CASE NO: SA. 6/2000

IN THE SUPREME COURT OF NAMIBIA

In the matter between

LAURENTIUS KOOPMAN

APPELLANT

versus

THE STATE RESPONDENT

CORAM; Strydom, C.J.; O'Linn, A.J.A. *et* Manyarara, A.J.A.

HEARD ON: 03/04/2001

DELIVERED ON: 28/05/2001

APPEAL JUDGMENT

STRYDOM, C.J.: The appellant in this matter appeared before Hannah, J., on a charge of murder. It was alleged in the indictment that on or about the 8th April 1998 and at or near Blou-Wes in the District of Keetmanshoop the appellant unlawfully and maliciously

killed one Clive Meyer. He pleaded not guilty to this charge and was defended by Counsel. After evidence was heard the appellant was convicted and sentenced to life imprisonment.

Thereafter the appellant launched an application for leave to appeal against his sentence. This application was unsuccessful. He thereupon petitioned three Judges of this Court, who granted him leave to appeal against both his conviction and sentence. The extension of the grounds of appeal to also now include an appeal against the conviction where no such application was launched and considered by the Court *a quo* was a nullity. (See *inter alia* S v Cassidy, 1978(1) SA 687 (AD).) This was again confirmed by this Court (per O'Linn, AJA) in the unreported case of David Silunga v S., which judgment was delivered on 8 December 2000.

This point was not taken by Counsel but was raised by the Court *mero motu* when the appeal was argued before us. Both Counsel, i.e. Mr. Miller, who appeared *amicus curiae,* for the appellant, and Ms. Lategan, who appeared on behalf of the State, accepted the law as laid down in the above cases. However, as both Counsel prepared themselves fully to argue the appeal on conviction as well as sentence it was decided to follow the *modus operandi* set out in the Silunga-case, *supra*.

In the Silunga-case, *supra,* the grounds of appeal were, on petition, also extended to include an appeal against the conviction notwithstanding the fact that application for leave to appeal to the trial court was limited to sentence. The Court nevertheless heard argument on the conviction and was of the opinion that this was not an exercise in futility as the merits could be decisive in deciding which course the Court should follow which

would best serve the interest of justice. If the Court were of the opinion that there was merit in the appeal against conviction then it would be necessary to postpone all proceedings in order to regularize the appeal and to obtain the necessary leave. This could cause a long delay. If the Court were of the opinion that there was no merit in the appeal against conviction it would not postpone the proceedings and could then deal with the appeal against sentence and bring that to finality. (See S v Langa and Others, 1981(3) SA 186 (AD), at 190A – 191A.)

Under the circumstances I will first consider the merits of the conviction and, depending on the outcome thereof, the appeal against sentence.

The defence of the appellant was one of self-defence. The State was not able to call any witness who saw how the trouble between the appellant and the deceased started. The only witness called, who was close to the scene of the fight, was Mr. Ambrosius Awaseb who testified on behalf of the State. He stated that he knew both the deceased and the appellant. He was busy loading goats on a donkey-cart when he saw the appellant approach some distance away. One Willem Titus and the deceased were with him. The deceased then walked away from where he was standing with the witness and Titus. At one stage Titus, who was assisting the witness with the loading of the goats, drew the witness's attention to the fact that the two men, i.e. deceased and appellant, were fighting. Mr. Awaseb then saw that the appellant was holding the deceased with his left hand in front of the chest whilst the deceased was holding onto the arm of the appellant. The witness also saw a knife in the right hand of the appellant and he saw a dark spot on the T-shirt of the deceased. He saw the appellant push the deceased whereafter the latter staggered away for about 50 meters and then fell down. The witness did not see any knife in the

hand of the deceased or in the vicinity where he had collapsed. Deceased and appellant were some 25 paces away from him when Titus drew his attention to them. He subsequently saw no injuries on the appellant. He furthermore described the two persons as of the same height but said that the body of the appellant was much bigger. He later qualified this statement by stating that he could not say who was the stronger of the two. Counsel for the defence put various statements to the witness from which it was clear that Mr. Awaseb did not see what had happened between the appellant and the deceased prior to his attention being drawn to the fight by Mr. Titus.

