

IN THE COURT OF APPEAL OF BOTSWANA

Criminal Appeal No. 9 of 1987

In the matter of:

KOSI SHARP Appellant

vs

THE STATE Respondent

Mrs. E. T. Malakaila for the Appellant

Mr. N. Chadwick for the Respondent

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J U D G M E N T

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Coram: Amissah, JA  
Van Winsen, JA  
Doyle, JA

DOYLE, JA.

On the morning of the 22nd of May, 1986, Appellant and a man named Fitus Sebogwe went off drinking at various places. During the afternoon they met the deceased. They continued drinking with him and as they left a bar deceased suggested that they should go and steal. Appellant replied that he did not know how to do so but that he would agree to beat up people in a bar. Deceased then suggested they break into a house and Appellant told him he was talking shit. A quarrel developed and Fitus walked away.

Later the three men joined up again and as they were walking along the Deceased said to the Appellant "If I wasn't afraid of you, I would beat you up". This was in relation to the Appellant's refusal to steal. Fitus and the Deceased both laughed at Appellant whereupon Appellant punched the Deceased.

Fitus held Appellant and was abused for his powers. Deceased had fallen to the ground and Appellant kicked him once with his heel. Fitus and Appellant left Deceased on the ground.

Deceased was later taken to hospital. He was unconscious on admission and died on 26th May.

The post-mortem showed certain facial abrasions and a contusion of the scalp 13 cm x 7 cm over the left parietal temporal bones. There was no fracture of the skull. There was acute diffused sub-dural haemorrhage over the left half of the brain. Both parietal and temporal lobes were contused. Death was due to acute sub-dural haemorrhage with cerebral contusion.

The medical evidence was that a blunt instrument or even a fist could cause the head injury. What had happened was that, because of a blow to the head, the brain had moved within the skull and the motion had caused a rupture. The doctor did not accept a suggestion that a great amount of force was needed but stated that a fairly hard kick would suffice.

The learned trial Judge was satisfied that death was caused by the kick to the head. He then stated that the issues he had to decide were:

- (1) The Appellant's intent;
- (2) Whether there was provocation and, if so, the extent of the provocation.

In dealing with (1) he said that he was sure that Appellant did not intend to kill but that he intended to cause really serious bodily harm to the Deceased.

The only basis for this finding seems to have been the

delivery of a fairly hard kick to the head following on the punching incident.

On the question of provocation he held that there had been provocation when the Appellant was called a fool and later when he was again laughed at. He found that there had been a delay between the latest provocation and the assault. In this he was in error as the assault had immediately followed the incident when Fitus and the Deceased had laughed at him.

The learned Judge found that the provocation did not bear a reasonable relationship to the nature of the attack.

He found that the Appellant was under the influence of drink but not so as not to be aware of the nature of his act.

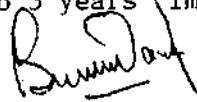
He found the Appellant guilty of murder. Having considered the circumstances he found that there were extenuating circumstances and sentenced Appellant to 5 years' imprisonment.

The learned Judge gave no real consideration to the medical evidence as to the nature of the kick. In my view while a fairly hard kick to the head is certainly designed to cause pain and possibly some injury, it is not possible to deduce from such a kick even if it followed a punch that a person doing so must intend to do really serious injury. A moderate blow can cause death. In most cases it does not. Fairly hard kicks are certainly intentionally inflicted during for instances, a Rugby match and sometimes such kicks are to the head. If on such an occasion the person kicked died, no doubt the aggressor might be guilty of some offence. I do not think

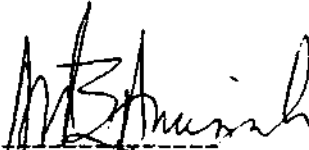
it possible that such a kick per se even if it followed a punch must found malice aforethought to sustain a charge of murder.

I consider that in this respect there was a misdirection. In the circumstances it is not necessary therefore to consider whether the Judge's finding that Appellant intended to do "really serious injury" sufficiently fulfilled the terms of the definition of "grievous harm" in Section 5 of the Penal Code or to consider any question relating to provocation.

I would allow the appeal and substitute a verdict of guilty of manslaughter contrary to Section 205 of the Penal Code. The sentence is reduced to 3 years' imprisonment.

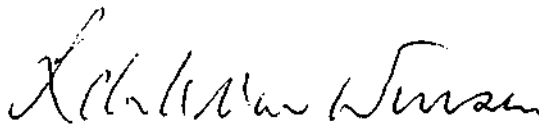


B. A. DOYLE  
Judge of Appeal



I agree

A.N.E. AMISSAH  
Judge of Appeal



I agree

L. de VAN WINSEN  
Judge of Appeal

GIVEN at Lobatse this 3<sup>rd</sup> day of July, 1987.