IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
(CRIMINAL DIVISION)
ACCRA-GHANA

CORAM: AKOTO-BAMFO (MRS) JA. (PRESIDING)
ABBAN (MRS) JA.
APALOO JA

CRIMINAL APPEAL
NO. 21 / 94
30TH OCTOBER, 2007

KWASI ALHASSAN ... APPELLANT

VRS.

THE REPUBLIC ... RESPONDENT

ABBAN (MRS) J.A: This appeal emanates from a judgment of the High Court Sekondi, dated 16th March 1993.

The appellant who was arraigned before the said High court, charged with the offence of murder, was found guilty and sentenced to death.

He appealed against his conviction and sentence and filed four grounds of appeal namely.

(1) The conviction for murder is unreasonable and cannot be supported having regard to the evidence adduced at the trial.
(2) The conviction of the Appellant on the indictment of murder occasioned a substantial miscarriage of justice, since the prosecution failed to prove the essential elements of the offence against the appellant.
(3) That since the conviction of the Appellant cannot stand; the death penalty imposed on the appellant by the High Court judge is untenable and ought to be set aside.

(4) That in case the Court of Appeal arrives at a conclusion that the appellant should have been convicted for a lesser offence such as manslaughter, on the basis of such extenuating factors as excessive use of force by the appellant in self-defence and provocation on the part of the deceased, a lenient sentence ought to be imposed on the appellant as a very young offender at the time in 1993.

The facts which led to the conviction and sentence are as follows:
On the night of 24th October, 1989, at Apremdo, Takoradi, the appellant engaged in three fights with the deceased (Kwasi Ofori). During the first two fights the inmates of their house separated them, and each went into his room. However they both came out as third time to fight once more and it was during this third fight that the deceased was stabbed in the back and in the chest with a knife by the appellant resulting in the deceased's death whilst being conveyed to the hospital.

It was as a result of this, that the appellant was charged with one count of murder, trial and convicted by a seven-member jury at a Sekondi High Court presided over by his Lordship A. A. Benin J. as he then was.

Being dissatisfied with his conviction and sentence, the appellant who was convicted and sentenced on the 19th day of March 1993, waited until 12th October 1993 before seeking leave of the Court to file his notice of appeal.

Strangely it was not until 21/2/2006 that the Court of appeal differently constituted gave him leave to file his notice of appeal and written submission of case. This was done the following day i.e. 22/2/2006.

It is the argument of Counsel for the appellant that the prosecution failed to prove the charge of murder against the appellant, and therefore the conviction and sentence is unreasonable having regard to the evidence before the trial Court. In saying this, he submitted that the offence of murder as defined in S.4% of the Criminal Code, 1960(Act 29) states thus:

"whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to man-slaughter by reason of such provocation or other matter of partial excuse, as mentioned in S.52."

To circumvent the definition of murder, S52 of Act 29, provides that:

"A person who intentionally causes the death of another person by unlawful harm shall be guilty of manslaughter, and not murder, or attempt to murder if-

(a) he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in succeeding sections: or
(b) he was justified in causing some harm to the other person

His argument was that in a murder trial the prosecution was enjoined by the provisions of the Evidence Decree S.13 (1) to prove the constituents of the crime beyond reasonable doubt. Therefore in this particular instance it was incumbent on them to prove the following:

(1) That Kojo Ofori is dead.
(2) That he died as a result of unlawful harm.
(3) That the unlawful harm was caused by the appellant.
(4) That the harm was caused intentionally.
(5) That there was no matter of justification or partial excuse to reduce the offence of murder to manslaughter.

In proving their case, the Prosecution called 5 witnesses:

P.W. 1- Esi Amanuah Wilson
P.W. 2- Mary Ofori
P.W. 3- John Ocran
P.W. 4- Joseph Ocran
P.W. 5- No. 23062 D/Sgt. Peter Beyeden

The Counsel argued the 1st two grounds of appeal together submitting that the conviction and sentence of appellant cannot be supported or is unreasonable having regard to the evidence adduced at the High Court. It is his contention that the prosecution could not prove that the harm that led to Kojo Ofori's death was

unlawful or that he appellant intentionally caused the death Kojo Ofori. For there was at the time, a matter of absolute justification of self-defence or partial excuse of extreme provocation by the deceased which reduced the offence of manslaughter. He argued that the appellant therefore should have been convicted of the offence of manslaughter instead of murder considering his tender age as at the time of the offence, the fact that he was a young offender, the threats issued to him by the deceased, the initiation of all 3 fights by the deceased on 24th October 1989 the fact that deceased was older, bigger in sizes and stronger than the appellant.

Counsel for appellant submits that P.W. 1 – Esi Amanuah Wilson's answers in cross-examination dealt a big blow t the Prosecution's ease, as she told the Court that the deceased was heavier than the appellant; She could also not tell the Court who started the fight that resulted in the death of Kojo Ofori.