The appellant testified that he was on his way to the house of Mr. Awaseb when he saw the deceased approach him. When they were about ten paces away from each other the deceased started throwing stones at him. In an attempt to dodge the stones the appellant tripped over one of his shoelaces and fell down. The deceased stormed at him but he managed to jump up. When he and the deceased were face to face the latter hit him with a fist, butted him with his head and strangled him with both hands. Thereafter he saw the deceased take a knife from his pocket and open it with his teeth. Appellant said that he then realized that the deceased was serious and that he was going to injure him. The appellant then took out his knife, opened it and tried to move the deceased's hand away from his mouth to prevent him from opening his knife. Appellant asked the deceased what his intentions were and why he was fighting him. Deceased however did not desist whereupon the appellant stabbed him. Even then the deceased was still trying to open his knife and did not let go of the appellant as a result of which the appellant again stabbed the deceased. Appellant said that he was in shock and could not say how many times he had stabbed the deceased. According to the appellant he and the deceased had the same build although the deceased was a little taller than he.

Detective Sergeant Higoam was the first policeman on the scene. He testified that at the scene lots of small flat stones were lying around. He did not see any weapon in the area where the fight took place or where the body of the deceased lay. He however candidly stated that he was not really looking for any weapon. Sgt. Higoam was also the person who arrested the appellant. This took place on a farm some ten kilometres from where the deceased was stabbed. After the appellant was warned according to Judge's Rules and informed of his right to legal representation he explained to the witness that the deceased had attacked him by throwing stones at him and beating him with fists and that that was the reason why he had stabbed the deceased. He also told the witness that he threw his knife away. Sgt. Higoam did not see any injuries on the appellant.

Sergeant Coetzee was the investigating officer. He was at the scene of the incident the same day where Sgt. Higoam handed the appellant over to him. He in turn warned the appellant of his rights and the appellant repeated to him the explanation that he gave to Sgt. Higoam. Appellant also told him that he was hit in the face but the witness did not see any marks or open wounds on his face. There was however a scratch mark on his neck. This witness also testified to the fact that the deceased was taller than the appellant but added that the deceased was very thin, presumably meaning that the deceased was of slender build.

There was evidence that the appellant was under the influence of alcohol to a certain extent. According to Awaseb the appellant, when he saw him, was staggering a little and he was also talking a lot which was, according to the witness, a sign that he was under the influence. When Sgt. Coetzee saw him he got a strong smell of alcohol but the appellant

was steady on his feet and could speak. There was no indication in the evidence of the appellant that the alcohol he consumed played any role in the incident. This was, so it seems, also the attitude of Counsel in the Court *a quo* and when the matter was argued before us.

According to a post-mortem examination, performed by Dr. Sugo, the deceased had four stab wounds. One about the 3rd intercostal space left, which went through the cardiac major blood vessel and caused massive cardiac tamponade. This stab wound was a deep penetrating wound, which was executed with severe, or strong force. This wound also caused the death of the deceased. There were further two stab wounds on the left upper chest of the deceased, as well as one on his back. The doctor also found bruises on his face, right knee and upper chest.

In developing his argument before us, Mr. Miller stated that the finding of the trial Judge that the appellant, when he stabbed the deceased, at least acted with *dolus eventualis* regarding the death of the deceased, is not in contention. What is in contention is whether the State has proved beyond reasonable doubt that the admitted act of stabbing the deceased was a wrongful act. Counsel referred the Court to various decisions in which the approach of a Court towards the evidence of an accused was discussed and set out. It was further submitted that due to the Court *a quo's* finding that the deceased was the initial aggressor, and because there was no evidence gainsaying that of the appellant, that the deceased was armed and threatened to stab him, that the State had to stand or fall by the evidence of the appellant.

Ms. Lategan strongly supported the findings of the trial Court and more particularly the

Court's finding that the deceased did not have a knife when he and the appellant were fighting. Counsel submitted that under the circumstances there was no basis for finding that the appellant acted in self-defence.

It seems to me that whether the appellant acted in self-defence when he stabbed the deceased depends, to a great extent, on whether the Court *a quo's* finding that the deceased was not armed with a knife, was correct. The trial Court found, correctly in my view, that it was in all probability the deceased who started the fight. There was evidence by the mother of the deceased, Mrs. Meyer, of some bad blood between the appellant and the deceased and Awaseb testified that at one stage the deceased left the group where he was standing seemingly to confront the appellant. The Court also found that it must be accepted that there were stones thrown by the deceased followed by a head butting and a wrestling but found that this, by itself, was no justification for the killing of the deceased.

