

IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA

Criminal Appeal No. 8 of 1981

In the matter between:

MOROTSI MOKWENI

Appellant

and

THE STATE

Respondent

V.J.G. Matthews for the Appellant

P.T.C. Skelemani for the Respondent

JUDGMENT

Coram: Maisels, P
Aguda, J A
Amissah, J A

Amissah, J A

The appellant was tried with two others for murder before the High Court. The evidence accepted by the learned trial judge was that, the deceased had died from cardiogenic shock as a result of the crushing of his testicles. The attack which crushed the deceased's testicles was found to have been made by one of the other co-accused, described in the judgment as A.1 for convenience. He was rightly found guilty of murder and sentenced to nine years' imprisonment.

The appellant was also found guilty of murder by the judge. In his case the facts found against him were that he had counselled A.1 to commit the act which caused the death of the deceased. Was this a justifiable conclusion? To arrive at the answer, a brief recollection of the circumstances leading to

fatal assault the deceased and one SEKAPANE were asleep on the ground in the court-yard of premises where shake-shake beer had been sold by the third accused person, described for convenience as A.2, and the appellant. With the object of awakening the sleepers and getting them to depart, A.2 had poured water on them. Both men got to their feet and SEKAPANE made for the opening in the fence which surrounded the yard. The deceased however, did not walk directly towards that opening. He met the appellant who placing a hand near his throat pushed him back with the result that he fell upon his back. This was undoubtedly an assault by the appellant on the deceased. The deceased, who had apparently consumed a substantial quantity of alcohol and may therefore not have been sober, managed to get to his feet and was pushed by A.2 towards the opening. Just outside the yard A.2 struck the deceased with his fist several times and the deceased fell forward on his face. Incidentally, these acts of A.2 also constituted an assault on the part of A.2 on the deceased. The point of this observation will appear presently.

The deceased was immediately subjected to an assault by A.1 with a stick. The fatal blow was delivered by A.1 subsequently. It must have been a violent blow which had this devastating result. Witnesses to the incident had said that during the battery with the stick they heard the deceased emit a sound like a gurgling gasp and then fall silent. He never moved thereafter. When his body was seen next morning the hands were together in front of his genitals indicating that this was the last movement he made before he died.

Remembering that this attack which resulted in the death of the deceased was made on him by A.1, the question is how the

learned judge found that the appellant must also bear responsibility for it. The trial judge accepted evidence that it was the appellant who told A.1 to go and cut the stick. The exact circumstances in which this advice was given were not clear to the judge but he concluded that the stick was to be used in an assault upon the deceased and his companion SEKAPANE. One witness stated that the appellant had said that the deceased and SEKAPANE should be thrashed. The learned judge then took the view that the only inference which could be drawn from the established facts was that in assaulting the deceased with a stick, A.1 was executing the will and intention of the appellant.

Counselling another to commit an assault is one thing. It is quite a different thing to say that counsel to assault followed by such a violent attack as results in immediate and sudden death is counsel to kill. The learned judge to arrive at this result prayed in aid section 25 of the Penal Code which provides in sub-section (1) that:

" When a person counsels another to commit an offence and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel. "

Granted that the appellant counselled A.1 to thrash the deceased with a stick, the question is whether the facts constituting the offence actually committed, which in this case was the causing of death through the crushing of the deceased person's testicles, were a probable consequence of A.1 carrying out the advice of the appellant to thrash the deceased.

We are of the opinion that it is not. As the learned judge himself said in another context, in the hands of some less violent and brutal person that A.1 the stick which was used might not have been directed to such vital parts with such force. It would be quite an extraordinary proposition to hold that a person who advises an ordinary assault on a third person advises that that person be killed, only because the one advised chooses to inflict such violence as would kill. The result would in no way be within the contemplation of the advice. Consequently, the conviction for murder cannot stand.

It would appear that the learned judge was himself not convinced of the result he had reached. For having concluded that the appellant was guilty of murder in counselling A.1 and, therefore, presumably equally responsible for the death of the deceased, in imposing sentence, he said that the appellant was somewhat unlucky to have been convicted of murder. And the judge sentenced him to 2 years' imprisonment while he sentenced A.1 to 9 years.

We think that in the circumstances of what took place on that fateful day, the appellant's position could not have been much worse than that of A.2 of whom the judge said that there was very little evidence implicating him in the killing. He was acquitted. But it will be recalled that he had committed an assault on the deceased just as the appellant had done. The only difference was that the appellant had, on the evidence accepted by the judge, counselled A.1 that a further assault be committed on the deceased.

Having regard to the view we take we think that the proper verdict on the appellant should have been one of guilty of assault.

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We therefore quash his conviction for murder and substitute a conviction for assault contrary to section 251 of the Penal Code. And for that, impose a sentence of three months' imprisonment to commence from the date of his conviction by the High Court. As he has already spent more than that time in prison, we order that he be released forthwith.

Signed: A. N. E. AMISSAH
Judge of Appeal

I agree: Signed: I. A. MAISELS
President of Court of Appeal

I agree: Signed: T. A. AGUDA
Judge of Appeal

LOBATSE
17th June, 1981.