In my opinion I do not see how the candid admission of the P.W. 1 that she did not know who had started the fight could dent the prosecution's case in any way. She admits that she was in her room when she heard the deceased and appellant fighting. She and other inmates came out and advised them to stop fighting, but the two fighters ignored them. They fought two or three times and each time "we came out and advised them but they ignored us, so we told them we would ignore them if they fought again".

She went to the bathroom and on her way back to her room she heard deceased crying "he has killed me, he has killed me, he has stabbed me with a knife". She saw deceased bleeding and she helped take deceased to hospital, but he died on the way.

This evidence was corroborate din material by S. 2,3 and 4 except for the fact that she did not see the deceased being stabbed. P.W. 5 tendered the post-mortem report which indicated that the deceased died as a result of stab wounds. In the absence of any evidence showing that the deceased committed suicide or consented to being stabbed to death, I do not see how someone stabbing another person to death could be said not to have inflicted harm.

The issue is whether the harm caused was unlawful.

S.76 of Act 29 defines unlawful harm as:

> "Harm is unlawful which is intentionally or negligently caused without any of the Justification in Chapter 1 if this part.
>
> S.37 of the code which deals with use of force for prevention of or defence against crime states that for the preventions of or for the defence of himself or any other person against crime or for the suppression or dispersion of a notorious or unlawful assembly a person may justify any force or harm which is reasonably necessary extending in case of extreme necessity even to killing"

The defence put up by the appellant is that the deceased who was bigger than him fought him, and to defend himself he stabbed him, and that the deceased provoked him into fighting him by making certain statements to which he did not take kindly to.

The classic pronouncement on the law of self-defence is that of the Privy Council in Palmer v. R (1971) AC814, approved in R V. Mclnnes 55 Cr-App. R 551.

Lord Morris delivering the judgment of the Court said:

> "it is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, that is reasonably necessary. But everything will depend upon the particular facts and circumstances of these, a jury can decide. It may in some cases be only sensible and dearly possible to take some simple avoiding action. Some attacks may be serious and dangerous, but others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary"

In examining the words the deceased uttered

> "that the (deceased) had been to secondary school, but appellant had not" could this be considered as sufficient provocation to result in a fight? Or the statement that" I normally behave like an angry man whenever I come from football practice, do not respond to any question, and that Ansah is not to move with me anymore"

All this is the appellant saying that he overhead deceased telling one Ansah these things as the two walked along a path together.

On coming home, he confronted the deceased and asked the latter why he and Ansah were gossiping about him. In answer, deceased stopped him and hit him resulting in fight. The inmates of the house separated them, but they kept on exchanging insults to the extent that there was another fighting. Once more they were separated. The appellant went to his father's room, but later the father – Johnson Alahassa, asked appellant who slept in a Mr. Marrison's room to go to bed appellant therefore came out and according to him deceased rushed on him and gave him a heavy, blow to his head hitting his head against a wall. He became so provoked that he entered Mr. Morrison's room, picked an akapi knife which was lying on a table in the room, hid the knife in his right palm, and came out of the room and when the deceased started beating him, he "started throwing blows and the knife touched the deceased twice and deceased creamed that "I have stabbed him and he fell down".

The above excerpt is from the confession statement of the appellant which forms part of the prosecution's case.
There is no evidence that when he, appellant alleges that he went into the room to pick the knife, the deceased chased him into the room. What prevented him from locking the door when he entered the room?

This clearly shows that there was an intervening period during which he could have cooled down. It also shows that during the 1st two fights the knife was not on the appellant. It was because he was getting the worst of the fight that is why he

went into Mr. Morrision's room, picked the knife intending to stab the deceased and indeed he went ahead and stabbed him resulting in death. If this is not premeditated murder, then what is it?

In view of the English authority cited supra can we say that this is reasonable force used in self-defence? The answer is in the negative, if at the time of the fighting, the knife was in his hand and he had inadvertently stabbed the deceased, then the English decision might have availed him, as it is, his statements rather corroborate the evidence of P.W. 5, 2,3 and 4 who stated that it was during the 3rd fight that they heard the deceased say that "he has stabbed me, he has stabbed me, he has killed me."

As at the time the offence was committed the appellant was 18 years old and was not a juvenile, considering that the age of maturing in Ghana has been pegged at 18 years, hence he was tried as an adult. He cannot therefore use his age as a mitigating factor to influence the verdict one way or the other.

The appeal against conviction and sentence is hereby dismissed and the decision the court below is affirmed.

(SGD) H. ABBAN (MRS)
JUSTICE OF APPEAL

AKOTO-BAMFO (MRS) JA: I agree.

" V. AKOTO-BAMFO (MRS)
JUSTICE OF APPEAL

APALOO JA. I also agree.

" R. K. APALOO
JUSTICE OF APPEAL