I agree with this finding by the trial Court. Although the throwing of stones could be dangerous this came to an end once the parties came face to face. As far as the body build of the respective parties was concerned most of the descriptions by witnesses were that the appellant, although shorter than the deceased, was the more sturdily built of the two. Mention was also made by the appellant that at one stage the deceased was strangling him with two hands. However, under cross-examination he stated that the deceased held on to his T-shirt and was attempting to strangle him by twisting the collar with both hands. Also the butting with the head turned out, under cross-examination, to have been without any effect as the deceased only succeeded to hit the appellant on his hands. Up to this stage the appellant seemingly did not harbour any fear of being seriously injured by the deceased nor did he think that his life was in danger because he

testified that it was only after the deceased took out a knife and tried to open it that he realized that the deceased was serious and was going to injure him. The absence of any injuries, except for a scratch on the neck, is further proof of the fact that appellant was not in danger of serious injury and could well cope with the situation. On his own evidence the appellant's action in stabbing the deceased can therefore only be justified if the deceased himself was armed and threatened to use his knife.

Regarding the approach of a Court in the evaluation of an accused's evidence and on the question whether the deceased was also armed with a knife the Court-*a quo* stated as follows in its judgment:

> "There is, of course, no onus whatsoever on the accused to establish that the deceased was indeed armed with a knife. Even if his account that the deceased had a knife is improbable the Court is not entitled to convict unless it is satisfied beyond reasonable doubt that such account is false. In considering this question I take account of the following factors. Awaseb and the deceased's mother testified that they saw no knife. I see no reason not to accept their evidence in this regard and had the deceased in fact had a knife I think it likely that one or the other, if not both, would have seen a knife. Further, no knife was seen by Sergeant Coetzee when he inspected the place where the fight took place. Had the deceased dropped it there when he was stabbed it is likely that it would still have been there when the inspection took place. Anyone intent on removing a knife from that place would in all probability also have helped himself or herself to the cap referred to by Sergeant Higoam. Another factor is the inconsistent description given by the accused when giving evidence of how the deceased produced the knife. I do not attach too much significance to this but it has to be thrown into the balance with the other factors. Then there is the very telling factor that the accused made no mention of the deceased being armed with a knife when questioned by both police sergeants. Why mention the stone throwing and the punch but omit the knife? The accused was cross-examined about this and his answers were totally unconvincing. He said that Coetzee said he must explain a little bit so he explained a small part. To omit the central fact makes no sense at all. Then he said he did not think about telling the police about the knife. Why not? The answer to my mind is plain. The story of the deceased having a knife is an afterthought invented for the purpose of justifying his actions. I am satisfied beyond reasonable doubt that the account of the deceased taking out a knife is false."

In my opinion the reasoning of the learned Judge cannot be faulted and it follows therefore that the appellant, when he stabbed and killed the deceased, was not acting in self-defence. There can also be no doubt that the appellant, when he did so, had the necessary intent to kill the deceased. Mr. Miller in my opinion correctly conceded this. It is clear from the medical evidence that the appellant stabbed the deceased not once but four times. Three of these wounds were on the upper left side of the chest of the deceased and the stab, which caused the death of the deceased, was a deep penetrating wound which was executed with severe force.

Under the circumstances I am of the opinion that the appellant has no reasonable prospect of success to appeal against his conviction and it would therefore be a waste of time to send the matter back to the trial Court to consider an application for leave to appeal in that regard.

In regard to sentence counsel were agreed that that was pre-eminently a matter for the trial Court and that a Court of Appeal would only be entitled to interfere with a sentence where the trial Court exercised its discretion improperly. (See S v van Wyk 1993 NR 426 (SC) at 447G.)

Mr. Miller submitted that the trial Court misdirected itself in that it overemphasized the previous convictions of the appellant at the expense of other cogent mitigating circumstances. According to Counsel the remark by the learned Judge, when he imposed the sentence of life imprisonment, that it would be safer to leave it to the prison authorities

to decide whether it was safe for society for the appellant to be released from custody also constitutes a misdirection.

