

**CASE NO.: CA
110/05**

**IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)**

In the matter between:

**OMPHEMETSE EDWARD MOUWANE
APPELLANT**

AND

THE STATE

RESPONDENT

CRIMINAL APPEAL

MAFIKENG

MOGOENG JP, MONAMA AJ

DATE OF HEARING: 2 MARCH 2007

DATE OF JUDGMENT: _____

COUNSEL FOR APPELLANT: ADV. J M MOGOTSI

COUNSEL FOR RESPONDENT: ADV. T S DIKGOPO

JUDGMENT

MONAMA AJ:

INTRODUCTION

[1] The Appellant is approximately nineteen years old. He was charged in the Regional Court for the Southern Division of Taung with an offence of Murder which was committed on 16 December 2000. He pleaded not guilty. However, the appellant was convicted as charged and sentenced to six years imprisonment.

[2] The Appellant, having obtained the requisite leave, now appeal to this Court against the conviction and the sentence imposed on him.

EVIDENCE IN THE MAGISTRATE'S COURT

[3] The witnesses for the State were Nancy Rantso, Hans Botsile and Rosina Langa. Nancy Rantso testified that on 16 December 2000 she was accompanied by the Accused to a place which is not clear from the record. On the way they observed two shadows of people whereupon the Accused whistled and one of two people whistled back. They then met and the Deceased confronted the Accused and demand to know why the Accused insulted him. During the interaction the said witness left.

[4] The relevant testimony of Rosinah Langa is that on or during the relevant night she was inside her house and heard people quarrelling outside. The witness testified that she recognised the voice of the Deceased who wanted to know why he was being insulted and the threats that he will be stabbed.

[5] The witness then went outside and saw the Deceased

falling. The Deceased is alleged to have uttered the words to the effect that “.... leave me, that person has finished with my life.”

- [6] The evidence of Hans Botsile shows that during the evening of 16 December 2000 while in the company of the Deceased there was a whistling and that the Accused insulted the Deceased for no apparent reason. The insult resulted in the quarrel. The Accused threatened to “.... Open up his [Deceased’s] stomach and he [Deceased] hit the Accused with an open hand. When the Deceased was about to hit the Accused for the second time, the Accused stabbed him with a knife.

DEFENCE EVIDENCE

- [7] The Accused testified that on the 6th December 2000 in the evening he was in the company of Nancy Rantsho, the first state witness in this matter. He accompanied the said Rantsho to an undisclosed destination. On the way they saw two people and he whistled. This

whistling was responded to by whistling. The Accused testified that he thought it was a certain Lebogang, the friend to the Accused responded thereupon he insulted that person who responded.

- [8] He, the Accused, later realised that the person who reciprocated was indeed not Lebogang but his cousin, the Deceased. Upon the realisation of his error he apologised but was assaulted by an open hand. The witness testified that when the Deceased threw or attempting the second blow he tried to block and stabbed the Accused.

THE MAGISTRATE'S FINDINGS AND JUDGMENT

- [9] The Magistrate found that the Deceased assaulted the Accused because of the insult. However, the Learned Magistrate remarked that "... the Deceased went too far by assaulting the Accused ..."

The learned Magistrate found that the Accused had the necessary intention to murder the Deceased. He based his decision and finding on the following statement; namely

“... he [Accused] will cut his stomach so that when he [Accused] goes back to his [Accused’s] mother he [Accused] will be carrying his [Accused] with his [Accused] hands”.

The Magistrate found that these words constitute the requisite intention to commit murder. Accordingly he found the Accused guilty.

[10] The learned Magistrate imposed jail sentence of six years after evaluating the prevalence of the crime, society imperatives, the personal circumstance of the Accused particularly his relationship with the Deceased, and the age of the Accused.

SUBMISSIONS ON APPEAL

[11] It was contended on behalf of the Appellant that he acted in self defence and that the trial court erred that the requisite intention was present. The Appellant submitted that the imposed sentence is shockingly inappropriate for several reasons.

[12] The Respondent submitted that notwithstanding that the Deceased was the original aggressor, the Appellant exceeded the bounds of self defence and the conviction was in the circumstance proper. On the sentence the State submitted the sentence is appropriate.

EVALUATION OF THE RECORD

[13] The Appellant and the Respondent are *ad idem* that the Deceased was the original aggressor. The place where the assault and counter-attack occurred was dark. The Deceased was in the process of inflicting further blows

on the Appellant. The question for determination was whether in such situation was it reasonable for the Appellant to anticipate further assault and to act as he did and whether the Appellant in such circumstances, he had the requisite intention to murder the Deceased?

[14] The learned Magistrate held that the Appellant had intention because the Accused “upon meeting the Deceased there, he (Appellant) said he will cut his stomach so that when he goes back to his mother he will be carrying his stomach with hands”

It is correct approach that in establishing the intention the court should look at the conduct of the accused but all the facts of the occurrence cumulatively. The Deceased and the Appellant are cousins and he apologised profusely for directing unknowingly the derogatory words to the Deceased. The Appellant was, in our view, careless and acted carelessly and accordingly negligent.

[15] The trial court did not consider the entire facts cumulatively and only highlighted a portion of fact. Such evaluation is misplaced and has effect of losing other relevant consideration. According to the finding that the Appellant had the intention is hereby set aside and replaced with the finding that the Appellant acted negligently and the Appellant is found guilty of culpable homicide. The appeal is accordingly upheld.

[16] The imposition of the sentence is always a matter of discretion which must be exercised judiciously. The trial court considered the personal circumstance of the Appellant, including but not limited to, his age, his relationship with the Deceased and the interest of the society. There is no misdirection. In *Summerely v Law Society of Northern Provinces* 2006 (5) SA 613 (SCA) at page 621 F - H where the court held as follows regarding discretion:

“. . . it is of course a well established principle that in an appeal against the

exercise by a court of a discretion, the
appeal court has no limited power to
interfere . . . ”

It does not appear from the judgment of trial court that
it had exercised its discretion capriciously and on wrong
principle. Accordingly the appeal on the sentence is
dismissed.