

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No 8 of 1980

KUTLWANA MAKIRIKE KERAYANG Appellant

v.

THE STATE Respondent

Appellant in Person

Mr G R Gareebine for The State

J U D G M E N T

Coram : MAISELS, P
DENDY-YOUNG, JA
HANNAH, JA

MAISELS, P

The Appellant was convicted by Mr Justice Dyke who was then Chief Justice of the High Court as long ago as 10th November 1976 on a count of murder and he was sentenced to life imprisonment. The learned Chief Justice found that there were extenuating circumstances and consequently he did not sentence the Appellant to death.

Before I deal with the merits of the case I should say something about the fact that the Chief Justice gave no reasons for finding extenuating circumstances. It is important that when extenuating circumstances are found, or not found, that the trial judge should set out his reasons either for finding or not finding extenuating circumstances. This is important not merely from the point of view of the accused and possibly of the Court of Appeal if that Court

has to consider the matter but is perhaps most important from the point of view of the public. The public is entitled to know why a man who has been found guilty of murder either with or without extenuating circumstances, why they were found or not found. I am sure that these remarks of mine will be borne in mind by members of the High Court whose duty it is to deal with cases of this nature.

I have said that the Appellant was found guilty of murder and it is important at the outset to look at the provisions of the Penal Code in this country dealing with the crime of murder. Murder is defined in section 207 as follows -

" 207. Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. "

"Malice aforethought" is defined in section 209 of the Penal Code and I shall refer only to that portion of that section which is relevant to the present case.

That portion reads -

" 209. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

(a) an intention to cause the death of or to do grievous harm to any person "

Under section 5 of the same Code "grievous harm" means

" any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely to injure health or to any permanent or serious injury to any external or internal organ ".

As so often happens in cases which come before this Court, the trouble in the present case arose out of a

comparatively minor quarrel which the Appellant had with his brother. The deceased on the evidence tried to stop the quarrel. The Appellant apparently took exception to this and stabbed the deceased. According to a statement which the Appellant made and which was handed in by the prosecution, the Appellant stated, and I quote,

" I took out a knife and I stabbed him and I ran away. I thought I only scratched him. "

The evidence, which was accepted by the learned Chief Justice, shows that this was no mere scratch but that it was a hard blow delivered by the Appellant on the deceased. The instrument used was a sharp knife which we have seen and the stab wound to the chest pierced to the heart. There was gross haemorrhage into what is called the pericardial cavity and one deep wound in the left ventricle. Some attempt was made by the Appellant to suggest that he had acted in self-defence but on the facts as found by the Trial Judge, with which I cannot quarrel, there is no question really of the Appellant acting in self-defence. It was further suggested on behalf of the Appellant in the Trial Court that the Appellant had been provoked by the deceased. There is no evidence to support this and it seems to me to be clear that the Appellant is guilty of murder having regard to the definition of murder to which I have referred earlier in this judgment. There is no reason therefore for interfering with the judgment of the Chief Justice that the Appellant was guilty of murder.

There remains to consider the question of sentence. As I have said above, the learned Chief Justice imposed a sentence of life imprisonment. Ordinarily an Appeal Court does not interfere with the proper exercise of discretion by the Trial Court on matters of sentence, but where as in this case it is the opinion of the Appeal Court that the sentence is substantially excessive and far greater than one that would have been imposed by it, it is not only its right but its duty to interfere with the sentence imposed by the High Court.

Counsel who appeared for the State found himself quite unable to support the sentence imposed in this case. I agree with him. It is clear that this was not a premeditated crime. It is also clear that a quantity of beer had been consumed and it is clear that this is a matter which arose as it were on the spur of the moment. At the same time the use of a knife is far too frequent in this country and as this case shows it was used without sufficient justification. In many cases serious injury, and as in this case, death, results.

Whilst therefore I consider the sentence of life imprisonment to be too severe it is necessary to impose a substantial term of imprisonment. In my judgment the appeal against conviction fails but the sentence is altered to one of ten years' imprisonment.

I should perhaps earlier have explained that an appeal was entered very late and this explains the delay

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in the matter coming before this Court. The Appellant was however successful in obtaining condonation in the delay in bringing his appeal before this Court.

(Sgd.) I A MAISELS, President

I agree.

(Sgd.) J R DENDY-YOUNG, Judge of Appeal

I agree.

(Sgd.) N R HANNAH, Judge of Appeal

Lobatse

5th December 1980

The Order of this Court is that the appeal against conviction is dismissed. Appeal against sentence succeeds and is altered to ten years' imprisonment.