From the judgment it is clear that the trial Court regarded the previous convictions of the appellant as particularly aggravating. The learned Judge stated that if the offence committed by the appellant was seen in isolation, and bearing in mind the mitigating circumstances accepted by the Court to have been present, he would have considered a sentence in the region of 10 years imprisonment. The Court however found that the previous convictions of the appellant was of such a nature that it showed that the appellant had a propensity for violence and that it was therefore necessary for the Court to impose a sentence which would also serve as protection of the public.

The previous convictions of the appellant were indeed serious and most relevant to the crime of which he was convicted by the Court *a quo.* In 1990 the appellant was convicted of assault with intent to do grievous bodily harm. The weapon used was a knife and he was given a suspended sentence of 6 months imprisonment. In 1991 the appellant was convicted of stock theft and was again given a suspended sentence. In the same year the appellant was convicted of murder after the victim was killed by striking him with the handle of a pickaxe over the head. He was also, on this occasion, convicted of malicious damage to property and the sentence was ordered to run concurrently with the sentence of 9 years imprisonment imposed for the conviction of murder. Whilst out on bail on the present murder charge, the appellant was again convicted and sentenced on a charge of stock theft.

The appellant testified in mitigation of sentence and stated that he was released from prison

during May 1996. From this it is clear that the second murder was committed within two years after having served a sentence of imprisonment for a similar conviction. Seemingly the 5 years the appellant spent in prison did not make much of an impression on him and did not stop him from again resorting to a dangerous weapon when he was provoked. The way in which he used this weapon, by stabbing the deceased four times and once at least with severe force, is further support for the finding of the trial Judge that the appellant showed a propensity for violence and that it was necessary to protect the public against him. It may be that the trial Court in balancing the principles applicable to sentencing gave more weight to the deterrent and retributive aspects of sentencing but as was pointed out by Ms. Lategan this is sometimes unavoidable and, depending on the circumstances, does not amount to a misdirection (see S v van Wyk, *supra,* at p 448E). In S v Tcoeib, l996 (1) SACR 390 (NmS) at 397 f-i the following was stated by Mahomed, CJ, when he discussed the constitutionality of a sentence of life imprisonment, namely:

> "Even when it is permitted in civilized countries it is resorted to only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimize the extreme degree of disapprobation which the community seeks to express through such a sentence. These ideas were expressed by the Court in the case of Thynne, Wilson and Gunnell v The United Kingdom, 13 EHRR 666 at 669, where it stated that:
>
> > 'Life sentences are imposed in circumstances where the offence is so grave that even if there is little risk of repetition it merits such a severe, condign sentence and life sentences are also imposed where the public require protection and must have protection even though the gravity of the offence may not be so serious because there is a very real risk of repetition…'."

Although the moral reprehension of the murder was to some extent tempered by the fact

that the deceased was the initial aggressor, the past history of the appellant and the violent way in which he responded to the attack on him, when it was not necessary, marked him as a dangerous man.

As to the effect of the sentence imposed, I also agree with Ms. Lategan that the murder committed by the appellant was before the new Prisons Act, Act No 17 of 1998, came into operation, and that in terms of the provisions of the new Act the appellant will still have to serve his sentence according to the provisions of the old Act, Act no 8 of 1959. Under Act 8 of 1959 it was generally accepted that life imprisonment, although indeterminate, constitutes a period of 20 years imprisonment. (See S v Masala, 1968(3) SA 212 (AD) and the evidence of Chief Superintendent Kleynhans of the National Release Board given in S v Florin, an unreported judgment by Teek, JP, delivered on 22 December 1999.)

In my opinion there was also nothing wrong with the remark made by the learned Judge *a quo*, that the prison authorities are in a better position to decide that the appellant is no longer a threat to the public and can be released. This is not an instance where the Court imposed a sentence, which is longer than what is appropriate, in order to counter any remissions, which the offender may receive, in terms of the relevant prison legislation.

I am therefore of the opinion that the appellant's appeal against his sentence cannot succeed and the appeal is dismissed.

(signed) STRYDOM, CJ.

I agree.

(signed) O'LINN, AJA.

I agree.

(signed) MANYARARA, AJA.

/mv

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