, J.A.
LORD N. WYLIE, J.A.
J.H. STEYN, J.A.STEYN J.A.:

The Appellant appeared in the High Court charged with the crime of manslaughter contrary to the provisions the Penal Code (Cap. 08:01). It was alleged that he unlawfully killed one **KEDISANG LESOLE**.

He pleaded not guilty to this charge but was found guilty and sentenced to 5 years imprisonment of which 2 years were conditionally suspended. He appeals both against his conviction and sentence.

The facts are the following:

On the 27th of July 1991 the deceased had wrongfully entered the home of one Peter Ndlovu, saying that he was looking for a lady with "big buttocks". The deceased was apparently under the influence of liquor. When Mr. Ndlovu tried to apprehend him, he produced a knife and threatened to stab Mr. Ndlovu with it.

The incident was reported to the police who accompanied the

complainant to seek out the deceased. He apologised for his behaviour in the presence of the police and was duly pardoned by the complainant. However certain persons arrived and intimated that the deceased should be punished for his unlawful conduct. Canes were cut and the deceased having agreed to a mild chastisement lay down to receive his lashes.

These apparently exceeded his expectations. There is some dispute as to whether Appellant participated in the corrective treatment meted out to the deceased. However that may be, the deceased retaliated to the assault upon him by throwing a heavy iron pot lid at the Appellant. Obviously very irate, the deceased, arming himself with a heavy stick (referred to as a piece of firewood, but indeed a formidable weapon) assaulted Appellant by striking him on the back of the head.

Appellant fell to the ground bleeding. He immediately jumped up, took a knife from his pocket and stabbed the deceased under the armpit, inflicting a fatal wound on him. The Appellant averred - and so testified - that he had a real apprehension that the deceased intended to kill him and that he acted in defence of his life.

The Court a quo rejected this contention. In his judgment Barrington-Jones J. who presided in the Court below made the following finding.

".....in the last analysis, I have concluded that whilst the accused's testimony is truthful [and indeed is supported by the evidence of the State witnesses] up to the point when the deceased hit him with the piece of firewood which had caused him to fall down; but thereafter I believe his evidence was both self-serving and untruthful in regard to any alleged second attack made upon him by the deceased; and it is my belief that the accused in his evidence embroidered what he had told the judicial officer so as to include

a second potentially lethal attack made upon him by the deceased; and I believe I am fortified in that conclusion because none of the prosecution witnesses referred in evidence to any such second attack on the accused by the deceased.

It was at this finding which Mr. Dahyanake for the Appellant directed his principal challenge. He contended that on a proper evaluation of the evidence, this finding amounted to a misdirection on the part of the Court a quo.

Indeed, it is difficult to see how the Court could have come to this conclusion. Such evidence as was adduced before it painted a very different picture. It is one in which an intensely angry deceased, virtually beserk after the beating he received, having failed to hit Appellant with the heavy pot lid he threw at him, pursues him - clearly with the intent to cause him bodily injury, and does so by striking him a blow on the back of the head. This blow was sufficient not only to cause him to bleed but fells him to the ground. What occurs next is not a separate incident but part of one continuous series of events.

In the summary of evidence handed in by consent at the trial PW4, one Steven Sephantsha stated that "while still on the ground Sedikwa (Appellant) took out a knife and stabbed Kedisang (deceased) with it."

The only witness who gave viva voce evidence in the Court a quo also confirmed that Appellant fell down and "immediately he stood up he took out a knife."

Appellant in his evidence also makes it clear that it was immediately after being struck down that he took out a knife and stabbed the deceased "because I saw that the deceased was intending to kill me."

Two other matters are of importance. The first and perhaps most significant is that at no stage during the trial was any attempt made to probe what opportunities Appellant had to take any action other than to do what he did in order to avoid being seriously assaulted by the deceased, or being done to death in some other way. In this regard it was common cause that Appellant knew that the deceased had been in possession of a knife the previous night and had not hesitated to threaten the owner of the house with it. Neither the only state witness nor Appellant himself was ever questioned concerning whether Appellant had any opportunity to escape, or to avoid further and serious risk to his person by taking any action other than to stab the deceased. Miss Matroos who appeared on behalf of the State suggested that he could and should have run away. However, it was never suggested to Appellant that he could have done so. No questions were asked of Appellant as to where he and the deceased were standing at the critical point in time. We do not know where the other persons were in relation to the two contestants. We certainly know that the deceased was fighting mad, as it were, that "he started hitting everybody" and that "they ran away." In fact no questions were asked of Appellant challenging his version that he acted in self-defence.

Secondly, the state of mind of Appellant in the circumstances that obtained cannot be viewed from an armchair perspective, or with the benefit of hindsight. He was being relentlessly pursued by a very angry deceased who was hitting out at everybody and eventually felled to the ground by him. It was certainly no time for nice judgments, or for mature reflection

and evaluation. There was no "second stage" in the events - it was indeed one continuous event with no interregnum permitting of evasive or alternative action.

It is true that in his terse statement to the police Appellant made no mention of the fact that he feared for his life. However what he does say is not inconsistent with the version he deposed to in evidence.

The failure by the State to lead evidence outlining the circumstances with sufficient detail or clarity or through cross-examination to elicit information that could have evidential value in negating the defence of self-defence was a fatal flaw in its case.

The Court a quo was accordingly obliged to rely on speculation in concluding that "the State has dislodged the accused's defence of self-defence" and that the defence of self-defence having failed it was proved that Appellant was guilty of manslaughter".

There were ample grounds for finding that the Appellant had a reasonable belief that his life was in danger. The fundamental error the Court a quo made was to conclude that the evidence of the Appellant was amenable to an interpretation that there was a "second potentially lethal attack made upon him (Appellant) by the deceased" and that this version was in conflict with that of the other prosecution witnesses. This was not Appellant's evidence, nor was his evidence in conflict with the evidence adduced on behalf of the State on this critically important issue.

The State failed to prove his guilt on the charge of

manslaughter. Appellant was wrongly convicted. The appeal succeeds. The conviction and sentence are set aside.

Delivered in open court this *11th* day of July 1994.

J.H. Stein
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J.H. STEIN
JUDGE OF APPEAL

I agree.

T.A. Aguda
.....
T.A. AGUDA
JUDGE OF APPEAL

I agree.

N. Wylie
.....
N. WYLIE
JUDGE OF APPEAL